

MIMICKING THE WORDS, BUT MISSING THE MESSAGE: THE MISUSE OF CULTURAL FEMINIST THEMES IN RELIGION AND FAMILY LAW JURISPRUDENCE†

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I. INTRODUCTION

In the nineteenth century, images of religion and the family, like images of women, were carefully constructed to represent ideals that were the exact opposite of the commonly accepted characteristics of capitalism.¹ Both the church² and the family³ provided a retreat from the competitive atmosphere of the marketplace—"a haven in a heartless world"⁴—where higher values of caring and unselfishness reigned supreme. Women, who exhibited "natural and proper timidity and

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¹ The following chart represents the concepts traditionally associated with "private" sphere entities like the "church" and family, and "public" ones like the market and the state.

"Private"		"Public"	
Religion	Family	"Market"	"State"
Unquestioning Faith	Unquestioning Loyalty	Reason Efficiency	Neutrality
Moral Behavior	Cooperative Behavior	Competitive Behavior	Law Enforcement
Self-sacrifice	Self-sacrifice	Self-Gratification	Self Preservation
Spiritual Atmosphere	Nurturing Atmosphere	Self-Serving Atmosphere	Self-Defense

² See MARK HOWE, *THE GARDEN IN THE WILDERNESS* (1965).

³ See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

⁴ CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977).

delicacy" and were unfit "for many of the occupations of civil life,"⁵ belonged in the private shadow⁶ of these two major institutions.⁷

Changes in attitudes about women in the twentieth century have been paralleled by major changes in family law, and law and religion, brought about by the dominance of liberal thought.⁸ The liberal model of law and religion jurisprudence continues to place religion in a private sphere,⁹ but the primary rationale for separating "church and state"¹⁰ has shifted from a goal of protecting the church as well as the state to a goal of safeguarding the state against sectarianism.¹¹ An increased emphasis on pluralism and secularism has virtually removed religious language from dialogue about legal issues.¹² Family law has moved from a patriarchal structure to a model of formal gender equality with an emphasis on rights of individuals within the family.¹³ In both areas, a growing number of commentators, discontented with the highly individualized, rights-oriented jurisprudence have begun to attack the "official"¹⁴ liberal version of the law.¹⁵ Many of these attacks

⁵ *Bradwell v. State*, 83 U.S. 130, 140 (1872) (Bradley, J. concurring). In this infamous case, the Supreme Court held that women could be constitutionally banned from practicing law.

⁶ The public/private dichotomy has been well documented in legal literature. See, e.g., Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 13, 17-21 (David Kairys ed., 1990); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

⁷ See Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. LAW 741 (1988) for an interesting discussion of the relationship between church, state and family spheres.

⁸ See generally Mensch, *supra* note 6, at 31-33.

⁹ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1154-1301 (2d ed. 1988) (affirming distinction); Frederick Mark Gedicks and Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579 (1987) (criticizing distinction).

¹⁰ I use the generic term "church and state" because it is so common in the jurisprudence of the field. I am well aware that the term explicitly excludes most non-Christian religions, especially Judaism.

¹¹ A number of historians have challenged the concept that the original focus on separation of church and state was to protect the state. See, e.g., HOWE, *supra* note 2.

¹² See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND PRIVATE POWER* (1988); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); Michael W. McConnell, *The Role of Democratic Politics in Transferring Moral Conviction Into Law*, 98 YALE L.J. 1501 (1989); see also *infra* notes 31-35 and accompanying text.

¹³ See, e.g., Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, 1869-1895*, 84 MICH. L. REV. 1518 (1986); Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989); Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819. See also *infra* notes 133-40 and accompanying text.

¹⁴ The concept of "official" and "unofficial" versions of the law is that of Robin West, one of the most important cultural feminists. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 12 (1988).

¹⁵ See *infra* notes 37-43, 141-55 and accompanying text.

come from traditional conservatives;¹⁶ however increasingly they also come from the left, or at least from people using the language of the left.¹⁷ Although the specific doctrines discussed differ, critics of liberal thought in family law and law and religion jurisprudence emphasize similar themes. Both groups argue that mainstream jurisprudence in these areas is overly concerned with rights, not responsibility, and autonomy, not relationships.¹⁸ Both call for a return to "moral" dialogue in the formulation of laws in the area.¹⁹ On the surface, these commentators have much in common with cultural feminists²⁰ (alternately referred to as relational²¹ or difference femi-

¹⁶ In the area of law and religion, the most prominent conservatives include Michael McConnell, John Noonan, and David Smolin. See *infra* note 37 and accompanying text. In the area of family law, they include Bruce Hafen and Carl Schneider. See *infra* notes 151, 161-68 and accompanying text.

¹⁷ In the area of law and religion, the most prominent "leftist" critics are Mark Tushnet and Alan Freeman and Betty Mensch. See *infra* notes 39-40 and accompanying text. In the area of family law, the most prominent example is Mary Ann Glendon. See *infra* note 149 and accompanying text.

¹⁸ See *infra* notes 45-52, 147-55 and accompanying text.

¹⁹ See *infra* notes 117-18, 147-55 and accompanying text.

²⁰ It is not easy to give a definition of cultural feminism, because any description of the genre is shaped by the author's attitude toward its themes. Leslie Bender, a cultural feminist, refers to "a school of feminist theory that acknowledges women's gender differences." Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VERT. L. REV. 1, 1-2 (1990) [hereinafter Bender, *Gender Difference*]. Deborah Rhode elaborates on this theme:

[T]his strain of feminist theory has not merely celebrated values traditionally associated with women. It has insisted that these values be *valued* and has demanded changes in occupational structure, public policies, and male attitudes. The point has been not simply to celebrate women's experience, but to change men's, to affect their conduct in work, family, and political contexts.

DEBORAH RHODE, JUSTICE AND GENDER 309 (1989). A critic of cultural feminism offers this definition:

This theory suggests that the moral reasoning of women differs from that of men because of their psychological development, and that women's different voice is at least equal, if not superior, to masculine reasoning. Typical characterizations of this difference are that women are relational, connected, practical, and have an ethic of care, whereas men are individualistic, objective, abstract, and have a justice of right.

Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 120-21 (1991).

²¹ This term is used to describe the aspect of cultural feminist theory which stresses its emphasis on relationships. This term is used by Martha Minow, among others. See MARTHA MINOW, MAKING ALL THE DIFFERENCE 219 (1990). I have chosen to use the term cultural feminism throughout this Article, because it expresses the theme that I find most compelling: the concept that women are shaped by their culture in certain ways. See *infra* notes 248-54 and accompanying text. Cultural feminism is occasionally described by its critics as biological feminism, which suggests that its proponents believe women's biology alone differentiates them from men. This viewpoint is frequently attributed to Robin West. See, e.g., Patricia Cain, *Feminism and*

nists²²) who also criticize the liberal emphasis on autonomy and self-interest,²³ and advocate an "ethic of care" and ideals of cooperation and responsibility.²⁴ This commonality intrigues and infuriates me because, although the critics of liberal religion and family law jurisprudence mimic cultural feminist themes, their ultimate goals and proposals are often detrimental to most women and antithetical to goals of most feminists.²⁵

In this Article, I will explore the ways in which three representative authors ultimately miss the substantive messages of cultural feminism. Since this distortion of cultural feminists' language may seem to validate the arguments of their critics,²⁶ I will also respond to some of the

the Limits of Equality, 24 GA. L. REV. 803, 837 n.128 (1990). I do not personally subscribe to this aspect of cultural feminism, but I think the critics' descriptions of West's views have been somewhat exaggerated. The only feminist whom I would describe as a purely biological feminist is Marie Ashe. See *infra* notes 112, 184, 241.

²² This term refers both to cultural feminists' emphasis on differences between men and women and to CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982), a work which has had an enormous influence on feminist thought. Gilligan's work is a study of the difference in the reasoning of boys and girls, which suggests that boys' reasoning tends to be more hierarchical and girls' reasoning more relational and contextual.

²³ For an excellent overview of the criticism of liberal thought by cultural feminists and a challenging defense of liberal thought, see Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992). The classic description of the relationship between liberalism and feminist jurisprudence is West, *supra* note 14.

²⁴ The authors advocating this theme are too numerous to cite in a single footnote. A representative list includes: Judith Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988); Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Leslie Bender, *A Lawyers' Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter Bender, *Lawyers' Primer*]; Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 [hereinafter Bender, *Feminist (Re) Torts*]; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986); Judith Resnik, *On the Bias: Feminist Reconsideration of Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); West, *supra* note 14.

²⁵ See *infra* notes 57-70, 157-58 and accompanying text.

²⁶ Again, a single footnote can only provide a partial list of criticisms of cultural feminism. The most important include: CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987) [hereinafter MACKINNON]; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) [hereinafter Williams, *Deconstructing*]; Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 [hereinafter Williams, *Postmodern*]; Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) [hereinafter Williams, *Gender Wars*]; Drucilla Cornell, *The Doubly Prized World: Myth, Allogamy and Feminism*, 75 CORNELL L. REV. 644 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Femi-*

major criticisms of cultural feminism²⁷ and conclude by arguing that its themes continue to have much to offer to women's struggle against subordination.²⁸

II. ATTACKS ON THE LIBERAL VISION OF LAW AND RELIGION JURISPRUDENCE

A. *The Prevailing Doctrine and Its Challengers*

According to liberal philosophy, the ideal society is one in which individuals are given the maximum amount of freedom to make rational, autonomous choices.²⁹ Therefore, establishment of religion is undesirable because too-powerful religions inevitably restrict individual religious preferences.³⁰ Freedom of religion is desirable because it enhances the rights of individuals to observe personal religious practices. Religion properly belongs in a "private" sphere, into which the government cannot and should not intrude, and conversely religious beliefs should not permeate the "public" sphere—the realm of government. The courts should strive toward neutrality in decisionmaking regarding church and state issues, and the government's stance toward religion should also be neutral—neither hostile nor approving.³¹ The ideal society, then, is one of religious pluralism.³² "Moral" dialogue has no place in legal discourse, which should consist of reasoned, objective arguments and principles.³³ There are distinct dichotomies between "science" and "religion,"³⁴ and between "knowledge" and religious "beliefs."³⁵ These basic principles are the underpinnings of current law and religion doctrine. The metaphor of a "wall of separation" between

nist Jurisprudence, 75 IOWA L. REV. 1135 (1990); Schroeder, *supra* note 20; Mary Joe Frug, *A Post-Modern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992) [hereinafter Frug, *Manifesto*]; Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim, "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37 (1992) [hereinafter, Frug, *A Different Voice*].

²⁷ See *infra* notes 206–47 and accompanying text.

²⁸ See *infra* notes 248–88 and accompanying text.

²⁹ See generally BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10–12 (1980).

³⁰ For a historical account of the tendency of religion to oppress individuals, see LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (1st ed. 1953).

³¹ See, e.g., Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2–6 (1961).

³² ACKERMAN, *supra* note 29, at 1–44, 345–78.

³³ For an interesting discussion of this viewpoint, see Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1991).

³⁴ For a challenge to this statement, see Alan Freeman and Betty Mensch, *Religion as Science/Science as Religion: Constitutional Law and the Fundamentalist Challenge*, TIKKUN Nov.–Dec. 1987, at 64 [hereinafter Freeman and Mensch, *Religion as Science*].

³⁵ *Id.*

church and state is consistent with the public/private distinction—the wall is necessary to prevent an overlapping of the two spheres.³⁶

In the past two decades liberal philosophy about the relationship of religion and the state has come under increasing attack, both in the judicial opinions and in law review literature. The traditional accommodationists adopt the starting point that religion or "morality" has an important place in public life and cannot be shuttled into its own separate sphere; instead, it must be "accommodated."³⁷ In contrast, the primary emphasis of the "new wave" scholarly critics is not a positive affirmation of the merits of religious values, but rather a negative criticism of liberal thought about religion.³⁸ These critics are generally affiliated with less traditional areas of scholarship, such as critical legal studies³⁹ or law and economics.⁴⁰ The attack on liberal thought by

³⁶ *Emerson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Justice Black wrote: "[t]he First Amendment has erected a wall between church and state. That wall must be kept impregnable. We could not approve the slightest breach." *Id.*

³⁷ Former Chief Justice Burger, and Justices Scalia, White and Rehnquist have repeatedly expressed this opinion in Supreme Court decisions. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) ("equally persuasive is the evidence of accommodation of all faiths and all forms of expression . . ."); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Michael McConnell and John Noonan are two of the most important proponents of this viewpoint among academics. See, e.g., Michael W. McConnell, *Accommodation in Religion: An Update and a Response to the Critics*, 60 G.W.L. REV. 685 (1992); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 N.W. L. REV. 146 (1986); JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT (1987); John T. Noonan, Jr., *The Constitution's Protection of Individual Rights: The Real Role of the Religion Clauses*, 49 U. PITT. L. REV. 717 (1988); John T. Noonan, Jr., *Principled or Pragmatic Foundations for the Freedom of Conscience*, 5 J. LAW & RELIGION 203 (1987). Many accommodationists are also originalists, who argue that the framers, at least the majority of them, never intended for the religion clause to apply to the states, and that the federal government was simply required to promote neutrality among religious sects, but was not prohibited from offering any aid to religion.

³⁸ See, e.g., Mark Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131 (1989) (book review); *Comments on Gedicks and Ball*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 457 (1990); *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986). Tushnet argues that liberal thought in the area of law and religion is indeterminate, ultimately self-destructive, and ignores the tradition of republicanism which helps shape the religion clauses.

³⁹ Peter Gabel, Al Freeman and Betty Mensch and Gary Peller, in a series of articles about "creationism," attack the sterility of liberal thought and its emphasis on positivist science. TIKKUN, Nov.-Dec. 1987, at 55-76. Stanley Fish, in a mischievous article, uses Stephen Carter's critique of traditional law and religion jurisprudence to "prove" that there is no such thing as liberalism. See Stephen Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L. J. 977; Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L. J. 997.

⁴⁰ Michael W. McConnell and Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989). The authors contend that liberal theory in the area is inefficient and insists that an economic analysis will resolve all the problems of the current "murky" doctrine.

writers who accept the fundamentalist world view⁴¹ is even broader and deeper than that of the "new wave" theorists. They argue, like the traditional accommodationists and the new wave critics, that there is no such thing as neutrality in matters pertaining to religion.⁴² They go further, however, by arguing that this non-neutrality—which includes an emphasis on rational thought to the detriment of religious belie—166s in and of itself a religion: the religion of secular humanism.⁴³

Despite their very different political perspectives, most of these critics share some similar themes. They attack the sterility of liberal thought and its emphasis on autonomy and argue that it ignores the deep-seated place religion plays in many people's lives. Additionally, they argue that it is both impossible and undesirable to separate religious dialogue from political decisionmaking. In the next sections of this Article, I will examine an article by Alan Freeman and Betty Mensch, which explores several of these themes.

B. *The Freeman/Mensch Article*

Alan Freeman and Elizabeth Mensch's article, *The Politics of Virtue: Animals, Theology and Abortion*,⁴⁴ is a remarkably sophisticated and provocative examination of the role of moral dialogue in American theology and politics since World War II. It is worth reading for its rich historical and philosophical summary of this topic alone. More spe-

⁴¹ The most prominent are David Smolin, Wendell Bird and John Whitehead. See, e.g., David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) [hereinafter Smolin, *Postmodern America*]; David M. Smolin, *The Enforcement of Natural Law By the State: A Response to Professor Calhoun* 16 DAYTON L. REV. 381 (1991) [hereinafter Smolin, *Natural Law*]; David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345 (1988) [hereinafter Smolin, *Self-Censorship*]; Wendell R. Bird, *Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J. L. & PUB. POL'Y 125 (1979); John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991) [hereinafter Whitehead, *Operation Rescue*]; John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public School*, 16 PEPP. L. REV. 229 (1989) [hereinafter Whitehead, *Religious Apartheid*]; John Whitehead and John Conland, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978).

⁴² See generally Smolin, *Self Censorship*, *supra* note 41 at 346.

