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The Limits of Feminism

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Many people have been fascinated by the idea of feminism, and yet there is no consensus about what feminism entails or even what its objective should be. The fascination lies in the curious fact that statistically, the group "women"—which makes up more than half the population—has not fared as well as the group "men" according to criteria of success that are accepted by both women and men, and are not obviously linked to the physical differences between the two. With no other facts supplied, we all know that a baby girl is less likely than a baby boy to become President of the United States. Not only is this an arresting social fact, but it is a fact likely to evoke personal interest. Almost everyone either is a woman or has been closely associated with one, and the categories in question ("men" and "women") are categories that we all learn early in life to recognize as important.

Over time, feminism has produced a number of different responses to the question what should be done on behalf of women. I am particularly interested in the legal side of feminism—what can and should be done on behalf of women through the medium of law. In the following pages I will trace very briefly the most prominent strands of feminist theory and evaluate them as programs for legal reform.[1]

Feminism focused first on a demand for equal treatment or "formal equality": women should have the same legal status and right as men, and should be protected against discrimination on the basis of sex.[2] Accomplishing this was no mean task, but for the most part, the necessary legal changes were made. Civil rights were extended to women and discrimination in regard to goods such as education and employment was outlawed.[3]

Equal treatment, however, was unsatisfying to many of those interested in the performance of the group "women." One difficulty was that discrimination against particular women could not always be effectively

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1. Although I will describe these as if they were a chronological progression, this is misleading. All the ideas I discuss, and many that I have omitted, have committed adherents today.

2. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 969 (1984) (freedom from "sex based legal constraints"). For a history of American women's rights movements through the enactment of the 19th Amendment, *see* ELEANOR FLEXNOR & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (enlarged ed. 1996).

3. *See* U.S. CONST., amend. XIX (the right to vote); Title VII of the Civil Rights Act, 42 U.S.C.A. §§ 2000 et seq. (1969) (employment); Title IX of the Civil Rights Act, 42 U.S.C.A. §§ 1681 et seq. (1972) (education); N.Y. Married Women's Property Act, Laws of N.Y. ch. 200 (1848), reprinted in MARY BECKER, CYNTHIA GRANT BOWMAN, & MORRISON TORREY, FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 7 (1994); Reed v. Reed, 404 U.S. 71 (1971) (Equal Protection Clause applies to sex-based classifications); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (challenge under Equal Protection Clause requires proof of discriminatory purpose).

proved. Legal proceedings are not subtle enough to catch every effort to exclude a woman from a desired position. This led to proposals to allow indirect proof of discrimination, based on the number of women represented in whatever position was at stake.[4] Nominally, the theory continued to be one of equal treatment, but attention had shifted toward actual parity along some dimension of success.

Proof of discrimination, however, was not the only difficulty. Quite apart from discrimination, it was evident that the competitive performance of women was inhibited by background conditions such as responsibility for children and deficiencies in women's skills and aspirations. This observation led feminism in several new directions.

One response to the failure of equal treatment to produce equal results was intensification of interest in "women" as a group. Women were seen to be linked not only by biological characteristics but by common experiences, especially in regard to care of children and relations with men.[5] Some also suggested that the group "women" was united by a common set of interests and aptitudes and even a common method of reasoning.[6] On this view, which remains controversial, women are naturally cooperative, disposed to nurture others, and likely to analyze problems in terms of relational patterns rather than by deductive or inductive logic.

Dissatisfaction with the results of equal treatment also led to various legal strategies explicitly designed to promote "substantive" equality—equal conditions or outcomes. Each of these strategies called for special treatment for women in one form or another, in response to what were perceived to be women's special circumstances or needs. The narrowest proposals were for specific measures to counteract competitive disadvantages women faced in connection with childbearing. Proponents called for pregnancy leave and, more controversially, accommodations for women with young children.[7] Blunter proposals for special treatment demanded preferences or "affirmative action" for women seeking

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4. *E.g.*, Nadine Taub & Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure*, 37 RUTGERS L. REV. 825, 836-44 (1985).

5. *E.g.*, Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

6. *E.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (finding differences in the way boys and girls solve problems); Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1380-88 (1986) (rejecting "abstract universiality" in favor of "contextual" reasoning). For a critique of the notion that feminism entails a unique epistemology, see Janet Radcliffe Richards, *Why Feminist Epistemology Isn't (And the Implications for Feminist Jurisprudence)*, 1 LEGAL THEORY 365 (1995).