⁴³ This religion, they argue, is established in many areas of public life, such as public schools, and thus constitutes an Establishment Clause violation. It must either be balanced with the fundamentalist viewpoint or eliminated entirely. Although this viewpoint has attracted attention in the popular press, and is an important part of fundamentalist theology, it has received short shrift in academic literature. Only a few judges accept their arguments—and the most prominent—Judge Hand in Alabama—has received widespread criticism for doing so.

⁴⁴ Alan Freeman & Elisabeth Mensch, *The Politics of Virtue: Animals, Theology, and Abortion*, 25 GA. L. REV. 923 (1991) [hereinafter Freeman and Mensch, *Abortion*].

cifically, Freeman and Mensch discuss the role of moral discourse in the context of the controversy about abortion.⁴⁵ Although the article has a number of corollary themes, including a fascinating discussion of the complex relationship between proponents of animal rights and pro-life advocates,⁴⁶ its primary thesis is that "an almost entirely secular version of the abortion debate triumphed, leading to the constitutionalization of abortion rights under the rubric of privacy. Lost in the process was the continuing possibility of a genuine and ongoing moral debate about abortion."⁴⁷ Freeman and Mensch, who describe themselves as "identified with the left/liberal side of law and politics,"⁴⁸ are highly critical of this result and argue that moral dialogue about abortion, and presumably other issues, is in fact highly desirable.⁴⁹ They contend that liberal thought with its emphasis on autonomy represents "a celebration of self as the ultimate concern, the final arbitration, the trump to all moral claim."⁵⁰ *Roe v. Wade*⁵¹ is interpreted "as inviting, or even encouraging, routine use of abortion for the instrumental realization of self-interest."⁵²

In criticizing the emphasis on rights in *Roe*, Freeman and Mensch also portray the pro-choice movement as dominated by "white, educated, middle-class women"⁵³ for whom "the libertarian emphasis on

⁴⁵ Abortion, perhaps more than any other subject, illustrates the close relationship between family law and law and religion. Therefore, it is not surprising that both Freeman and Mensch, writing in the area of law and religion, and Carl Schneider, writing in the area of family law, use the subject as their primary topic. See *infra* note 168 and accompanying text. Abortion is also a central topic of Mary Ann Glendon. See *infra* note 149.

⁴⁶ Freeman and Mensch, *Abortion*, *supra* note 44, at 939-63. The authors note that most animal right supporters are politically left, while most pro-life proponents are conservative. They suggest that despite their differences, "those who advocate respect and reverence for life, animal or fetal, may share, more than they realize, a moral and theological common ground." *Id.* at 940. In an article specifically devoted to the topic of animal rights, the authors criticize the "arrogant instrumentation" of Western culture, a theme they continue in the abortion article. Alan Freeman and Betty Mensch, *Scratching the Belly of the Beast*, *TIKKUN*, Sept.-Oct. 1989, at 34, 36.

⁴⁷ Freeman and Mensch, *Abortion*, *supra* note 44, at 939.

⁴⁸ *Id.* at 934. They describe themselves as "gropingly religious people," but "neither Catholic nor fundamentalist." *Id.* at 934. The authors also describe their own personal history with abortion. *Id.* at 933-4.

⁴⁹ *Id.* at 1079-1138.

⁵⁰ *Id.* at 1121.

⁵¹ 410 U.S. 113 (1973).

⁵² Freeman and Mensch, *Abortion*, *supra* note 44, at 1121-22.

⁵³ *Id.* at 1123. The authors also compare the pro-choice emphasis on reproductive freedom to "that of a spoiled suburban teenager who expects to be fed, clothed and otherwise taken care of, but becomes indignant at authoritarian interference with lifestyle choice." *Id.* at 1126. This clearly hostile description serves as more evidence that the authors are not as "neutral" as they purport to be and seems to parallel the frequent claim by many pro-lifers that women have abortion purely for "convenience." Freeman and Mensch's depiction of contemporary liberals

choice was consistent with experience."⁵⁴ These elitist women, in Freeman and Mensch's analysis, ignore the real needs of poor women, who may be forced through economic coercion to seek abortions they do not really want. The authors quote with obvious approval from K. McDaniel's feminist pro-life book:

If poverty is the reason a woman is terminating the pregnancy, if in fact she wants the child but cannot afford to have it, she is actually being coerced into an abortion. She does not, in fact, have a choice at all. For many women, this is precisely their perception of the situation; they go to abortion counselors saying they "have no choice," they "have to" have an abortion.⁵⁵

This section of Freeman and Mensch's article seems to parallel much of feminist thought, particularly cultural feminist thought.⁵⁶ Certainly the criticism of rights analysis and of unrestrained, selfish autonomy are common themes.⁵⁷ But this similarity is ultimately

resembles Carl Schneider's caricature of "psychologic man." See *infra* notes 178-80 and accompanying text.

⁵⁴ Freeman and Mensch, *Abortion*, *supra* note 44, at 1124. See also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (similar description of the sociological and economic differences in many pro-life and pro-choice supporters). For a sophisticated feminist explanation of the reasons many lower class women oppose abortion, see ANDREA DWORKIN, *RIGHT WING WOMEN* (1983).

⁵⁵ Freeman and Mensch, *Abortion*, *supra* note 44, at 1125 (quoting K. McDONNELL, *NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION* 71 (1984)). Some feminist authors question whether one can be a feminist and pro-life. See Kathy Pollitt, *Everything's Up to Date in North Dakota*, *TIKKUN*, Jan.-Feb. 1990 at 57. Certainly the vast majority of women writing in the field of feminist jurisprudence are pro-choice. See, e.g., Robin West, *Forward: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43, 43-47, 63-85 (1990); Suzanna Sherry, *Women's Virtue*, 63 *TUL. L. REV.* 1591 (1989); Ruth Colker, *Abortion and Dialogue*, 63 *TUL. L. REV.* 1363 (1989); Frances Olsen, Comment, *Unraveling Compromise*, 103 *HARV. L. REV.* 105 (1989); MACKINNON, *supra* note 26; Williams, *Gender Wars*, *supra* note 26; Kathryn Abrams, *Ideology and Women's Choices*, 24 *GA. L. REV.* 761 (1990). However, although I am also pro-choice, I am uncomfortable with any definition of feminism that excludes views with whom one does not agree. The viewpoint that a feminist pro-lifer is a "contradiction in terms" is similar to Catherine MacKinnon's denunciation of those who do not share her views on pornography. See MACKINNON, *supra* note 26, at 198-205. This is a position I find equally problematic despite my own agreement with MacKinnon's statements about pornography.

⁵⁶ Several pro-choice feminists authors have noted there is a potentially dangerous parallel between the themes of cultural feminism and anti-abortion rhetoric. See Schroeder, *supra* note 20. This concern is well-founded, as Freeman and Mensch's article illustrates. Ironically, Joan Williams, one of the leading critics of cultural feminism, advocates use of some of its themes as a way to show that pro-choice women can be as moral and caring as their pro-life counterparts. Williams, *Gender Wars*, *supra* note 26 at 1589-94.

⁵⁷ For critiques of an overemphasis on rights and autonomy, see Bender, *Lawyers' Primer*, *supra* note 24 and Littleton, *supra* note 24. Most feminist jurisprudence is ambivalent toward

superficial—the actual approaches taken by feminists emphasizing these themes differ significantly from those advanced in Freeman and Mensch's work. In order to portray the choice movement as dominated by elitist rights-obsessed white middle-class women, Freeman and Mensch inexplicably overlook the fact that a number of prominent pro-choice feminists are also sharply critical of *Roe's* "right of privacy" analysis.⁵⁸ These feminist authors argue that the correct way of looking at the issue is through equal protection theory, a possibility Freeman and Mensch choose to ignore. At no place in their article, which appears in a feminist jurisprudence symposium,⁵⁹ do the authors seriously confront the fact that abortion regulations will have a disproportionate impact on women.⁶⁰ They may argue that this fact is too obvious to be mentioned, but their "gender neutral" approach contrasts sharply with cultural feminist theory, which is explicitly woman-centered,⁶¹ recognizing that "the woman question" cannot be ignored.⁶² In this aspect alone, Freeman and Mensch's work differs from much of feminist jurisprudence, which has as one of its primary objectives an exploration of the way women's situations are different from men's.⁶³

The fact that many poor women may be economically coerced into an unwanted abortion is a very real problem and one which does concern many feminists. However, despite their denials and claims

rights analysis, recognizing its limitations, but refusing to repudiate it entirely. See West, *supra* note 14, at 55.

⁵⁸ See, e.g., Colker, *supra* note 55; MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 50-52 (1987); Frances Olsen, *Comment, Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); MACKINNON, *supra* note 26, at 93, 97; Williams, *Gender Wars*, *supra* note 26, at 1572-94. For a criticism of the feminist critique of privacy, see Laura W. Stein, *Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153 (1993).

⁵⁹ The article appears in Volume 24, Issue 4 of the GA. L. REV., an issue which is entitled "Feminist Jurisprudence Symposium." Most of the article is concerned with a history of theology and it only briefly touches upon feminist theory. In this area, the authors' primary goal is to challenge the concept "that the only correct 'feminist' position is unswerving support for *Roe v. Wade*." Freeman and Mensch, *supra* note 45, at 934.

⁶⁰ The authors do attempt a feminist analysis in a section entitled "Women, Nature and Nazis." *Id.* at 953-86. However, the section never considers the equal protection analysis and emphasizes the view of pro-life feminists. *Id.* at 956-57.

⁶¹ See, e.g., Bender, *Lawyers' Primer*, *supra* note 24, at 3; West, *supra* note 14.

⁶² See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) ("Feminists across many disciplines regularly ask a question—a set of questions, really—known as 'the woman question,' which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.")

⁶³ See, e.g., Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352, 353 (book review) ("[t]he purpose and practice of feminist theory is to name, expose, and eliminate the unequal position of women in society.")

of neutrality,⁶⁴ I believe that Freeman and Mensch's article can and should be read as an endorsement of some form of state restriction of abortion.⁶⁵ Freeman and Mensch would apparently tell poor women, "because you have no real choice, in a meaningful sense of the word, for your own good we want to keep you from exercising that 'false choice.'"

This highly abstract approach to the problems faced by poor women is a sharp contrast to the pragmatism found in much of feminist jurisprudence.⁶⁶ As Margaret Radin explains ". . . it seems there are two ways to think about justice. One is to think about justice to an ideal world, the best world that we can now conceive. The other is to think about nonideal justice: given where we now find ourselves, what is the better decision?"⁶⁷ Freeman and Mensch refuse to come to grips with the fact that a woman faced with an unwanted pregnancy in a nonideal world is forced into pragmatism—she must make a decision. It is easy to decry the economic pressures that may force poor women to seek abortions and to call for reform of an unjust economic system. Much of cultural feminism, which one commentator describes as "Marxism you can take home to Mother"⁶⁸ is devoted to this goal.⁶⁹ But realistically, these major economic changes are not likely to happen in the near future. Instead, there is an emphasis on cutting benefits to welfare mothers, a step which would place poor women bearing additional unwanted children in an even worse economic condition.⁷⁰ It may be true that it is wrong to exclude talk about morality from dialogue about abortion, but it is far worse to exclude recognition of

⁶⁴ At the onset of the article, Freeman and Mensch state that their goal "is not to advance one side or the other in the abortion debate, but rather to explore whether we are necessarily stuck with the grim and destructive fact of moral incommensurability." Freeman and Mensch, *supra* note 45, at 931. Throughout the article, the authors claim to criticize both sides, however in terms of length and weight, their criticism is primarily aimed at the pro-choice side.

⁶⁵ It is difficult to read the article any other way. The authors consistently talk about "death" when they refer to abortion and portray the women who choose abortion as either forced by economic necessity into a false choice, or as selfish persons overly concerned with autonomy. See *supra* note 53 and accompanying text.

⁶⁶ See, e.g., Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Bartlett, *supra* note 62, at 849-63.

⁶⁷ Radin, *supra* note 66, at 1700.

⁶⁸ Williams, *Deconstructing*, *supra* note 26, at 820.

⁶⁹ See, e.g., Bender, *Gender Differences*, *supra* note 20, at 34-36; Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

⁷⁰ For descriptions and analysis of these attacks on welfare mothers, see Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856 (1989) and Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. J. 274.

the necessity for tough pragmatic decisions from the dialogue, as Freeman and Mensch have done.

The authors' approach also fails to achieve the empathy of cultural feminism. Lynne Henderson describes empathy as embodying three basic phenomena: "(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another"⁷¹ Although Freeman and Mensch accuse rights-based theorists of lacking empathy for "the moral and social experience of many women,"⁷² their one-sided perspective ultimately represents their own failure of understanding. According to their article, women who have abortions are either economic victims or driven by "an internalized feminist pressure to be successfully autonomous and independent."⁷³ There are no voices of women who have had abortions and regard it as the right choice for them.⁷⁴

In contrast, in her article *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, feminist Ruth Colker demonstrates an ability to hear a variety of voices.⁷⁵ Like Freeman and Mensch, she is critical of the failure of some pro-choice feminists to recognize that the decision to have an abortion can be very difficult and traumatic.⁷⁶

⁷¹ Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Henderson might object to her work being described as an example of cultural feminism, because she explicitly rejects the argument that women are naturally more empathetic than men. *Id.* at 1582-83. My use of her work, however, is not necessarily to try to fit Henderson into a "category" of feminist jurisprudence, because there is no agreement as to who belongs where among feminists. See, e.g., Schroeder, *supra* note 20, at 121 (classifying Mary Joe Frug as a cultural feminist vs. Frug's description of herself as a postmodernist); Frug, *Manifesto*, *supra* note 26. Regardless of the label, I believe it is accurate to say that the works most commonly known as cultural feminist do emphasize empathy.

⁷² Freeman and Mensch, *Abortion*, *supra* note 44, at 1123.

⁷³ *Id.* at 1125. This language strikes me as displaying a curious hostility toward feminism. It could have been written by Phyllis Schlafly.

⁷⁴ Although I have carefully read this article many times, I have not been able to find any language which can be read as expressing empathy for women who choose abortion, other than the section depicting them as victims of economic necessity. See *supra* notes 54-55 and accompanying text. Indeed, even when describing their own experiences with abortion, the authors use negative, derogatory language, stating their abortion history "is one of almost perfect irresponsibility, of the kind that absolutely precludes self-righteousness." Freeman and Mensch, *Abortion*, *supra* note 44, at 933.

⁷⁵ 77 CAL. L. REV. 1011 (1989). The author has recently published a book on the subject of abortion. RUTH COLKER, *ABORTION AND DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW* (1992). Because I did not have access to this book at the time I was writing this article, my discussions and cites will refer to her law review article. However, the position the author takes in the book is similar to those in the article.

⁷⁶ Colker, *supra* note 55, at 1046.

Colker discusses with sympathy a pro-life book "Silent No More"⁷⁷ and its stories of women who have come to regret their abortion decisions,⁷⁸ but notes that its author "chooses voices selectively. He only provides us with stories of women who claim they were wrong to choose abortion. He gives us little insight into how and why they changed their minds, making it difficult for us to assess whether the change was the result of reflection."⁷⁹ Colker, unlike Freeman and Mensch, attempts a deeper understanding of why women may choose abortion and then regret the decision. She recognizes that both the decision to have an abortion in the first place *and* the subsequent regret can be shaped by outside forces: "[i]n both cases, the woman appeared to rely on a dominating culture or an other—a parent, boyfriend, social worker, or later, the Church."⁸⁰ Colker's empathetic discussion of women's decisions avoids judgmental statements like "[t]o abort a fetus is to kill, to prevent the realization of a human being."⁸¹ She understands that many women "do not bear a child now in order to bear a child later. It is because of their love and concern for the value of potential fetal life that they choose to defer child birth."⁸²

Colker, like Freeman and Mensch, is critical of much of liberal pro-choice theory and argues that theology deserves a place in dialogue about women's issues,⁸³ but her cultural feminist approach⁸⁴ differs from their analysis in several significant respects. In addition to displaying greater understanding of the real stories of women choosing to have an abortion,⁸⁵ she is more willing to articulate her own positions

⁷⁷ DAVID REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987).

⁷⁸ Colker, *supra* note 55, at 1063–67.

⁷⁹ *Id.* at 1065.

⁸⁰ *Id.* at 1066. Colker argues that by relying on the opinion of others and the dominant culture, a woman fails to recognize her authentic self.

⁸¹ Freeman and Mensch, *Abortion*, *supra* note 44, at 1137.

⁸² Colker, *supra* note 55, at 1059.

⁸³ *Id.* at 1017. Colker argues that theological dialogue would benefit feminism generally because it would provide an aspirational dimension that current feminist theory lacks. *Id.* at 1017–30.

⁸⁴ Again, I feel compelled to offer the caveat I have made elsewhere—I am not necessarily classifying Ruth Colker as a cultural feminist. See, e.g., Cain, *supra* note 21, at 837 n.128 (distinguishing Colker from Robin West, whom she describes as believing that women have a native essence). I am arguing that her approach to the abortion issue embodies many aspects of cultural feminism. For an argument that relational feminism cannot be effectively used to support a pro-choice position, see Pamela S. Karlan and Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858 (1993).

⁸⁵ Colker discusses the actual women involved in *Roe v. Wade* and *Doe v. Bolton*. Colker, *supra* note 55, at 1050–54 (noting that the woman in *Roe* was pregnant allegedly as the result of a rape, and the woman in *Doe* had already lost two children to foster care and had been a patient in a mental hospital).

on laws regulating abortion⁸⁶ and to offer pragmatic solutions. Instead of just bemoaning the fact that some women may be coerced into abortions they may later regret, Colker suggests that states require that group counseling sessions be available to all pregnant women⁸⁷ and that the state should bear the cost of these programs.⁸⁸ Colker also recognizes the obvious fact that Freeman and Mensch ignore—that abortion regulation will impact almost exclusively on women⁸⁹—and provides an equal protection analysis of abortion legislation.⁹⁰

Although Freeman and Mensch, and Colker share similar themes and even use many of the same words (“love,” “compassion,” “theology,” “aspirations”), Colker’s message of pragmatic empathy⁹¹ for women faced with an unwanted pregnancy and her aspirational goals for all women contrasts sharply with Freeman and Mensch’s empty abstract theorizing.

Freeman and Mensch’s work also lacks empathy for supporters of the pro-choice position. While it is true that many of the leaders of the pro-choice movement are white, middle-class women, I think it is debatable whether the movement actually lacks concern for the poor. I reached adolescence and young adulthood at a time when abortion was illegal in most states, yet when my white, middle-class college roommate⁹² wanted an abortion, she had little trouble obtaining one. When I first became aware of the extreme controversy surrounding abortion, I couldn’t really understand what everyone was so upset about. I had regarded abortion law as being as ineffective as the prohibition against sales of alcohol in my home town.⁹³ The fact is that most white middle and upper class women were able to get abortions

⁸⁶ Colker states that she is pro-choice and opposed to criminalization of abortion. Colker, *supra* note 55, at 1046–49. In contrast, Freeman and Mensch continually deny their own pro-life positions, insisting that they are not taking sides. See *supra* note 64–65 and accompanying text.

⁸⁷ Colker, *supra* note 55, at 1066–67. She suggests that the programs be run by trained ethicists and be voluntary.

⁸⁸ *Id.* at 1067.

⁸⁹ Colker notes that men have less incentive to take responsibility for birth control and argues that criminalizing abortion “has virtually no effect on the male partner who should be forced to bear more responsibility for the unwanted pregnancy.” *Id.* at 1048–49.

⁹⁰ Colker, *supra* note 55, at 1053–54.

⁹¹ Colker notes that “[a] fundamental problem with the legislation in both *Doe* and *Roe* was its failure to take account of the specific factual situations in which abortion decisions arise.” *Id.* at 1054. Freeman and Mensch’s work suffers from a similar defect.

⁹² To protect the privacy of the person whose experience I described, I would like to state that I had fourteen different roommates during my four years of college, all of whom were white and middle-class.

⁹³ I grew up in Knoxville, Tennessee, a city which banned the sale of alcoholic beverages until 1967.

before *Roe* and they will continue to be able to get them if *Roe* is overruled.⁹⁴ As Freeman and Mensch recognize in an earlier part of their article, abortion regulation primarily affects the poor, and thus disproportionately women of color.⁹⁵ It is highly unlikely that so many middle-class women would mobilize against abortion regulation if self-interest was their only motivation.

Freeman and Mensch's criticism of pro-choice women is specific to the issue of abortion, but it is a sub-part of a major theme of all of their work in the area of law and religion. In their essay on fundamentalism and creationism,⁹⁶ as well as in the abortion article, the authors characterize secular liberals as elitist snobs who are out of touch with the lower classes⁹⁷ and patronizing or even contemptuous of religious beliefs they do not understand.⁹⁸ This is an attack carefully designed to strike at the hearts of leftist intellectuals, who are self-consciously aware of their privileged status and who feel overwhelming guilt when confronted with an accusation that they are not sufficiently conscious of class issues. There is much truth to Freeman and Mensch's criticism, particularly their characterization of the attitude much of the press and academia have toward fundamentalists, but the snobbery they describe is hardly limited to liberals. I teach in a law school in which approximately 10% of the students are fundamentalists, many of whom tell me they are afraid to express their beliefs in class, because of their fears of peer disapproval. This disapproval is not the scorn of "politically correct" leftists,⁹⁹ who are not exactly dominant among the student

⁹⁴ For a similar conclusion, see Marion Hart, *Keeping Control*, N.Y. TIMES, July 12, 1992, § 6 (Magazine), at 12. In an article describing her experience as a teenager pregnant in China, forced to fly to New York for her abortion, she wrote:

My experience in China illuminates the tragic bottom line of this issue. Even if the Supreme Court overturns *Roe v. Wade* and abortion is criminalized in the United States, women who are wealthy enough to live above the law will always have a choice. If I found myself in similar circumstances again, I could afford to take another international flight. Others would not have that option.

Id. at 12. Every media account I have ever read about *Roe*'s potential demise states that there will be states in which abortion will remain legal.

⁹⁵ Freeman and Mensch, *Abortion*, *supra* note 44, at 932-33. The authors do not sufficiently develop this important theme in other sections of their articles.

⁹⁶ Freeman and Mensch, *Religion As Science*, *supra* note 34.

⁹⁷ See Freeman and Mensch, *Abortion*, *supra* note 44, at 1131-32.

⁹⁸ Freeman and Mensch, *Religion As Science*, *supra* note 34, at 68. The authors state that "few [fundamentalists] . . . fit the caricature of the ignorant, redneck buffoon, out of touch with the modern world." *Id.*

⁹⁹ I deliberately put this term in quotes, because I am convinced that the entire concept of "political correctness" is a public relations ploy created by the far right as a means of silencing anyone who challenges the supremacy of white male thought and raises race and gender issues. See Randall Kennedy, *The Political Correctness Scare*, 37 LOY. L. REV. 231 (1991); Mark V. Tushnet, *Political Correctness, The Law, and the Legal Academy*, 4 YALE J.L. & HUMAN. 127 (1992).

body at the University of Tulsa, but the clearly classist disdain of apolitical, economically privileged students toward members of religions identified as "hicky."¹⁰⁰

The fact that fundamentalists are often the victims of class snobbery, however, does not remove the reality that many of their absolutely held beliefs are deeply sexist,¹⁰¹ racist,¹⁰² and homophobic.¹⁰³ Leftist intellectuals should be on guard against insensitivity to class issues, but the solution to this important concern is not an over romanticized celebration of every "working class" attitude.¹⁰⁴

Not only are liberals and other intellectuals elitist, according to Freeman and Mensch, they are also essentialists.¹⁰⁵ In their opinion, people who insist on a secular world view "universalize one's own physical or temporal moment, and then project its understanding across space, or time, accordingly."¹⁰⁶ But from my own admittedly skeptical, somewhat secular, viewpoint, these words apply even more powerfully to religious beliefs. To non-believers in any given religion, that religion's religious beliefs are surely the epitome of mortals universalizing their own physical reality and projecting it across space. Statements like "all men are born in original sin"¹⁰⁷ are the quintessential form of essentialism and I could not possibly invent a better example of arrogant universalism and Eurocentrism than the blond, Aryan Jesus that appears in countless religious paintings.¹⁰⁸

¹⁰⁰ Similarly, I am amused at watching the white male business and cultural leaders of Tulsa go to great lengths to separate the city from its association with Oral Roberts, whom they regard as an embarrassment to the image they would like to project.

¹⁰¹ Consider this statement by Pat Robertson, a fundamentalist evangelist, describing the proposed equal rights amendment, "[i]t is about a socialist, anti-family political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism and become lesbians." *Overheard*, NEWSWEEK, September 7, 1992, at 15.

¹⁰² See Mayer G. Freed and Daniel D. Polsby, *Race, Religion and Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1; Dee-Ana Bardette and Nancy Parker, Bob Jones University v. United States: *Paying the Price of Prejudice - Loss of Tax-Exempt Status*, 35 MERCER L. REV. 937 (1984); Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).

¹⁰³ See generally *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34. The article states, "[f]or fundamentalists, the anti-gay animus is rooted in Biblical injunctions against same sex unions. Corinthians promises that homosexuals (along with fornicators, idolaters, adulterers and thieves) shall never inherit the Kingdom of God." *Id.* at 37.

¹⁰⁴ A classic example is the Revolutionary Communist Party, which purports to represent the working class and describes homosexuality as "a product of petty bourgeois ideology." Ed Kurt, *How Far Has the RCP Come?*, THE GUARDIAN, May 20, 1992, at 2 (letter to the editor).

¹⁰⁵ Freeman and Mensch, *Abortion*, *supra* note 44 at 1131-33. Calling one's opponent essentialist appears to be the latest trump card in legal academia. See *infra* notes 243-47 and accompanying text.

¹⁰⁶ *Id.* at 1132.

¹⁰⁷ *Romans* 5:12:21 (King James).

¹⁰⁸ See, e.g., BARBARA BURR, *THE LIFE OF CHRIST: IMAGES FROM THE METROPOLITAN MUSEUM OF ART* (1989).

Because we are human, none of us can completely escape essentialism. We all begin with our own experience when we try to formulate principles and rules which will apply to others. With this understanding, we can at least argue with other secular essentialists who emphasize (or overemphasize) "rational" dialogue yet recognize that others' experiences may differ from their own. But how is it possible to meaningfully argue with "God?" Religious fundamentalism is irrefutable on its own terms.¹⁰⁹ This type of essentialism is very different and far more dangerous than the sometimes overly broad generalizations made by difference and radical feminists.¹¹⁰ Most white, heterosexual feminists, when confronted with explanations of the ways in which the experiences of women of color or lesbians differ from their own, will welcome these additional insights.¹¹¹ Religious essentialists refuse to consider the possibility of any truth but their own.¹¹² It is impossible to exaggerate the danger of this form of essentialism. Consider the chilling prediction of David Smolin, one of the evangelical Christians romanticized by Freeman and Mensch as a victim of elitism:¹¹³

The disappearing middle and the stark contrast between loyalty to autonomy and loyalty to God's fixed moral code means that it is impossible to promise a society in which all will be comfortable. There will be no ultimate middle ground, no place of comfort and concord in which the traditional theocrat and modernist liberal can live in equal comfort. One can offer the losers of this conflict the comfort of *some* minimum protections; one cannot offer the losers the vision of a society that will permit and sanction their ways of life. The losers will

¹⁰⁹ See generally Smolin, *Postmodern America*, *supra* note 41.

¹¹⁰ For a discussion of the problem of essentialism in feminist jurisprudence, see *infra* notes 243-47 and accompanying text.

¹¹¹ See, e.g., Bender, *Gender Difference*, *supra* note 14, at 26 ("The criticisms of white Eurocentric heterosexist feminist thinking from African-American, Latin-American, Native American, Asian-American women, third world women, and lesbians, among others, were well-placed and have been taken to heart by most of those criticized.").

¹¹² For a thorough discussion of "inerrant" religion, as opposed to dialogic religion, see Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1 (1991).

¹¹³ Freeman and Mensch, *Religion as Science*, *supra* note 34, at 70-71. Freeman and Mensch do acknowledge the dangers of fundamentalism at the end of the article, stating that the Nazi regime grew out of a "yearning for community and for moral significance," and arguing "[o]ur task now is to recognize and hold in check the potential for fascism created by a similar alienation in our own culture, as it is experienced by fundamentalists who feel disaffected by America's orthodoxy of secularism." *Id.* at 71. The problem with these disclaimers is that they are too little and potentially too late.

live in a society that is hostile to the continuance of their ways of life, even if force is not literally used to destroy them.¹¹⁴

Smolin makes it very clear elsewhere in his work that if his side wins, the "losers" will include all gays and lesbians¹¹⁵ and all women who do not accept the Biblical view of women as subservient to men.¹¹⁶

C. Separation of "Morality" and Legal Discourse

Freeman and Mensch argue fervently that "moral dialogue" does belong in discussion about abortion, or any other issue which raises complex political, religious, social and philosophical questions.¹¹⁷ Most cultural feminists would agree that purely "logical," "neutral," "objective" language is not the only way to approach a problem.¹¹⁸

It is true that it is virtually impossible and probably undesirable to separate talk about "morality" (or unselfishness, or cooperative behavior) from our dialogue about the law. But the critical flaw in Freeman and Mensch's works is that they are content to let their inquiry stop there. The real question is not *whether* the government can attempt to create "moral" (unselfish, cooperative, etc.) behavior through its legal system, but *when* it is appropriate for the government to do so. Freeman and Mensch betray their own lack of analysis on this issue by asking whether Laurence Tribe, whom they characterize as opposing moral self-sacrifice in the case of abortion, would also oppose "economic regulation demanding self-sacrifice for moral purposes"¹¹⁹

¹¹⁴ Smolin, *Postmodern America*, *supra* note 41, at 1097.

¹¹⁵ *Id.* at 1094.

¹¹⁶ *Id.* at 1078 n.52, 1094-95 & n.121. While Smolin's criticism of feminism is not as hostile as his criticism of gays and lesbians, his underlying contempt is obvious. He also distorts the position of Ruth Colker (*supra* note 55), by citing her out of context with regard to her criticism of the failure of feminists to take theology seriously.

¹¹⁷ Freeman and Mensch, *Abortion*, *supra* note 44, at 1131-38. This theme is very popular in the current legal literature. Mark Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131 (1989) (book review); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992) (book review); GREENAWALT, *supra* note 12; PERRY, *supra* note 12; SMOLIN, *supra* note 41.

¹¹⁸ One of the inspirations for cultural feminism is Carol Gilligan's work on the difference between "feminine" and "masculine" approaches to problem-solving. GILLIGAN, *supra* note 22. Her famous example of Jake and Amy contrasts a strictly logical hierarchical approach to a problem to a more contextual approach. The rejection of "neutrality" and "objectivity" is a central theme of cultural feminists, who recognize that these concepts are only disguises for the viewpoint of middle-class white men, who regard their own experiences as universal. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 38-45 (1987); Bartlett, *supra* note 62, at 877; Bender, *Gender Difference*, *supra* note 20, at 17-20.

¹¹⁹ Freeman and Mensch, *Abortion*, *supra* note 44, at 1122.

They pose this rhetorical question knowing perfectly well the answer is "no," both in the case of the actual Laurence Tribe the person, and Laurence Tribe, the symbol of liberalism. Their point is supposed to be an indictment of the inconsistencies of liberalism,¹²⁰ but there are clear differences. First, in the special case of abortion, the government mandated self-sacrifice is limited only to women. Second, and more important, the decision about abortion touches upon a deeply intimate part of a person's life and will have a continuing major impact on that life.