7. *E.g.*, Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J.. 1, 21-28 (1985). Child care leave is more controversial than pregnancy leave because child care is not inevitably the responsibility of women. *See id.* (only strictly biological differences should be recognized); M. RIVA POLATNICK, WHY MEN DON'T REAR CHILDREN: A POWER ANALYSIS, IN MOTHERING: ESSAYS IN FEMINIST THEORY 23 (Joyce Trebilcot, ed. 1983) (men impose responsibility for children on women in order to maintain power).

education or employment, to make up for whatever unseen obstacles might be impeding their progress.[8]

A more radical form of special treatment proposal, also designed to promote equality of outcome, called for a change in social rewards. If women are conditioned or perhaps intrinsically better suited to engage in activities such as child care, then the answer must be to ensure that these activities are valued and compensated as highly as the activities in which men typically engage.[9] The performance of women and men may continue to differ, but with success redefined, they will succeed in equal measure.

Special treatment strategies, however, are not likely to provide a complete solution to the problem that inspired feminism—the fact that "women" have not fared as well as "men" according to common criteria of success. Neither pregnancy leaves nor preferences can close a gap in performance that has myriad causes, including the attitudes of women themselves. As for a change in the system of financial and other rewards society accords to particular skills and activities, this is simply not a real possibility. Rewards are not controllable in a society that maintains any freedom of choice and thought—they are a function of demand. The necessary changes would be exceedingly difficult to bring about, and if they could be made, they would purchase a form of equality between sexes at the price of incalculable damage to other social goods.

Further, substantive equality and special treatment strategies generate a new set of practical and theoretical problems for feminism. One of these is that special treatment marks women as people in need of assistance. This threatens the confidence of women, and it invites discrimination and skepticism by others. If respect is one of the goods in which women should share equally, special treatment is self-defeating.[10]

Another serious difficulty is that substantive equality and special treatment bring group equality into conflict with the interests and welfare of individuals. This is unavoidable in regard to particulars—the cost of pregnancy leave, for example, will affect the salaries of women who have no children. Preferences will cast doubt on the credentials of women who could easily compete.

More generally, individual welfare and group equality come into conflict at a theoretical level in ways that complicate the definition of substantive

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8. *E.g.* Mary Joe Frug, *Securing Job Equality for women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 98-99 (1979). Arguments in favor of preferences are, of course, closely related to arguments for treating disparate impact as evidence of discriminatory intent. *See supra* note 4 and accompanying text.

9. *E.g.*, Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1323-36 ("Making. . .gender difference less costly could mean requiring the government to pay mothers the same low wages and generous benefits as most soldiers"). *See* A.F.S.C.M.E. v. Washington, 770 F.2d 1401 (9th Cir. 1985) (denying a "comparable worth" claim).

10. *See, e.g.*, Law, *supra* note 2, at 1012 ("stereotypes of inferiority").

equality. Equality—whether among individuals or among groups—must be understood in reference to some measure of welfare: individuals or groups should enjoy equal portions of wealth, prestige, or other selected goods. This immediately raises the problem that the goods identified with welfare may not in fact be equally attractive to all. When the goal is equality among individuals, it is possible, at least in theory, to avoid fixing on a single conception of the good. In one familiar version, for example, equality is achieved by giving each person a prescribed share of some currency, together with access to a market where she can use the currency to acquire what she needs to pursue her own conception of the good. If a further adjustment is made for differences in talent and luck, we might then say that people are situated as equally as they can be, by the measure of their own values and interests.[11] Group equality, on the other hand, must be measured in reference to a fixed set of goods that serve as the criteria of group success but may not be endorsed by all group members.