No one is completely selfish or completely unselfish, and no one is unselfish or selfish in exactly the same way at exactly the same time. But most of us are more likely to exhibit unselfish "moral" behavior in the most intimate, immediately personal areas of our lives. The number of people who would risk their lives to save their own child is far greater than the number who would put themselves in peril to save a stranger's child. We usually experience greater pleasure from altruistic actions at a personal level than in the abstract and feel greater guilt if we depart from our moral principles in our intimate relationships. This is generally true even when the "unselfish" behavior we exhibit toward people we love may not be necessary and may even injure people who we do not know. I know without a doubt that it is more important and "moral" for me to give to Oxfam than to keep my middle-class daughter well supplied with Barbie clothes, but the abstract need of unknown children often seems easier to ignore. Therefore, the most appropriate area for state action which mandates unselfishness and morality is on the more remote economic level, in areas of our lives which will not affect our very being. It probably is desirable for the state to mandate my contribution to starving children, through taxes, because of my own tendency to postpone or ignore my responsibility to unknown others.¹²¹

¹²⁰ Freeman and Mensch make a similar argument in Alan Freeman and Elizabeth Mensch, *The Public-Private Distinction in American Life and Law*, 36 *BUFF. L. REV.* 237 (1987). They claim that ideals of privacy, usually used to protect personhood, can be also used to protect private property, stating "[t]o assert privacy in the name of protecting our bodies against oppression is still to assert the liberal world view. 'It's my body, keep others away.' 'It's my factory, keep the angry local citizens out while I close it down . . .'" *Id.* at 256. This example illustrates the authors' blindness to real world feminist concerns. Elsewhere in the same article, the authors explicitly suggest that a woman's desire to be free from invasions of her body, in the form of rape or sexual battery is just an expression of liberal alienation. *Id.* at 254-56. This bizarre theory displays an outrageous insensitivity to the objectification of women that dominates patriarchal culture. See generally *MACKINNON*, *supra* note 26, at 171-73.

¹²¹ The example I give is one in which I am in agreement with the "moral" purpose the law strives to achieve, but do not always conform my beliefs with my actions. The case for government action may be even stronger when a majority of people agree about the desirability of supporting

Additionally, we should only accept "moral" decisionmaking which affects the judges as well as the judged.¹²² The truest test of moral judgment comes when we realize the consequence of that judgment will affect ourselves, not some stranger. This is particularly true, because being forced to accept moral judgments in which we do not concur will usually be more painful when they affect the deepest, most intimate aspects of our personal lives.

D. Conclusion

In summary, Freeman and Mensch raise four themes, each of which appears to parallel cultural feminist thought:

(1) The authors call for a different type of dialogue about complex legal and social issues and a rejection of purely "objective," "neutral" thought;

(2) They reject selfish individualism, as exemplified by an overemphasis on rights;

(3) They express concern about the lack of empathy for economically disadvantaged women; and, as a corollary

(4) They offer an indictment of the elitism and essentialism of liberal academics.

I have tried to develop four counter-themes, ways in which I think their work is *not* like cultural feminism, or indeed any other type of feminism:

(1) It is not explicitly woman-centered and therefore ignores the way in which their proposals would disproportionately impact women;

(2) It lacks the sense of "real world" empathy and pragmatism found in most feminist work;

(3) By overemphasizing the elitist contempt directed toward conservative religious beliefs, it fails to consider the inherently dangerous essentialism of these beliefs; and

(4) It fails to analyze the appropriate setting for state implementation of moral goals.

hungry children, for example, but a significant minority of people actively oppose the "moral" result. Uniform laws may be necessary to avoid the "free rider" problem.

¹²² It is a common feminist observation that if men could get pregnant, the freedom to choose abortion would become one of our most closely protected rights.

Ultimately, through their failure to consider explicitly the perspective of "outsiders" such as women, and gays and lesbians, Freeman and Mensch's work becomes a validation of the power structure they claim to oppose.

III. ATTACKS ON THE LIBERAL VISION OF FAMILY LAW JURISPRUDENCE

A. *The Prevailing Doctrine and Its Challengers*

Family law is generally characterized as moving from a patriarchal structure to a more egalitarian model.¹²³ Thus, in the minds of many liberals, it represents a story of women's progress, as exemplified by the emergence of women's and children's rights within the familial structure. Husband and wife are no longer "one," with the one being the husband;¹²⁴ the man is no longer the official head of the household with absolute authority to control the family's property and finances¹²⁵ and to determine the family's domicile.¹²⁶ Prohibitions on interfamilial lawsuits are generally abolished.¹²⁷ Courts and the police are more willing to intervene in cases of family violence¹²⁸ and in many states spousal rape is now a crime.¹²⁹

The most significant change in family law has been the move from a fault-based system of divorce, with an absolute rule that one party

¹²³ See Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, in CHANGING IMAGES OF THE FAMILY 319 (V. Tufte and B. Myerhoff eds. 1979). For viewpoints challenging the traditional version of family law, see Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135; Minow, *supra* note 13; Olsen, *supra* note 13.

¹²⁴ This statement is a paraphrase of Blackstone's famous description of the traditional husband/wife relationship. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 432-45 (1822). Blackstone wrote: "[b]y marriage, the husband and wife are one person in the law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ." *Id.* at 442.

¹²⁵ For a description of changes in marital property law, see K. CLARE, LAW OF DOMESTIC RELATIONS 288 (2d. ed. 1987).

¹²⁶ This authority was so well established that if a wife refused to accept her husband's choice of domicile, she was legally viewed as "deserting" the family. See, e.g., *Babbitt v. Babbitt*, 69 Ill. 277, 279 (1873).

¹²⁷ See, e.g., *Shook v. Crabb*, 281 N.W.2d 616, 619-20 (Iowa 1979).

¹²⁸ While much remains to be done in the area, there is no question that domestic violence has received much greater attention in the past two decades and that protection for battered women has increased. See, e.g., LENORE E. WALKER, THE BATTERED WOMAN (1979); WILLIAM A. STACEY & ANSON D. SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA (1983).

¹²⁹ See, e.g., *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985); Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

must be at fault¹³⁰ and rigid definitions of fault itself,¹³¹ to no-fault divorce, which for all practical purposes makes divorce a unilateral, autonomous decision of either party to a marriage.¹³² Laws and policies which constituted gender discrimination have largely been eliminated¹³³—alimony cannot be restricted to women,¹³⁴ unwed fathers as well as unwed mothers may have rights as parents.¹³⁵ The tender years doctrine, the policy which automatically gave custody of children under a certain age to the mother,¹³⁶ has either been struck as gender discrimination¹³⁷ or abolished by state legislatures.¹³⁸

Most liberals applaud all these changes, as do some feminists, who point to the tender years doctrine, for example, as reinforcing stereotypes of women as solely maternal creatures, unfit for the rigors of the marketplace.¹³⁹ The liberal model of the family is one of formal equality

¹³⁰ See, e.g., *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma H. Kay eds., 1990); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 30-79 (1988).

¹³¹ It was well accepted that there must be an innocent party and a "guilty" party in a divorce. Therefore, under the strict fault-based logic, if both parties contributed to the demise of the marriage, true fault could not be determined and the divorce could not be granted. See, e.g., *Rankin v. Rankin*, 124 A.2d 639, 644 (Pa. Super. Ct. 1956).

¹³² See generally *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 130.

¹³³ This major change in family law is due to the Supreme Court's decision that gender based discrimination triggers an intermediate level of review and must be justified by an important state interest. *Craig v. Boren*, 429 U.S. 190 (1976). See generally Ruth B. Ginsburg, *Gender and the Constitution*, 44 CUN. L. REV. 1 (1975).

¹³⁴ *Orr v. Orr*, 440 U.S. 268, 278-83 (1979).

¹³⁵ *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983); but see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹³⁶ See generally Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 20 (1990); Ramsay L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982).

¹³⁷ See, e.g., *Ex Parte Devine*, 398 So.2d 686, 695 (Ala. 1981); *Watts v. Watts*, 77 Misc.2d 178, 350 N.Y.S. 285 (1973); *Pusey v. Pusey*, 728 P.2d 117, 119-20 (Utah 1986).

¹³⁸ Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 170 (1984).

¹³⁹ Mary Joe Frug argues that the doctrine "maternalizes the female body." Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1061 (1992). But see Ruth Colker, *The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug*, 105 HARV. L. REV. 1084, 1092, (1992) (arguing that the preference may help lesbian mothers). Many feminists today advocate the substitution of the primary caretaker doctrine for the tender years presumption. See, e.g., MARTHA L. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 180-84 (1991); Frances Olsen, *The Politics of Family Law*, 2 L. & INEQ. J. 1, 18-19 (1984); Barbara B. Woodhouse, *Toward a Revitalization of Family Law*, 69 TEX. L. REV. 245, 289 (1990) (book review); Williams, *Deconstructing*, *supra* note 26, at 838-39. This doctrine creates a presumption which would give custody to the child's primary caretaker, who in many cases would be the mother. For a comprehensive discussion of the doctrine, see Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992).

(with limited exceptions for children),¹⁴⁰ and the liberal vision is that the family has become a partnership of individuals, instead of a male-dominated dictatorship. All these changes, according to liberals, are desirable, because they enhance equality for women and individual freedom for everyone. This idyllic liberal view of modern family law is challenged by two major critiques.

Many feminists have vigorously disputed the statement that changes in family law are beneficial to women.¹⁴¹ They point to numerous studies which show that women's incomes generally decline after a divorce, while men's standards of living improve.¹⁴² Despite the fact that women are usually the primary caretakers of children,¹⁴³ when custody is contested, the husband has a better than average chance of obtaining custody.¹⁴⁴ Martha L. Fineman, one of the most influential feminists in the area,¹⁴⁵ argues that the changes in family law have resulted in an "illusion of equality," but that "[t]he rhetoric of equality is too easily appropriated and utilized to gain support for antifeminist measures."¹⁴⁶

¹⁴⁰ See MINOW, *supra* note 21, at 267-311 (1990) for a comprehensive discussion of children's rights.

¹⁴¹ See, e.g., Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789; FINEMAN, *supra* note 139; Bartlett, *supra* note 24; Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900 (1986) (reviewing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)); Deborah L. Rhode and Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 130, at 191-92; Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 73 NEW ENG. L. REV. 437 (1988); MACKINNON, *supra* note 26; Woodhouse, *supra* note 139.

¹⁴² The most influential initial study is LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). See also Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L. Q. 79, 97-98 (1986); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351, 352 (1987); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 130.

¹⁴³ Martha L. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 769 & n.166 (1988).

¹⁴⁴ See Nancy D. Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); see also Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determination at Divorce*, 1987 WIS. L. REV. 107, 120. Many of these decisions giving custody to the father are based on extremely gender-biased criteria, for example a mother's decision (usually forced by necessity) to work is seen as detrimental to the child's best interest, while a father's is not. See Sack, *supra* note 139.

¹⁴⁵ Patricia Cain describes Martha Fineman as a cultural feminist, who views women's relationships as socially constructed. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835 n.122 (1990).

¹⁴⁶ FINEMAN, *supra* note 139, at 190.

The second critique of family law,¹⁴⁷ which is becoming increasingly prevalent, draws on some of the arguments of the feminist critique,¹⁴⁸ but has a different primary emphasis—the decline of “morality,” connectedness, and unselfishness in family law. Many critics, including Mary Ann Glendon,¹⁴⁹ Elizabeth Scott¹⁵⁰ and Bruce Hafen,¹⁵¹ assert that family law has become dominated by selfish individualism, and a “waning of belonging,”¹⁵² to the detriment of human relationships. Many of these commentators advocate specific changes to the law, which would provide an “alternative story”¹⁵³ emphasizing the values of a “stable, interdependent, long-term relationship with a marital partner”¹⁵⁴ and “a sense of responsibility to their offspring.”¹⁵⁵

Criticism of an overemphasis on autonomy in family law appears to coincide neatly with cultural feminism, which is characterized by its critics as celebrating the “ideology of domesticity.”¹⁵⁶ But the specific

¹⁴⁷ The categories of schools of criticism of family law that I have identified are necessarily generalizations. I have chosen not to discuss a third category of analysis, which is less prevalent, but gaining in importance—an analysis explicitly and primarily based on law and economics. See generally Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992); GARY S. BECKER, A TREATISE ON THE FAMILY (1981); Lloyd Cohen, *Marriage, Divorce and QuasiRents; Or, “I Gave Him the Best Years of My Life”*, 16 J. LEGAL STUD. 267 (1987). These economists often sound conservative themes (e.g. Becker), but can also appear to be somewhat liberal, such as Stake. In any event, their language generally differs sharply from most members of the “moral school” of criticism, although one author, Elizabeth Scott, *infra* note 150, combines elements of both moral and economic analysis. For a comprehensive discussion of the economic analysis of family law regarding alimony, see June Carbone and Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991).

¹⁴⁸ Generally, these critics give a few obligatory footnotes to feminist authors, but do not use them extensively in their work.

¹⁴⁹ MARY ANN GLENDON, THE TRANSFORMATION OF AMERICAN FAMILY LAW (1989); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987). One critic describes Glendon’s works as an “idiosyncratic blend of conservative convictions and radical feminist commentary.” Jane M. Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 YALE L. J. 1235, 1238 (1989). See also Katherine T. Bartlett, *Storytelling*, 1987 DUKE L. J. 760, 764 (book review) (describing Glendon’s programs as “decidedly conservative”).

¹⁵⁰ Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

¹⁵¹ Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1 [hereinafter Hafen, *Belonging*]; Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989) [hereinafter Hafen, *Entity*]; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interest*, 81 MICH. L. REV. 463 (1983) [hereinafter Hafen, *Marriage, Kinship and Sexual Privacy*]. Hafen is the most openly conservative of the authors I discuss—he is explicitly critical of homosexual rights, for example.

¹⁵² Hafen, *Belonging*, *supra* note 151 at 3.

¹⁵³ Scott, *supra* note 150, at 12–13.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Id.*

¹⁵⁶ See *infra* notes 206–16 and accompanying text.

proposals which emerge from this theme are often in fact detrimental to women. For example, Elizabeth Scott's proposals, which are designed to make divorce more difficult when minor children are involved,¹⁵⁷ ignore economic and cultural disparities between men and women, and would have a detrimental impact on most divorcing women.¹⁵⁸ So, once again, I am faced with the dilemma of seeing ideals and language I support used in ways I find deeply troubling.¹⁵⁹ Again, however, I believe the problem is illusory, because despite the similarities in rhetoric, the underlying goals and assumptions of many critics of family law and cultural feminists are actually very different. I will begin my discussion by examining a law review article which has proved highly influential for the "moral value" school of family law commentators.¹⁶⁰

B. *Carl Schneider and the Theme of Lost Morality in Family Law*

In "Moral Discourse and the Transformation of American Family Law,"¹⁶¹ Carl Schneider proposes a basic theme: four forces shaping family law have produced "a diminution of the law's discourse in moral terms about the relations between family members" and the "transfer of many moral decisions from the law to the people the law once regulated."¹⁶² Unlike some of his later disciples,¹⁶³ Schneider himself purports to be a disinterested commentator, not a critic; he expressly begins the article by stating he does not mean to imply that the law is "less good" because it is less moral and by distancing himself from commentators like Christopher Lasch who would like to return to "the virtuous past."¹⁶⁴

¹⁵⁷ Scott, *supra* note 150, at 73-90. For an interesting proposal also designed to reduce divorce when minor children are involved, see Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891 (1992).

¹⁵⁸ See Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435 (1992). Among other things, Scott's proposals for a two year waiting period prior to divorce would endanger battered women. Her proposal that the party wanting out of the divorce must pay the other party a specified sum does not take into account the differences between men and women's earning power. Her emphasis on pre-marital agreements ignores the potential problem of unequal bargaining power between men and women.

¹⁵⁹ Katherine Bartlett has expressed similar concerns about Glendon's work. Bartlett, *supra* note 149 at 764.

¹⁶⁰ The author of this article is cited repeatedly by Hafen and Scott.

¹⁶¹ Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

¹⁶² *Id.*

¹⁶³ Hafen and Scott, both of whom rely heavily upon Schneider, are openly critical of changes in family law.

¹⁶⁴ Schneider, *supra* note 161, at 1808. Schneider states "I doubt that you can go home again and even if you could, I doubt that you would enjoy it." *Id.*

Schneider begins with a summary of examples of his thesis, starting with the most obvious and important—the move to no-fault divorce, and the corresponding decline of discussion of moral factors, such as adultery, in divorce cases.¹⁶⁵ He states that in the area of child custody, “moral discourse has been reduced by the legislative and judicial erosion as proper bases for decision of various issues of morality, particularly sexual morality, such as non-marital cohabitation and homosexuality”¹⁶⁶ His other examples of a reduced reliance on moral dialogue in family law include laws governing non-marital relations¹⁶⁷ and laws regulating sexual relations and reproduction.¹⁶⁸

The author then describes four broad phenomena which he identifies as the reasons for the trend to exclude moral dialogue from family law: (1) the legal tradition of noninterference in the family;¹⁶⁹ (2) the tradition of liberal individualism;¹⁷⁰ (3) society's changing moral beliefs;¹⁷¹ and (4) the rise of psychologic man.¹⁷² Schneider devotes most of his time to discussing his fourth identified phenomenon—the rise of psychologic man. He paints a view of this man as a person whose search for self-fulfillment comes before everything else.

¹⁶⁵ *Id.* at 1809.

¹⁶⁶ *Id.* at 1809–11. Schneider overstates his case. He relies upon a statement of the Uniform Marriage and Divorce Act which states that “[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.” *Id.* This statement, however, is simply a proposed standard. Schneider does not discuss the considerable evidence that many judges do use “immoral” behavior, especially homosexuality and adultery by the mother, as the major factor in custody decisions. See Note, *Custody: Lesbian Mothers in the Courts*, 16 GONZ. L. REV. 147 (1980); Steve Susoeff, *Assessing Children's Best Interests When A Parent is Gay or Lesbian: Toward A Rational Custody Standard*, 32 UCLA L. REV. 852 (1985).

Schneider also characterizes changes in alimony awards as an example of “diminished moral discourse.” Schneider, *supra* note 161, at 1810. He ignores other factors regarding changes in alimony such as the Supreme Court's decision in *Orr v. Orr*, 440 U.S. 268 (1979), and the fact that alimony was never as prevalent as is commonly believed.

¹⁶⁷ Schneider, *supra* note 161, at 1814–15. His primary example is the celebrated *Marvin v. Marvin* palimony case. 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

¹⁶⁸ Schneider, *supra* note 161, at 1817–18. In a late section of the article, Schneider uses abortion and *Roe v. Wade*, 410 U.S. 113 (1973), as a “case in point” of his thesis.

¹⁶⁹ Schneider, *supra* note 161, at 1835–39. Fran Olsen challenges the popularly-held statement that in the past the state did not intervene in family relations. Frances C. Olsen, *The Myth of State Invention in Domestic Relations*, 18 MICH. J.L. & REF. 835 (1985).

¹⁷⁰ Schneider, *supra* note 161, at 1839–42. Schneider's basic thesis in this section is that John Mill's principle that the state can only exercise power to prevent harm to others has been incorporated into family law. *Id.* at 1839.

¹⁷¹ *Id.* at 1842–45. Schneider partially attributes the “sexual revolution” to “the waning influence of Christianity among the relatively affluent, educated elite,” a theme similar to Freeman and Mensch's. *Id.* at 1843; see *supra* notes 96–98 and accompanying text. In this context, he attributes the change in family law to members of the “legal elite” who “have more liberal attitudes on family law questions than the mass public.” Schneider, *supra* note 161, at 1821.

¹⁷² *Id.* at 1845–70.

Instead of asking "is it right?" Schneider's psychologic man asks, "does it work?" and behaves accordingly.¹⁷³ Thus, all relationships and commitments are seen as unimportant and disposable. The heart of Schneider's picture of psychologic man, and indeed of his entire article, is his statement that "[t]his view prefers temporary marriages, temporary nonmarital arrangements, and temporary children"¹⁷⁴ Schneider describes the psychologic view as stating "you can't legislate morality" when it comes to family law discussions.¹⁷⁵

Throughout his article, Schneider's style is almost Olympian with its air of detachment. He positions himself as a mere observer of the phenomena he describes, not an active participant in the debate. He volunteers no information about himself, a sharp contrast to the highly personalized style of Freeman and Mensch.¹⁷⁶ This veneer of "neutrality" is one of the most important ways in which Schneider's work differs from that of cultural feminists, who explicitly write from a women's perspective and reject the idea that anyone can be completely "objective" or neutral. They argue that the "objective" perspective is really just the viewpoint of middle-class white men.¹⁷⁷ The validity of this

¹⁷³ *Id.* at 1848.

¹⁷⁴ *Id.* at 1855.

¹⁷⁵ *Id.* at 1862. Schneider also claims that "those most enthralled by the psychologic attitude seem the least interested in privacy, as we may infer from the phrase 'let it all hang out'" *Id.* at 1850. Schneider's statement that psychological man does not desire traditional privacy is not supported by any statistical evidence. Instead, in one of the most transparent examples of his deliberate attempt to caricature others, he discusses a few instances of people appearing on Phil Donahue to discuss personal private matters. He presents no evidence to indicate that the majority of people engage in this behavior or that those who do so are exclusively modernist liberals, as Schneider apparently assumes. There are many examples of self-styled moral traditionalists, such as Jim and Tammy Bakker, who have also indulged in a great deal of public disclosure of their personal lives.

¹⁷⁶ Freeman and Mensch explicitly describe their own experience with abortion, for example. Part of this difference may be chronological—the style of law review articles has changed dramatically from 1985 to 1992, but the real difference is philosophical. Although their work in many ways increasingly differs from most critical legal scholars, Freeman and Mensch are still basically "crits" and accept the concept of lack of neutrality and objectivity of the law. Their use of their own stories helps enhance the idea that law is always viewed from someone's subjective perspective. Schneider, a traditionalist, would never concede this point.

¹⁷⁷ Leslie Bender offers a definitive critique of people like Schneider:

It has never been satisfactorily explained how privileged men could escape their locations and centers to view the world neutrally and objectively from some outside Archimedean point. How are they so different from the rest of us, whose perceptions they challenge as biased and suspect because of our distinct locations and identities Limited male perspectives are masked, erased, or universalized through techniques of objective, third person language and author invisibility, but these techniques do not make them less limited in fact.

Bender, *Gender Difference*, *supra* note 20, at 19. Schneider's lack of neutrality becomes more obvious in his later works. See, e.g., Carl E. Schneider, *State-Interest Analysis and the Channelling*

argument is illustrated by Schneider's section on psychologic man, in which his own animosity to the changes he describes and their advocates become obvious. His carefully constructed "psychologic man" is a caricature of a 60's hippie.¹⁷⁸ At one point, Schneider describes his psychologic man as having a tendency "to see the family as a collection of individuals united temporarily for their mutual convenience and armed with rights against the other."¹⁷⁹ This outrageous description bears absolutely no resemblance to the way people really experience their own families.¹⁸⁰ I know a lot of liberals, but I have yet to meet one who actually regards his or her family as an armed camp of rights bearers. I seriously doubt if Schneider has either.

Schneider is hardly a stupid or unobservant man; his rhetoric is a very calculated attempt to place "modern" persons (such as feminists), outside of the traditional vision of the warm, loving, caring family circle. His deliberate misportrayal of less traditional families reflects a failure of imagination and empathy, a blindness to the fact that those who depart from the traditional patriarchal model can be just as capable of self-sacrifice and love as Ozzie and Harriet Nelson.¹⁸¹ Carrie

Function in Family Law, 55 ALB. L. REV. 669, 671, 676 (1992) (author validates the traditional heterosexual view of marriage).

¹⁷⁸ When he describes psychologic man, Schneider deliberately uses the tritest and most self-indulgent phrases attributed by the media to the 60's counter culture. He describes his person as saying "let it all hang out," for example. Schneider, *supra* note 161, at 1850.

¹⁷⁹ *Id.* at 1859.

¹⁸⁰ What Schneider has done is confuse an abstract viewpoint one may articulate as a professor in a classroom with the actual experience the same person may have with his or her family. Paul Finkelman, a law professor, offers an amusing but accurate response to this sort of rhetoric in discussing a later paper by Schneider:

I doubt, however, the channelling function had any influence on our decision to become parents. Did my wife and I calculate the tax advantages of a child? Did we calculate that we should make sure the child would be born as late in December as possible, but not after January 1st? Did we tell each other that we pay school taxes, so we might as well take advantage of the money we are shelling out? I can recall no such conversation, and I expect few others, except perhaps the occasional tax professor, can recall them either.

Paul Finkelman, *Family, Crime and Government Interests: Commentary on Schneider and Stith*, 55 ALB. L. REV. 689, 690 (1992).

¹⁸¹ The Nelsons, a 1950's television family, with a working husband, a full-time mother (who wore heels while washing dishes) and two clean-cut children are the traditionalists' view of the ideal American family. These traditionalists ignore the statistics that show that only a minority of families today fit this traditional nuclear model. In 1990, studies showed that as few as ten percent of American families fit the traditional model. See, e.g., Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 COLO. L. REV. 269, 273-74 nn.18-21 (1991). The estimated number of children being raised in lesbian and gay households is estimated at between 6 and 14 million. Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, in *HOMOSEXUALITY AND THE FAMILY* (1989).

Further, it is at least questionable whether the conservatives' idealized "moral" family ever

Costello has described traditional conservative attitudes toward families as setting up a dichotomy between the "Order" and the "Other" (e.g. racial minorities or gays and lesbians).¹⁸² She explains that:

The Order exalts its position by defining itself against the Others who are definitionally debased. It interprets the intimate relations of the Other as lascivious, promiscuous, and sexually savage. Thus, the Order feels that the Other in question is immoral and inferior, and that the Order's control is therefore legitimate.¹⁸³

Schneider's article is clearly written from the perspective of a defender of the Order.

Despite his disclaimers of neutrality, Schneider's overall theme that moral dialogue has disappeared from family law implicitly suggests that those who advocate changes in the area are immoral or at best amoral. This approach differs sharply from that of cultural feminists, who usually write from the perspective of the Other¹⁸⁴ and recognize that there are many alternative versions of "morality" and unselfishness. Even if Schneider is accurate in stating that "in the psychological view, happiness comes from discovery and expressing one's unique

really existed. In the actual real life case of the Nelsons for example, Ricky Nelson, the quintessential all-American boy, was divorced and a cocaine user at the time of his death. Ozzie Nelson has been depicted as a manipulative overachiever who "expected his real-life sons to carry their show images into daily life." Lynn Van Matre, *Trapped as a Teen-Age Idol*, CHH. TRIB., June 29, 1990, at 3 (reviewing JOEL SELVIN, RICKY NELSON: IDOL FOR A GENERATION (1990)).

¹⁸² Carrie G. Costello, *Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation and Control of the American Family*, 15 HARV. WOMEN'S L.J. 79, 80-86 (1992). Costello's article describes in detail the methods used by the Order to control the family structures of racial minorities and gays and lesbians.

¹⁸³ *Id.* at 85.

¹⁸⁴ This statement might be disputed by Joan Williams, who creates a dichotomy between outsider-scholars and "relational feminists." Williams, *Postmodern*, *supra* note 26, at 318-21. Although she begins by limiting the category of outsider-scholars to racial minorities, in discussing the work of Marie Ashe, a white feminist, Williams states that Ashe is more like an outsider-scholar than a relational feminist. *Id.* at 321-22.

Williams' example raises the problem with classifying people as outsiders or insiders, because the categories depend on one's perspective. It is true that in her criticism of the medical establishment Ashe may be an outsider, but more centrally she is an insider with respect to her chosen topic of reproduction, because she is able to conceive and bear children. Ashe's work, which portrays childbirth as a mystical experience which creates the only meaningful bond between mother and child, explicitly makes all infertile women outsiders, who can never be "real" mothers like Ashe herself. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521, 556-59 (1988) (discussing non-gestational parents and stating "[w]hile such parenthoods never rise—separately or in conjunction with each other—to the level of maternity asserted by a woman whose body has actually constituted the child's developmental process, each may . . . deserve some respect." (emphasis added)).

true self,"¹⁸⁵ it is not necessarily true, as Schneider assumes, that this "true self" is selfish and capable only of temporary relationships. As Ruth Colker demonstrates, for many women a search for our "authentic selves" can be one which will make us stronger and more capable of selfless behavior.¹⁸⁶ A person's reluctance to force another into completely binding arrangements does not necessarily mean that person does not want permanent relationships. Consider Germaine Greer's eloquent words:

Perhaps I am not old enough yet to promise that the self-reliant woman is always loved, that she cannot be lonely as long as there are people in this world who need her joy and strength, but certainly in my experience it has always been so. Lovers who are free to go when they are restless always come back; lovers who are free to change remain interesting. The bitter animosity and obscenity of divorce is unknown where individuals have not become Siamese twins. A lover who comes to your bed of his own accord is more likely to sleep with his arms around you all night than the one who has nowhere else to go.¹⁸⁷

These are not the words of a woman who wants only disposable relationships. Schneider also chooses to view the increased trend toward premarital sex and cohabitation before marriage as a sign of societal lack of commitment to permanence. An alternative view is that people understand that compatibility is necessary for a successful marriage and believe that premarital sex and cohabitation give them an opportunity to decide whether the relationship has a good chance of survival.

Unlike cultural feminists, Schneider ignores the complexity of even the situations he chooses to describe. One of his examples of his thesis that contemporary family law favors relativism and self-gratification at the expense of moral dialogue is the case of Phillip B.¹⁸⁸ Phillip B was a 12 year old boy with Down's Syndrome who had been institutionalized since birth.¹⁸⁹ When his father refused to give permission for

¹⁸⁵ Schneider, *supra* note 161, at 1849. I do not have the expertise in psychology to challenge the essential accuracy of Schneider's statements about psychological theory, but their bias is quite obvious to me and I would suggest that his portrayal of the discipline of psychology is at best incomplete.

¹⁸⁶ See Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity*, (Review Essay) 68 B.U. L. REV. 217 (1988).

¹⁸⁷ GERMAINE GREER, *THE FEMALE EUNUCH* 260 (1970).

¹⁸⁸ Schneider, *supra* note 161, at 1816-17.

¹⁸⁹ *In re Phillip B.*, 92 Cal. App. 3d 796, 800, 156 Cal. Rptr. 48 (Cal. Ct. App. 1979), *cert. denied*, 445 U.S. 949 (1980).

heart surgery for the boy, the state sought a court order compelling surgery, stating that without the operation Phillip's lungs would deteriorate and his life would be shortened.¹⁹⁰ The California Appellate Court declined to order the operation, relying upon parental autonomy as a justification.¹⁹¹

Schneider's story is carefully chosen to make his point. The reader is clearly supposed to view Phillip B's parents as monstrous examples of autonomy run amok—people who would let their mentally-retarded son die to fulfill their desire for self-gratification. But this story is incomplete in two ways. First, most actual litigated cases involving parental refusal to order medical treatment for children involve the parent's deeply held, sincere religious beliefs.¹⁹² These cases do discuss Schneider's lost morality and the correct "moral" resolution is not clear.¹⁹³ More importantly, Schneider's text simply leaves out the rest of the real story of Phillip B,¹⁹⁴ a story that Martha Minow, an advocate of many of the viewpoints Schneider criticizes,¹⁹⁵ tells us in full.¹⁹⁶ Minow's account, unlike Schneider's, is sensitive and complex. Despite the impression Schneider would leave with his readers, Phillip Becker's¹⁹⁷ story did not end with the California Court's refusal to order heart surgery. A family who had been become close to Phillip¹⁹⁸

¹⁹⁰ *Id.* at 799–800.

¹⁹¹ *Id.* at 804.

¹⁹² *E.g.*, *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968) (per curiam), *aff'g* 278 F. Supp. 488 (W.D. Wash. 1967) (three judge court); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); *In re Sampson*, 65 Misc.2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970). In a later section of his article, Schneider, in stating that the "rights approach" to family law can be used to abuse members of the family states that "[t]his possibility is most grimly raised when parents refuse lifesaving medical aid for their children." Schneider, *supra* note 161, at 1858–59. Schneider's footnote refers the reader to his Phillip B discussion and to an argument by a doctor regarding euthanasia. At no point in his article does he cite to or discuss the well-known and prevalent cases regarding religious reasons for refusal of medical treatment.