Defining the set of goods in reference to which the group "women" should be equal to the group "men" presents a special difficulty for those who believe that women's interests and characters are fundamentally different from those of men. If this is the case, it will not be acceptable to define group success by standards that prevail in the current, presumably male-designed world, such as wealth and prestige. Yet it is hard to know what goods women might prefer to wealth and prestige, if their practical choices have been limited by inequality. In other words, equality with respect to important goods may be prerequisite to an adequate understanding of which goods are important.[12]

The quest for substantive equality, therefore, ends in a definitional tangle, and on the way can make life harder both for individual women and for "women" as a group. This impasse led naturally enough to a third position, which demands fundamental changes in social practices that stand in the way of women's success. On this view, the object of feminism must be to expose and undermine the practices, attitudes, and institutions that have contributed to the failure of equal treatment and produced unequal outcomes for the group, "women." Rather than pursue particular ends within society as we know it, women should look for ways to seize social power and redefine social institutions in a way that will free them from the patriarchal oppression.[13] This is sometimes referred to as the

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11. *See* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFAIRS 283 (1981).

12. Christine Littleton acknowledges this problem. Littleton, *supra* note 9, at 1322 ("Positing alternative currency . . . will have to await a time when women have equal access to the mint").

13. *E.g.*, SIMONE DE BEAUVOIR, THE SECOND SEX 684-96 (H.M. Parshley trans. 1968); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 244-49 (1989) [hereinafter FEMINIST THEORY]; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). MacKinnon rejects the "postmodern" label, and yet subscribes to the notion that social norms are both

"dominance" branch of feminist theory, and its proponents often rely on postmodern techniques such as deconstruction of widely accepted beliefs.

To give just one example: one target of postmodern feminism has been sex itself. Dominance theorists have argued that society—under the influence of men—has adopted a particular conception of sexual attractiveness and sexual pleasure, in which women submit to men. This picture of sex has in turn become the model for relations between men and women in every area of life. The beliefs and practices that result are impervious to reason, because men and women alike have come to accept them as natural facts.[14] The only solution is to root out the offending conception of sex—for example by enacting strict laws against pornography, with the content of pornography to be defined by its (female) victims.[15]

One thing to notice about this strand of feminism is that it is not directly concerned with equality.[16] Its method is not to demand an equal share of anything but to undermine whatever conventions are seen as harmful to one group in relation to the other. Further, it freely accepts that no precise goals can be established for the group "women" as long as oppressive practices and institutions remain in place.[17] Whatever women may believe they want—including equality along some familiar axis—their beliefs inevitably are tainted by the social conditions under which they are accustomed to live.[18]

Nor can this approach be readily joined to a claim to equality. As I have said, equality necessarily refers to a set of goods—legal status, access to education or employment, or some form of satisfaction or success—that

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artificial and highly malleable.

14. *E.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 13-224 (1979); MACKINNON, FEMINIST THEORY, *supra* note 13, at 123-24, 128-29, 140-41, 149-50, 153; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 641-48, 652-54 (1980).

15. *See* ANDREA DWORKIN & CATHERINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY, Appendix D (1988) (Model Antipornography Civil-Rights Ordinance). The Dworkin-MacKinnon model ordinance defines pornography as "sexually explicit subordination of women through pictures and/or words," if the material also meets one of a number of additional conditions, such as "women are presented in scenarios of degradation." *Id.* § 1. Standing to sue is given to "any woman. . .as a woman acting against the subordination of women." *Id.* § 5(c).

16. *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 40-45 (1987) (focusing on "dominance" rather than "difference"); Claudia Card, *Evils and Inequalities* [this volume] (rejecting equality as the primary objective of feminism).

17. MACKINNON, FEMINISM UNMODIFIED, *supra* note 15, at 43 (under a "dominance" approach, "there is no separable question of what ought to be."

18. For skepticism about the validity of women's conscious choice and preferences, *see* MACKINNON, FEMINIST THEORY, *supra* note 13, at 149-50, 153; Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 99 YALE L.J. 914, 932-35 (1987); Rich, *supra* note 14, at 646-48;; WILLIAMS, *supra* note 14, at 829-31. *Cf.* Katherine Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 759 ("ideological determination" arguments are oversimplified); Vicki Schultz, *Telling Stories About Women and Work, Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1829-43 (1990) (women's work preferences as rational responses to the existing structure of employment).

people should enjoy in equal measure. Yet beyond the level of subsistence, the very notion of "goods" presupposes a social structure. Wealth, education, employment, political power—all are products of social organization. If these are open to redefinition, as deconstructionists maintain, they cannot give content to a claim to equality. It is not even clear that the group "women" can be sustained within a thoroughgoing postmodern theory. Without a socially determined set of desirable goods and a claim that women have fared poorly in respect to them, women have nothing more in common than any set of people who share a randomly chosen biological characteristic.