¹⁹³ See Judith Inglio Schneider, *When Children Die As A Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990).

¹⁹⁴ Schneider does describe the actual resolution of the case of Phillip B, but only as a follow-up sentence to the cite of the case in a footnote. Schneider, *supra* note 161, at 1817 n.52.

¹⁹⁵ I do not mean to imply that Schneider literally criticizes Minow's work specifically; he does not. However, in *The Free Exercise of Families*, as well as in her other work, Martha Minow advocates a recognition of less traditional family structures, a practice which Schneider does explicitly criticize. Martha Minow, *David C. Baum Memorial Lecture: The Free Exercise of Families*, 1991 U. ILL. L. REV. 925.

¹⁹⁶ MINOW, *supra* note 21, at 341–49.

¹⁹⁷ It is typical of the difference in their approaches that Martha Minow, unlike Schneider, chooses to use the boy's actual name, instead of reducing him to an abstract case study.

¹⁹⁸ The Heaths, a volunteer couple, had met Phillip while serving as volunteers at his institution, and had brought him to their home for overnight visits and holidays. *Id.* at 341.

instituted a suit asking for legal guardianship and eventually for custody of the boy.¹⁹⁹

In the subsequent trial, the judge concluded that the Heaths had become Phillip's psychological parents and gave them physical custody of the boy,²⁰⁰ who eventually did have successful heart surgery.²⁰¹ In a lengthy, emotional opinion, the judge departed from traditional legal analysis by imagining "a platonic dialogue with the court posing the choices to Phillip and Phillip's preferences being ascertained from the more logical choice."²⁰² He acknowledged that "judges are human and not machines" and "that we prefer to be judged by a real person with emotions and common sense," and expressed his personal "anguish and parental grief"²⁰³ about Phillip's story.

Schneider's decision to analyze only the initial part of Phillip's story and his emphasis on the formal aspects of the legal decision illustrate how completely he misses the real message of cultural feminism's theme of connection and empathy. Schneider would probably condemn the trial court's opinion in Phillip Becker's custody case because it lacks the rigid moral analysis he prefers, but the opinion actually offers something much better: "an encouraging sense of a real human being, struggling with his relationship to others in the face of moral issues, and a disturbing sense of how thin is the veneer of laws on a justice system of men."²⁰⁴

The contrast between Schneider's and Minow's approaches to the same story illustrates the difference between cultural feminists and other types of commentators who call for a return to "morality" in family law. Minow, like Schneider, is concerned about an overemphasis on selfishness and autonomy, and places a high value on ideals of caring and responsibility. Unlike Schneider, however, she recognizes that we cannot draw easy lines between selfishness and unselfishness, and "morality" and immorality. Because of his rigidity and inability to understand any version of morality other than his own, Schneider sees Phillip Becker's "case" as one of vindication for his theme that selfishness reigns triumphant in modern family law. Minow sees Phillip Becker's story as one of hope, of offering the possibility of transcending abstractions and dichotomies. She writes: "Let us tell the story of

¹⁹⁹ *Id.* at 343 (citing Trial Court Opinion, at 2).

²⁰⁰ The order did preserve the Beckers' rights as parents. See *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 188 Cal. Rptr. 781.

²⁰¹ MINOW, *supra* note 21, at 346 n.120.

²⁰² *Id.* at 345 (quoting Trial Court Opinion, at 16-17).

²⁰³ *Id.* at 347 (quoting Trial Court Opinion, at 18-19, 23 nn.68, 68a, 70).

²⁰⁴ *Id.* at 347.

Phillip Becker when asked about medical treatment decisions for disabled persons—and the chance of deepening our relationships to judging and living”²⁰⁵

C. “Domesticity” and Cultural Feminism

Schneider’s article, along with others in the “moral view” genre of family law, appears to validate the major critics of difference feminism, who argue that cultural feminists have established an ideology of “Domesticity,” which overemphasizes and romanticizes women’s roles as care-givers and nurturers.²⁰⁶ This ideal, according to critics like Joan Williams²⁰⁷ and Jeanne Schroeder,²⁰⁸ revives the Victorian stereotype of women as belonging to a delicate, domestic sphere.²⁰⁹ Cultural feminists, Williams argues, “celebrate a women’s culture that encourages women to ‘choose’ economic marginalization and celebrate that choice as a badge of virtue.”²¹⁰ Critics charge that women do not really freely “choose” to abandon careers for child-raising. Instead, they are forced to assume responsibility because (1) they have been brainwashed into believing their actions are “moral” and “unselfish,”²¹¹ (2) men will not assume responsibility for domestic activities and someone has to do it (using Karen Czapinsky’s provocative analogy, women are “draftees” as parents, men are volunteers²¹²) and (3) the workplace will not make the necessary changes to accommodate workers who also have parenting duties.²¹³

²⁰⁵ *Id.* at 349.

²⁰⁶ Williams, *Gender Wars*, *supra* note 26, at 1566. Williams reads Carol Gilligan’s work, GILLIGAN, *supra* note 22, as finding that “‘femininity’ retains major components of the ideology of domesticity.” *Gender Wars*, *supra* note 26, at 1566. This argument is not the only criticism of cultural feminism. See *infra* notes 236–47 and accompanying text.

²⁰⁷ Williams, *Gender Wars*, *supra* note 26.

²⁰⁸ Schroeder, *supra* note 20.

²⁰⁹ The Victorian stereotype of women as delicate creatures who need to be regulated to a private sphere is well documented. See, e.g., Welter, *The Cult of True Womanhood, 1820–1860*, 18 AM. Q. 151 (1966). The fear, however, that we will return to Victorian times strikes me as unrealistic and over-exaggerated. The late 20th century version of capitalism and American society differs so dramatically from the 19th century model that a return to Victorianism seems extremely unlikely. In short, I think critics like Williams and Schroeder have erected a “straw woman” (perhaps actually made out of gossamer) in their fears of Victorian imagery of women.

²¹⁰ Williams, *Deconstructing*, *supra* note 26, at 801.

²¹¹ See, e.g., *id.* at 830.

²¹² Karen Czapinsky, *Volunteers and Draftees: The Struggle For Parental Equality*, 38 UCLA L. REV. 1415 (1991); see also ARLIE HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

²¹³ This argument, linked with a call for a massive restructuring of the workplace, is a major theme of much of feminist jurisprudence, regardless of category. See, e.g., Leslie Bender, *Sex Discrimination or Gender Inequality*, 57 FORDHAM L. REV. 941 (1989); Kathryn Abrams, *Gender*

All three of these arguments are valid and important, but in many ways the critics of "domesticity" are just as essentialist as the cultural feminists they assail. The viewpoint they present is incomplete and may be just as dangerous to feminist goals as an exaggerated version of "woman" as Earth Mother.²¹⁴ My first objection is to the label "The Ideology of Domesticity" as applied to writers who argue that women should value their nurturing skills and capacity to form cooperative relationships. As a woman who believes these characteristics *should* be affirmed and who has to some degree chosen to subordinate career goals to parenting, I am both annoyed and amused at the idea that I have become a member of a cult of "Domesticity."²¹⁵ Try telling that to my mother, who continues to show up at my house with a mop and cleaning liquid and to make dire references to my Aunt Lou, who according to our family folklore "lost" her husband because she wouldn't dust the bookshelves.

Assertions that women do not really choose to assume parenting responsibilities at some cost to their careers are highly problematic—first, because they are simply wrong in many individual situations, and second, as Kathryn Abrams has pointed out, because they may be a strategic disaster,²¹⁶ because, they widen the gap between women who work at home and those who work outside the home.

Critics of "domesticity" implicitly embrace work ethic standards which make them overvalue participation in the marketplace. Although she is a harsh critic of essentialism in difference feminism, Joan Williams relies upon a number of essentialist assumptions about the workplace. All jobs are simply not the same, in terms of structures and rewards.²¹⁷ Williams' assertion that many women often have no real

Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183 (1989); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990); Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

²¹⁴ Critics of cultural feminism routinely describe the genre as reinforcing this stereotype. Ironically, the only cultural feminist whose writing does unequivocally present the "Earth Mother" image is Marie Ashe, *supra* notes 112, 184, and *infra* note 246, whose work Joan Williams praises. Williams, *Postmodern*, *supra* note 26, at 321–22.

²¹⁵ Joan Williams explicitly denies that she is arguing that women who choose child-raising over careers suffer from false consciousness. Williams, *Gender Wars*, *supra* note 26. Despite this denial, Kathryn Abrams has compared Williams' critique of domesticity to false consciousness claims. Kathryn Abrams, *Ideology and Women's Choices*, *supra* note 55.

²¹⁶ Abrams, *supra* note 55, at 761.

²¹⁷ On the surface, Williams appears to acknowledge this. She also argues that "[c]hoice rhetoric clearly privileges the life patterns of the relatively affluent, predominantly white essential woman who can choose against employment." Williams, *Gender Wars*, *supra* note 26, at 1610. This is a very valid observation. I am not convinced, however, that the solution is Williams' own

choice regarding working versus taking care of the children is accurate for many women in low-paying jobs, because adequate day care can be more expensive than their salaries. But her statements are not so true for many professional women. I have a hard time seeing the woman lawyer who decides to become a permanent associate at a salary of \$80,000, as opposed to becoming a partner making \$200,000 or more, as a victim.²¹⁸ Even if her spouse²¹⁹ will not assume his proportionate share of child care responsibilities,²²⁰ this woman has the economic resources to hire a full-time, live-in care-giver. Her decision to forego partnership is more likely to be based on a decision that the "rewards" of partnership (more money than most people could possibly spend or need, dubious "power" over decisions unlikely to affect the real world in any significant way) are not worth succumbing to the pressure to bill 80 hours a week and assume a posture of eternal deference to senior partners.²²¹ Williams implicitly assumes that all work is interesting and fulfilling; something any woman would *want* to do if she were not forced to make a false choice for domesticity.²²² This assumption both greatly exaggerates the joys of the workplace and underestimates the genuine rewards of child-raising.²²³

"anti-choice" rhetoric, which in places often strikes me as being equally oblivious to class differences. I am also concerned that the theory of some feminists that women never really choose to spend time child-raising will only worsen the trend to force welfare mothers to "go to work." See *supra* note 70. I think Williams is right when she says that thus far only relatively privileged white women have the choice to remain home with their children, but I would prefer to see expanding that choice to all women. As good day care becomes more expensive, it will increasingly make sense for some women, those who really want to, to remain home with their children.

²¹⁸This is not to say that I approve of the term "mommy track" which is commonly used to describe this type of job or that I disagree with much of the criticism of the concept in its current form. See Williams, *Gender Wars*, *supra* note 26, at 1609-11. However, I think that it is desirable for law firms to offer permanent associate alternatives to the excessive demands of partnership.

²¹⁹This statement assumes a conventional married heterosexual relationship, which is not the only situation in which women are parents. See Costello, *supra* note 182. Most of the studies Williams relies upon, however, are concerned exclusively with this type of relationship. I am not aware of any study regarding allocation of child-care and other domestic responsibilities among lesbian couples.

²²⁰See HOCHSCHILD & MACHUNG, *supra* note 212.

²²¹For a satirical description of a large law firm viewed from a woman's perspective, see Sandra Lee Fenske, *Through the Glass Ceiling and What Alice Found There*, WASH. LAW., July/Aug. 1992, at 28.

²²²Williams' central theme that women do not really "choose" to forgo the workplace for child-raising resembles Freeman and Mensch's argument that lower class women do not really "choose" abortion. See *supra* notes 53-57 and accompanying text. I do not mean to suggest that Williams would accept Freeman and Mensch's viewpoint. Her own work on abortion makes it clear she does not, but she does acknowledge that the rhetoric of "choice" in the abortion area fuels a backlash.

²²³Williams consistently refers to women who decide to stay home with their children as being self-sacrificing, and as giving up their jobs only because they feel the children need them.

Williams' statements about the dangers of "sequencing"²²⁴—taking time off to raise children—may only be true for a limited number of professional women who work in corporations or law firms.²²⁵ They should not be true for physicians, for example,²²⁶ and almost certainly are not true for the many women stuck in lower paying, non-professional "dead end" jobs. The idea that her "career opportunities" will be hurt if she quits her job for a few years will sound silly to a woman employed as a dishwasher.²²⁷ The argument that taking time away from the workplace can permanently marginalize women is also undercut by the number of people who make successful mid-life career changes.²²⁸

None of this is to say that I disagree with the goal of restructuring the workplace so that women can work full-time and be effective parents.²²⁹ I regard the articulation of this goal and concrete sugges-

This motivation is undoubtedly *one* major reason mothers stay home, but an equally strong reason may be the woman's sense that she needs her children, that spending time with them contributes to her own personal happiness. Williams often overlooks the significance of her own stories. For example, she quotes a woman who quit her job after hearing that she missed seeing her child take his first step as saying, "I realized that his first year had gone by so quickly, I had been like a visitor in his life. I can always go back to work . . . I can't always raise my child." Williams, *Gender Wars*, *supra* note 26, at 1620–21. Williams characterizes this woman as "assum[ing] that the mature course of action is to choose marginalization." *Id.* at 1620. However, she presents no evidence that the woman felt the child was not being well cared for. A more likely explanation is that the mother simply wanted to spend more time experiencing the joy and satisfaction of watching her child grow older, an arguably "selfish" motive.

²²⁴ Williams, *Deconstructing*, *supra* note 26, at 827–28. Williams states that "[t]here is growing evidence that a career hiatus, at least in some professions, does not merely slow women down, but places them permanently in a second class, relatively low-paid mommy track." *Id.* at 828. She also takes issue with the media examples of successful sequencers, such as Jeane Kirkpatrick, Justice Sandra Day O'Connor and Judge Patricia Wald, stating that these women are the exception and that "most women would take years off their careers if they could be guaranteed that upon their return they could become an ambassador to the United Nations, a Supreme Court Justice, or a D.C. Circuit Court Judge . . ." *Id.* at 827–28. This argument obscures the fact that Kirkpatrick, O'Connor, and Wald had no such guarantee, they chose to take a risk that paid off.

²²⁵ Williams' examples of the danger of sequencing are primarily limited to those professions.

²²⁶ The process of becoming a doctor is very long, and attempting to take time off in the middle of this process might permanently affect a women's career development, especially in light of the established fact that medical schools routinely engage in age discrimination in their admissions process. (More than one commentator has suggested that Alvin Bakke's *real* grounds for a lawsuit was age discrimination). However, due to the medical profession's continued vigilance in limiting the number of doctors, a woman who *has* completed the process and received all her training should be able to take time off with no real detriment.

²²⁷ If she is a member of a union, she may lose significant benefits, but otherwise there is little evidence that time off for child-raising will hurt her career. I do not mean to be derogatory to dishwashers, but simply to suggest that a lot of jobs do not offer much room for advancement.

²²⁸ The phenomenon of people who do choose to make career mid-life changes and are successful is well documented. Williams does not really offer a satisfactory explanation as to how this phenomenon ties in with her statements about sequencing.

²²⁹ Certainly Williams, *supra* note 26, and Kathryn Abrams, *supra* note 55, do raise important points about the fact that women usually do shoulder a disproportionate share of child care and housekeeping responsibilities when both spouses work.

tions as to how it can be accomplished as one of the most important contributions of feminist scholarship.²³⁰ But I also recognize that these changes will not come quickly or easily in an era dominated by distrust of "government interference" with business, in a country where women must struggle to pass very modest family leave provisions already in place in almost every other industrialized country in the world.²³¹ I am simply not convinced that validating women who make what are necessarily imperfect choices in an imperfect world²³² diminishes our work toward major structural changes.²³³ Indeed, I would suggest, on a purely anecdotal basis, that some of the actual workplace victories are brought about not by law professors attacking "domesticity,"²³⁴ but by women who take their children to their offices, thus bringing about a subtle but potentially revolutionary change in the atmosphere of many workplaces, and from indispensable women employees whose decision to work part-time because of inflexible rules force their employers to rethink their policies.

IV. CONCLUSION: RESURRECTING THE MIMICKED THEMES AND MIXED MESSAGES

Although criticism of liberal jurisprudence in law and religion, and family law is often expressed in language about responsibility, caring and connection, language which is also used by cultural feminists, it often masks agendas which would work to the detriment of

²³⁰ See *supra* note 213 for a list of feminist works devoted to this objective.

²³¹ See *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES, Sept. 23, 1992, at A1 (President Bush vetoed family leave bill). Senator Dodd has been quoted as saying that the United States is the only industrialized nation without a job protection leave law. *Senate Approves Family Leave Bill*, TULSA WORLD, Aug. 12, 1992, at B2. This recently changed, however, as Congress passed the Family Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993), in the early days of Clinton's presidency. See *Family Leave*, SEATTLE TIMES, Feb. 10, 1993, at B5 (bill requires employers with fifty or more employees to provide workers up to twelve weeks of unpaid leave).

²³² Williams also never explains what the alternatives are for the woman faced with a "false choice." Are they: (1) Do not have children, (2) Quit your job anyway, but do not feel good about it or (3) Try to work full-time and have children, "juggling" both responsibilities. Option (1) and (3) may be viable for a number of women; but option (2) seems incredibly negativist. I think the woman who opts for quitting her job or part-time work does have much to celebrate and should do so. Sometimes this choice is indeed forced, and one that will make her unhappy, but that is not always the case.

²³³ In my more pessimistic moods, I predict that Derrick Bell's "interest converge" theory will apply to workplace reform as well. See DERRICK BELL, *AND WE ARE NOT SAVED* (1987). Male employers will only change to the extent it serves their own interests to do so. Because many of the women who will be powerful and articulate enough to make their demands heard will be professional women, ultimately I'm afraid much of workplace reform, like too many other aspects of the feminist movement, will end up benefiting primarily white middle-class women.

²³⁴ See *supra* notes 206-13 and accompanying text.

many women. Katherine Bartlett describes this problem in the work of Mary Ann Glendon: "[t]hose of us who have been attracted to these new themes and tools may well ask: Does Glendon's work mark a failure or weakness of these ideas as tools of progressive reform?"²³⁵

The concern expressed by Bartlett partially explains why cultural feminism is increasingly coming under attack²³⁶—the dangers of excessive domesticity²³⁷ or excessive deference to "morality" and religion²³⁸ to women are all too obvious. The fact that cultural feminism has dangerous aspects, however, does not warrant a wide-scale abandonment of all of its insights. An overly broad and superficial reading of Gilligan and some of her followers may lead some readers to the conclusion that cultural feminists long for women to return to their traditional roles. On the other hand, an overly broad reading of the critics of cultural feminism can lead to the conclusion that these authors advocate classical liberalism. If we reject cooperation and connection, aren't we left with autonomy? The fear of women being marginalized in the marketplace can be read as a glorification of

²³⁵ Bartlett, *supra* note 149, at 764.

²³⁶ See *supra* note 26 for a partial list of these attacks. For a comprehensive defense of cultural feminism, see Bender, *Gender Difference*, *supra* note 20.

²³⁷ See *supra* note 26 and accompanying text. One of Joan Williams' major examples of the danger of domesticity is *EEOC v. Sears*, in which the department store was sued for not hiring women to commission sales jobs. Williams, *Deconstructing*, *supra* note 26, at 813-21 (discussing *EEOC v. Sears Roebuck and Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988)). One of the experts for Sears, a noted feminist historian, testified that women do not want commission sales jobs, because they require long hours and travel time, both of which interfere with child-raising responsibilities.

Although Williams' discussion of the *Sears* case provides an important warning of the potential danger of cultural feminism, it is still an incomplete analysis of the implications of the case for women. She does not discuss seriously the possibility that in fact Dr. Rosenberg's theories may be statistically accurate for a majority of women. If an increasing number of studies show that many women do structure their careers to be compatible with child-raising responsibilities, then future gender discrimination litigators cannot just dismiss this potential evidence. To take a more obvious example, suppose that you were a lawyer suing an all-male basketball team for gender discrimination. It would be foolish for you to deny that women on the average are shorter than men and at best problematic for you to dispute that height is at least a relevant factor in a person's ability to play basketball. You *should*, however, be able to concede that the average woman will be less skilled at basketball than the average man and still win your case, if you can prove that defendant failed to hire specific women who were in fact better players than anyone on the current team. The real problem with Dr. Rosenberg's evidence in *Sears* was not that it reinforced stereotypes, but that it should have been considered irrelevant. The solution is not to ignore stereotypes that may be detrimental to women as a group, but to argue that group-based statistics cannot be used as a basis for individual decisionmaking. Mary Joe Frug presents a postmodern analysis of *Sears* which suggests that *both sides viewpoints* were incomplete. Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 675-82 (1992).

²³⁸ See *supra* note 37 and accompanying text.

capitalism and competition.²³⁹ Neither a return to liberalism²⁴⁰ nor unintended validation of conservatism²⁴¹ will aid feminists' goals; as Linda Alcoff argues, "feminists need to transcend the dilemma by developing a third course, an alternative theory of the subject which avoids both essentialism and nominalism."²⁴²

The postmodern emphasis on multiple perspectives and its rejection of an essential description of "woman"²⁴³ has contributed much to contemporary feminism and is hard to repudiate.²⁴⁴ Of course Joan Williams is right when she says, "[w]omen don't *always* react as women; sometimes they react as Democrats, lesbians, bigots or blacks."²⁴⁵ I

²³⁹ Because the aspects of liberal feminism, which in effect tell women that they must "think like men" and be more like men to be successful, have all but disappeared from feminist jurisprudence, academic women may overlook the continuing power of this advice in "the real world." Magazines like *Working Women* and *New Woman*, which I imagine have larger circulations than the *Harvard Law Review*, continue to assert this philosophy in a variety of ways. Women who have accepted patriarchal values, particularly those who have chosen to remain childless (some genuinely voluntarily, some with reluctance and later regret) may vigorously oppose workplace reform designed to accommodate parenthood and resent co-workers with children, who they believe expect "special" treatment and hurt other women's chances for success. They, like Williams, are greatly concerned with stereotypes of women as mothers and go out of their way to distance themselves from any aspect of "domesticity."

²⁴⁰ See Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993). After surveying the critiques of essentialism in contemporary feminism, the author concludes that there is "an emerging commitment among feminist legal scholars to the renewal and reconception of liberal theory." *Id.* at 1286.

²⁴¹ In an interesting article, Mary Joe Frug suggests that Gilligan's work can be given both a conservative and a progressive interpretation. Frug, *A Different Voice*, *supra* note 26. Frug suggests that a progressive reading of Gilligan's work would use it "as a methodology for challenging gender, as an example of how contingently-formed gender differences can be strategically deployed to unsettle existing inequalities between the sexes." *Id.* at 52. She is critical of Suzanna Sherry's "conservative" interpretations of Gilligan. *Id.* at 60-64.

²⁴² Linda Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405 (1988).

²⁴³ Of particular importance are the convincing critiques by women of color and gays and lesbians that cultural feminism ignores their perspectives. See, e.g., Cain, *supra* note 26; Harris, *supra* note 26. As I have discussed elsewhere, critics of cultural feminism often employ essentialist statements in their own work. See *supra* notes 243-47 and accompanying text.

²⁴⁴ Postmodernism has become so popular that whenever an author wants a point of view he or she accepts to prevail, all she or he needs to do is label it as "postmodern." Choosing to call something postmodern has become a substitute for the veneer of neutrality in more traditional legal scholarship: it enables an author to disguise his or her own subjective viewpoint. A classic example is Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992). After discussing the work of Robin West (only a "modernist") and Joan Williams (who Patterson says *tries* to be a postmodernist but doesn't *really* succeed), Patterson concludes with Zillah Eisenstein (at last, a real postmodernist!). Because Eisenstein is a postmodernist, it follows that her view on pornography (i.e. it can be both good and bad for women depending on your perspective) is correct, as opposed to Catherine MacKinnon's sadly modernist theories.

²⁴⁵ Williams, *Postmodern*, *supra* note 26, at 323. Williams states that: "[p]ostmodern reformulations of sameness and difference can transform the controversy over whether blacks and whites, men and women are essentially the same, into quite a different set of debates." *Id.* at 299.

doubt if any feminist, regardless of school of thought, would disagree with this commonsense remark. But postmodern critics of cultural feminism have created a false dichotomy between cultural feminism and postmodernism.²⁴⁶

Assertions that all cultural feminism is essentialist are often essentialist themselves. As Leslie Bender puts it, "because of preconceived notions in the minds of hearers, and our training in the dominant masculinist scholarly traditions, many feminist difference theorists have wrongly been heard to make authoritative, universalist claims."²⁴⁷

Cultural feminism has made significant contributions to feminist dialogue and continues to provide a perspective which illuminates at least part of many women's experiences. Its most important theme remains the insight that gender-based cultural expectations and mores for girls and boys do produce significant differences in many men and women, and that all the consciousness raising in the world can never completely eradicate these differences. I am more convinced than ever

²⁴⁶ One of the many problems with labels is that they can be manipulated according to one's opinion of the speaker. For example, Joan Williams, in discussing the work of Marie Ashe, which she likes, goes out of her way to state that Ashe's work "avoids many of the pitfalls of relational feminism; her description of difference ultimately resembles those of outsider-scholars." Williams, *Postmodern*, *supra* note 20, at 321-22. While I realize that categories are relative and depend on your perspective, it seems difficult to describe an author who makes statements like "the deep, primitive and irrational natural forces which move us cannot ever be permanently repressed by law and language" and "[d]oes the strongest of stitching come from our bodies?" (Ashe, *supra* note 184, at 558.) and "What if we wrote with words from the deepest part of our bodies, our selves?" (Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 358 (1989)) as anything but a biological feminist. Most critics of cultural feminism, including Williams herself, consider biological feminism as a sub-part of cultural feminism.

²⁴⁷ Bender, *Gender Difference*, *supra* note 20, at 22. While much of the criticism of cultural feminism points out many of its major flaws and contributes significantly to the dialogue about feminism, at times the criticism becomes extremely strained and based on what appears to be deliberate misinterpretations of the work. For example, Jeanne Schroeder criticizes Leslie Bender for referring to the public/private dichotomy as "false." *Supra* note 20, at 127 n.42. Schroeder states that:

the term 'false' seems to imply either that the dichotomy is illusory or that it does not meet some predetermined concept of truth. If one accepts, as I do, that the public-private distinction is one of the primary structures of masculinist law that functions to maintain women in a subordinate position, then one would say this dichotomy is very, very real. I can, therefore, understand arguments that this dichotomy is not logically required, is often indeterminate, and is oppressive, but hardly that it is false.

Id. By focusing only on an out-of-context technical meaning of the word "false," Schroeder ignores the fact that Bender's work describes the dichotomy in exactly the way Schroeder suggests is appropriate. Bender recognizes that the dichotomy is "real" in the sense Schroeder means; she explicitly states throughout all her work that it is one of the primary tools of oppression used against women.

of this theory now that I am a parent attempting to raise my daughter and son in non-gendered ways.²⁴⁸ These differences can and do transcend race and class.²⁴⁹ Children of all races and classes watch television and Disney features.²⁵⁰ Both K-Mart and Bloomingdales sell girls clothes in pink and boys clothes in blue.

As a corollary, it is *generally* true that these cultural differences result in women engaging in more relational, cooperative behavior and men in more competitive behavior. Numerous studies have established that mothers are more bonded to their children than fathers,²⁵¹ spend more time on child-raising,²⁵² and are more likely to want custody in the event of a divorce.²⁵³ All of these differences are significant; we ignore them at our peril. Feminists writing in the area of family law have already convincingly demonstrated that theories of formal equality which ignore women's differences regarding attitudes toward children result in actual inequality.²⁵⁴

Joan Williams' call for a "Gilligan in reverse,"²⁵⁵ if unchallenged, can lead to observations just as essentialist and inaccurate as the worst possible readings of Gilligan. Williams' own examples illustrate the dangers of a superficial approach to these "similarities." After asserting that women often enjoy power just as much as men, she states that "dealing with a two-year old is one of the recurring great power struggles in the cycle of human life."²⁵⁶ This is true, but not in the sense Williams means. Williams is apparently suggesting that this "power struggle" is similar to a hostile corporate takeover.²⁵⁷ This is patently

²⁴⁸ Williams suggests that parents exaggerate these differences. Williams, *Gender Wars*, *supra* note 26. There is some validity to this observation, but most of the differences are easily observable. It is a fact, not my perception, that my daughter wants to play exclusively with other girls.

²⁴⁹ This is not to say that race and class differences do not matter. In many instances these differences are far more important than gender differences.

²⁵⁰ The effects of television and films on reinforcing gender stereotypes are well-documented. See, e.g., ALFRED B. HEILBRUN JR., *HUMAN SEX-ROLE BEHAVIOR* (1981); Marcia R. Lieberman, "Some Day My Prince Will Come": *Female Acculturation Through the Fairy Tale*, in *SEXISM AND YOUTH* 228, 228-43 (Diane Gersoni-Staun ed. 1974).

²⁵¹ Fineman, *supra* note 143, at 769.

²⁵² *Id.* Authors like Williams, *Gender Wars*, *supra* note 26, and Czapinsky, *supra* note 212, would argue that this statistic proves nothing, because women are forced into assuming responsibility for their children. For my counter-arguments to this proposition, see *supra* notes 217-28 and accompanying text.

²⁵³ See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 43-45 (1991) (citations omitted).

²⁵⁴ See, e.g., FINEMAN, *supra* note 139.

²⁵⁵ Williams, *Deconstructing*, *supra* note 26, at 840.

²⁵⁶ *Id.* at 843.

²⁵⁷ This may be an unfair reading of Williams, but I am not convinced that it is. Obviously, Williams does not literally compare dealing with a two-year-old to a hostile corporate takeover,

absurd. A parent can always "win" a power struggle with a child if she chooses. After all, we *are* bigger and stronger than our children—if nothing else we can just pick up the screaming, kicking little brat and carry her to her room. What makes the *real* daily power struggle with two-year olds more complex and challenging than a hostile takeover is that the parent's goal is not really to "win"—it is to find that perfect balance of discipline and love that will help the child learn that certain rules must be obeyed, but that will not completely suppress the child's natural and desirable need for some independence.

In another example disputing Gilligan's analysis of playground games, Jeanne Schroeder argues that in fact boys *are* taught cooperative behavior, through the mechanism of team sports, whereas girls' sports, such as hopscotch or jump rope, tend to emphasize competitive behavior.²⁵⁸ But Schroeder's assertion that team sports foster "cooperative," relational behavior among boys provides an incomplete view of such sports.²⁵⁹ It is true that team members learn to work together through sports, but this "cooperative" model is designed to accomplish a single goal—beating the other team. (Schroeder's notion that sports are always "gentlemanly" and played with extreme deference to decisionmakers,²⁶⁰ should also seem naive to anyone familiar with Bobby Knight or John McEnroe.)²⁶¹ This type of "cooperation," with its mottos

and she does acknowledge that "nurturing involves a sophisticated use of power in a hierarchical relationship." *Id.* However, she makes the statement in the context of a highly critical discussion of Carol Gilligan's work, in which she strongly disagrees with Gilligan's conclusion that women are less competitive and less interested in power than men. Because a hostile corporate takeover is a good example of a competitive, power-laden situation, usually involving men instead of women, it seems reasonable to suggest that she was attempting to draw such a parallel. Williams also states that "the difference between being a boss and a mother in this regard are differences in degree as well as in kind." *Id.*

²⁵⁸ Schroeder, *supra* note 20, at 131–33.

²⁵⁹ I also question Schroeder's characterization of hopscotch and jump rope as competitive, because the games usually more closely resemble *solitaire*. See, e.g., JESSIE H. BANCROFT, *GAMES* 116–17 (1937) (describing hopscotch as a game for 1 to 10 players). The basic objective of the game is described as avoiding missing. The same is true for jump rope. *Id.* at 208–13. Jump rope chants also reinforce traditional nurturing role models for girls. See LILLIAN FRANKEL & GODFREY MASTERS, *THE GIANT BOOK OF GAMES*, 63 (1952), which recites the following classic jump rope chant:

Does he love me?
Yes, no, yes, no, yes.
Where will we get married?
Church, synagogue, house, barn.
How many children will we have?
One, two, three, four . . .

²⁶⁰ Schroeder, *supra* note 20 at 132–33.

²⁶¹ Bobby Knight, basketball coach at Indiana, is famous for being thrown out of games by referees. John McEnroe, a major tennis star, has upset the staid atmosphere at Wimbledon more

like "winning isn't everything, it's the only thing,"²⁶² is very different from women working together to take care of children²⁶³ or to sew a quilt. The sanctions for not being a good team member ("letting the team down") are harsh and contribute to a boy's perception of himself as an autonomous individual. For many adolescent boys, there is no worse fate than being bad at sports, just as for many adolescent girls there is no worse fate than not being "pretty."²⁶⁴

Cultural differences between men and women can also manifest themselves in significant stylistic ways—the ways men and women carry on a conversation or the body language they use. These differences result in conscious and subconscious perceptions which may disadvantage women. Cultural feminism can help accomplish the postmodern goal of aiding understanding of women's multiple perspectives by

than once by hurling choice obscenities at the referees. See, e.g., Larry Fine, *McEnroe in Middle Again as Tempers Flare*, REUTER LIBRARY REPORT, Sept. 7, 1992.

²⁶² This statement is popularly attributed to Vince Lombardi.

²⁶³ Women in different societies commonly engage in cooperative child-raising activities. See, e.g., GERMAINE GREER, *SEX AND DESTINY* 284–301 (1984). Greer describes child-raising in extended families. After noting that it may strike the reader as strange that a feminist would present the family as a model, she argues that "[t]he family offers the paradigm for the female collectivity; it shows us women cooperating to dignify their lives, to lighten each others' labor, and growing in real love and . . . sisterhood, a word we use constantly without any real idea of what it is." *Id.* at 286.

²⁶⁴ In the words of the poet William Butler Yeats:

And there upon
That beautiful mild woman for whose sake
There's many a one shall find out all heartache
On finding that her voice is sweet and low
Replied: "To be born woman is to know—
Although they do not talk of it at school—
That we must labour to be beautiful."

William Butler Yeats, *Adam's Curse*, in *CHIEF MODERN POETS OF ENGLAND AND AMERICA* VOL. 1, 1-105-6 (4th ed. 1965) (Gerald D. Sanders, John H. Nelson, & M.L. Rosenthal eds.). See also NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991). I raised Schroeder's point about sports not only because I believe she is wrong, but also because I think the points she raises about sports help illustrate what I think is a critical difference in the socialization of many girls and many boys. Boys are expected to be good at sports, which is a finite quest for victory (a 7–6 score is almost as good as a 7–0 score); girls are expected to be good at being beautiful, which is a bottomless search for perfection.

The difference in the two goals continues to affect gendered attitudes towards more sophisticated adult "games." I was once asked by a male lawyer how I could say that women are generally less competitive than men, when most of the women lawyers he knew worked far harder than their male counterparts. I would agree that far too many women professionals work much longer hours than they need to and seem driven beyond any reasonable standards to succeed. However, the word I would use to describe their behavior is not competitive—it is compulsive. Women who become professionals enter into a particularly stressful existence, because under the boys' rules, being perfect means winning. But winning is not enough, they must still be perfect—for compulsive women a 7–6 score is *not* the same as a 7–0 score.

providing explanations for these stylistic differences. For example, during my four years on our faculty appointments committee, I have observed a significant difference in the way many men and women interview at the AALS hiring conference.²⁶⁵ More men than women dominated the discussion, gave highly confident, direct answers and asked aggressive questions to the interviewers. More women than men appeared hesitant, equivocal and quiet. Our former dean used to ask every applicant what he or she expected that people would say about him or her when they spotted him or her ten years from now at an AALS convention. Men tended to answer something like "Well, Dean Walwer, I am confident that they will identify me by my seminal treatise²⁶⁶ on the termination of copyright transfers, and by my latest lead Harvard Law Review article." Women's answers were more along the lines of "I guess I'll just be happy if they say I'm a good scholar and teacher." Not too surprisingly, most of the men on my hiring committee would give the first speaker a higher score than the second. I've found cultural feminism useful as a device to explain to sympathetic male colleagues that the woman may be just as consumed with desire to write the ultimate work on termination of transfers as the male applicant and just as inwardly confident of her ability to accomplish this feat, but that there was a good chance that she was socialized from birth to appear modest and self-effacing. It is true that in the hands of some of my male colleagues my explanation could be twisted entirely out of proportion ("Even Linda admits that women lack self-confidence"),²⁶⁷ but that type of person will always be able to come up with some sort of excuse not to hire women anyway.²⁶⁸

²⁶⁵ These personal observations are not unique and are supported by a number of studies. See John M. Conley, William Barr and E. Allan Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375 (description of studies of presentational style in trial witness' testimony). The study found differences in male and female speech, with women witnesses exhibiting a "powerless" style—tentative or uncertain—more than men. See generally Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1646–55 (1991) (sources cited therein discuss other studies showing differences in women's and men's speech, with a general pattern of tentativeness in women's speech).

²⁶⁶ The cliché of "seminal" work is of course a classic example of a male's perspective shaping our language, in this case our language regarding academic excellence.

²⁶⁷ This hypothetical comment does illustrate the dangers of cultural feminism and use of studies demonstrating differences between men and women. Studies *do* generally show that in fact more women than men lack self-confidence and continued lack of self-confidence can be fatal in classroom teaching. In my original hypothetical, I pictured a woman applicant who only *appeared* to be less self-confident than the male applicant, a common situation. The issue of how to evaluate the woman applicant who actually *is* less self-confident than the male applicant is more complex. I would continue to argue that this woman should at least be considered, because many women teachers have successfully overcome lack of self-confidence in the classroom, but I recognize that this will be a difficult task in many cases.

²⁶⁸ Almost anything women say or do can become a weapon in the hands of our enemies.

Cultural feminists have also made important contributions to the goal of restructuring our legal system. The language and ideals of cultural feminism are more compatible with the progressive goal of redistribution of wealth than traditional liberal thought and the concept of an "ethic of care" represents a real challenge to patriarchal legal models. Leslie Bender explains that "our statutory and common law legal system can develop new categories of civil law analysis (rather than criminal or regulatory law) that recognize and value relationships, interpersonal responsibility, and human needs for safety, health, education, and security, rather than its traditional focus on money and commodity."²⁶⁹

A postmodern approach to cultural feminism should recognize that there may be areas of the law in which its themes have much to offer, and other areas where it is dangerous.²⁷⁰ When feminists speak of "an ethic of care and responsibility" in contracts,²⁷¹ torts,²⁷² property,²⁷³ or criminal procedure,²⁷⁴ they are, if nothing else, introducing concepts relatively unknown in these fields. This is particularly true in areas of the law traditionally associated with business, such as bankruptcy²⁷⁵ or taxation.²⁷⁶ Cultural feminist ideas in these areas *may*

Many women on predominantly male faculties have had the experience of seeing our words distorted, but that has not stopped us from speaking, nor should it. As Leslie Bender says:

If stereotypes are going to be used against us, as they have been in the past, they will be used regardless of what we say or do. Those who want to exercise their power by disadvantaging women based on stereotypes did so long before we celebrated women's cultures and will do so long after, no matter what strategy we select in our struggle for justice for women.

Bender, *Gender Difference*, *supra* note 20, at 44.

Some feminist authors in their concern about stereotypes seem to have a naive assumption of good faith among decisionmakers. Joan Williams' discussion of the *Sears* case hints at the possibility that the judge was determined to decide the case for *Sears* under any circumstance. See Williams, *Deconstructing*, *supra* note 26, at 813-21. Dr. Rosenberg's testimony just provided him with a convenient excuse.

²⁶⁹ Bender, *Gender Difference*, *supra* note 20, at 46.

²⁷⁰ See *supra* notes 235-38 and accompanying text.

²⁷¹ See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

²⁷² See, e.g., Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990); Lucinda Finley, *A Break in the Silence: Including Women's Issue in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

²⁷³ See, e.g., Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

²⁷⁴ Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987).

²⁷⁵ See Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990) (Gilligan-influenced description of the different attitudes women may have toward debts).

²⁷⁶ Marjorie Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

backfire and produce harmful results for women and other subordinated groups,²⁷⁷ but they have not traditionally been the "master's tools."²⁷⁸ Most white men are completely taken aback by ideas like Leslie Bender's suggestion that tortfeasors perform a *personal* service to compensate their victims.²⁷⁹

Some critics of cultural feminism have suggested that while its goals are desirable, they should be couched in gender-neutral terms, as "humanist" goals.²⁸⁰ There may be times when this strategy is desirable, but I think it would be a serious mistake to abandon the idea of "woman" as an organizing category.²⁸¹ As Linda Alcoff writes, in advocating the desirability of identity politics, "[i]t is the claiming of their identity as women as a political point of departure that makes it possible to see, for example, gender-biased language that in the absence of that departure point women do not always notice."²⁸²

²⁷⁷ For a critique of Leslie Bender's concept of a duty to rescue and an argument that it will harm women, see Schroeder, *supra* note 20, at 138-40.

²⁷⁸ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110 (1984).

²⁷⁹ See *Feminist Legal Theory Enters Business Area*, WALL ST. J., June 4, 1992, at 1, 8 ("Some corporate lawyers find the proposals baffling and impractical. 'It's just so far from the way the legal system currently operates that I—I just don't have a reaction to it,' said Gary Lynch, a partner at the New York law firm Davis, Polk & Wardwell.").

In contrast, statements about morality in abortion dialogue may lead to pandering approval among country-club Republicans. See Edwin M. Yoder, Jr., *Good Leaders Share Burdens of Followers*, TULSA WORLD, Aug. 18, 1992, at A7 (author, in discussing Barbara Bush's remarks on abortion, states: "[v]ery likely, both Bushes are frantically signalling friends and peers among the so-called 'Country Club Republicans' that—hint! hint! nudge! nudge!—they needn't get all bent out of shape over the Houston triumph of the hot-eyed anti-abortion fanatics.").

²⁸⁰ Williams, *Deconstructing*, *supra* note 26, at 843-45. Both Williams and Schroeder make a related, but separate criticism of cultural feminism. They assert that cultural feminists pretend that certain aspects of the theories they espouse were invented by feminists, while these theories actually owe their origins to male philosophers. This criticism incorporates at least a partial misreading of some cultural feminist work. Most cultural feminists do not necessarily claim that their critique of "objectivity" and "neutrality" is *original*; only that it is central to their theory.

As a corollary, Jeanne Schroeder states "feminists tend to ignore the writing of male philosophers who have struggled with many of the same issues." Schroeder, *supra* note 20, at 208. Schroeder's criticism masks an elitist assumption that the feminists she criticizes are completely familiar with all the philosophers she would like them to cite, or, if they are not, then they should be. I do not discount the importance of philosophy as a central part of feminist theory and I suppose that in an ideal world every feminist trained in the law would also be perfectly versed in other disciplines. I would suggest, however, that Schroeder's elitism may be just a little off-putting to women beginning to enter the field. If the most prominent feminist scholars make complete familiarity with the fields of philosophy, sociology, literature, science, psychology, etc., a barrier to entry for feminist jurisprudence, the area will be primarily limited to a select few who will not provide the diversity of experience that postmodernists like Schroeder claim to revere.

²⁸¹ See Alcoff, *supra* note 242, at 431-36.

²⁸² *Id.* at 432.

For example, in discussing the problems women face in obtaining custody of their children, Joan Williams advocates adoption of the primary caretaker presumption because it is gender neutral, as opposed to the clearly gender-based "tender years" doctrine.²⁸³ The strongest arguments for supporting the presumption, however, stem from a gender-based cultural feminist analysis. The current predominant "best interests of the child" standard appears to be the perfect "humanist" way to determine which parent receives custody. The problem is that this extremely vague and flexible standard is often interpreted in highly sexist ways which result in women being more likely than not to lose custody in a contested divorce.²⁸⁴ Additionally, the uncertainty of the outcome of the standard gives the father a "bargaining chip" in a divorce situation—he can threaten a custody battle if the mother does not agree to give up her economic rights.²⁸⁵ These two reasons, both of which are explicitly based on gender analysis, provide powerful reasons for supporting the doctrine, which a gender-neutral "humanist" analysis does not accomplish.

Finally, I believe cultural feminism's positive affirmation of women's lives and its optimism is desirable.²⁸⁶ I cannot agree with Mary Joe Frug, one of the most important postmodernists, that "the anger and pessimism connected with negative feminism produces a more positive political residue than the form of sentimental boosterism that often accompanies cultural feminism."²⁸⁷ Anger can be a powerful

²⁸³ Williams, *Deconstructing*, *supra* note 26, at 838–39.

²⁸⁴ See Fineman & Opie, *supra* note 144, at 120 & n.7. See also Mahoney, *supra* note 253, at 45 (citations omitted). Mahoney uses, as an example, a particularly outrageous case in which a battered woman had sought refuge for herself and her children in a shelter. The judge, using the best interests standard, awarded custody to the battering father, because he provided a better home. *Id.*

²⁸⁵ See FINEMAN, *supra* note 139; Sack, *supra* note 139.

²⁸⁶ My favorite example of the themes of difference feminism is a speech made by a very prominent woman in legal education. She began her speech, "I am the mother of two wonderful daughters, a law professor, an administrator," continued with a long list of professional achievements, and concluded, "I have listed these things in the order of their importance to me." While I recognize that many feminists may have valid concerns about a woman beginning her self-definition with her role as someone's mother (as wife, or daughter), I don't really believe that was this woman's point. I think that she was simply affirming an idea that seems intuitively obvious and right to me—that human relationships are more important than career achievements.

²⁸⁷ Frug, *supra* note 237, at 673. I also have to disagree with an example used by Frug to repudiate cultural feminism. Frug tells a story of a woman and a man trying on suits which are too long in the legs and too tight across the hips. The man says everything is fine, the woman says her legs are too short and her hips are too big. *Id.* at 665. Frug uses this story to draw analogies to liberal feminism (liberal feminists would say clothes stores must be changed to include an equal number of clothes which fit women) and cultural feminism ("cultural feminists would say that women must learn to feel more comfortable with our actual appearances, that we should give up our desire to conform to the fantasies men have invented for feminine attractive-

motivating force, but it can also be destructive and immobilizing. Too many women turn their anger inward, often in the form of self-destructive behavior, and this type of anger cannot lead to positive results. Some aspects of cultural feminism may have the potential to degenerate into a mushy version of the 70's pop psychology book "I'm OK, You're OK," but a truly postmodern approach to feminism should incorporate both anger and affirmation. There is much to be angry about, but there is also much to celebrate. Feminist authors should not let a healthy caution about essentialism keep us from talking about what we have in common, because it is exploration of similar experiences (and differences) that gives us a sense of identity and purpose.

*"Until we find each other, we are alone."*²⁸⁸

ness.") *Id.* She then goes on to say that postmodernists would reject both approaches as "likely to recreate and perpetuate the problem of the relationship between sexual difference and equality." *Id.* Ironically, however, Frug couldn't have chosen a more poignant example of the need for celebration of women's attributes than her anecdote. Anorexia and bulimia are now recognized as serious, sometimes fatal diseases, caused by women's poor esteem. It is estimated that 25 percent of U.S. and Canadian women suffer from these diseases. See, e.g., Joyce Steller, *Film Shows Women Dying to Be Thin*, *GUARDIAN*, June 3, 1992, at 19. Even Princess Diana, a woman who would appear to "have everything" is apparently not immune. See *PEOPLE MAG.*, Aug. 3, 1992, at 60-68. Of course, I recognize that Frug is not literally suggesting that women should not validate their bodies, the anecdote is an analogy used to illustrate an aspect of cultural feminism, but I regard it as a more powerful analogy as to why affirmation and celebration of women's differences are still important ingredients of feminist theory.

²⁸⁸ ADRIENNE RICH, *THE DREAM OF A COMMON LANGUAGE* 14 (1978).