Of course, there is no reason why the objective of feminism must be some form of equality for women. The principal difficulty with feminist theories that center on deconstruction of social practices is not their rejection of equality but their incapacity to generate stable objectives of their own. It is undeniable that many attitudes and practices affecting women are products of "social construction," but it is also unavoidable that they should be so. Building social artifices is the vocation of human beings. Without social artifices, nothing would remain of us but survival instincts and bodily functions.

It is also true that social institutions need not have developed as they have, and that existing practices and attitudes have an impact on the welfare of women (mainly in ways that are themselves a function of existing practices and attitudes). But nothing follows from this, except perhaps a subject for discussion and reflection. No one can will a wholesale change in social norms and practices. These result from the combined actions of all of us, and are highly resistant to deliberate control. Further, to the extent that it is possible to engineer certain changes in social practice through a mechanism such as law, offending practices cannot be eradicated selectively without affecting the whole in unforeseen ways. One can think about what might be desirable and what measures might help to bring it about, but it is important to understand both that the starting point must be whatever social conditions now exist and that those conditions cannot be managed in a reliable way.[19]

Similarly, the notion of false consciousness leads nowhere. What we think desirable and how we believe it can be accomplished has surely been influenced by the prior course of social history. But no one escapes social influence, and women have no choice but to use the intellectual equipment they have on hand.[20]

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19. *See* Edmund Burke, *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event, reprinted in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 424, 453-54 (Peter J. Stanlis, ed. 1963) (on the complexity of social conventions and the dangers of destroying them).

20. For a thorough analysis of the notion of false consciousness, *see* ALAN WERTHEIMER, EXPLOITATION 258-64 (1996).

Apart from these general problems of deconstructionist theory, there is a special reason why postmodern insights cannot support a program for law. Feminists interested in radical social change often hope to enlist law to further their ends. But law itself rests on an immensely complex set of social attitudes and institutions. Most importantly, it depends on the existence of a general disposition on the part of the public to respect legal rules and treat them as standards of conduct—a disposition that may not survive if the rules of law depart too abruptly from prevailing expectations and beliefs.[21] For this reason, law cannot be used to force large-scale changes in social practice without undermining its effectiveness for that or any other purpose. It follows that the method of deconstruction can generate at most an agenda for discussion, not an agenda for law.

Consider, for example, a law forbidding the production and distribution of pornography in which "pornography" is defined as material that refers to sex and is degrading to women. Ideally, from the point of view of dominance theorists, just what counts as degrading to women should be defined by women plaintiffs, according to their own developing notions of offense. In this way, customs and norms surrounding sex can be remade through law in a manner more favorable to women.[22]

Yet this plan cannot be carried out without forsaking both the Constitutional tenets of free speech and conscience and certain ideals associated with law itself, such as fair warning of what activities may be subject to legal sanction.[23] While some feminists are quite ready to make this trade, law cannot be the medium because law cannot sustain such a radical change. Principles such as free speech and fair warning are very deeply lodged in our social consciousness, the products of centuries of thought about human dignity and social reciprocity. This may not make them irreproachable, but it does mean that when law abandons them, it risks losing the public respect on which it depends.

The progression of feminist thought I have discussed is an understandable one. When equal treatment does not lead immediately to parity in important social goods, it is not surprising that the objective of feminist reformers should shift to "substantive" equality. When substantive equality encounters practical and definitional obstacles, the course

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21. On the "internal aspect" of legal rules, *see* H.L.A. HART, THE CONCEPT OF LAW 55-56, 79-88 (1961). On the problems of enforcing legal rules and the dependence of law on habits of unreflective obedience, *see* Larry Alexander & Emily Sherwin, *Past Imperfect: Rules, Principles, and Dilemmas of Law* ch. 5 (manuscript on file with author).

22. *See* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 23 (1985) (antipornography law "defines an injury to us from our point of view"). *Cf.* MACKINNON, FEMINISM UNMODIFIED, *supra* note 16, at 105 (sexual harassment laws as a way for women to define their own legal injuries).

23. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (invalidating the Indianapolis version of the Dworkin-MacKinnon antipornography ordinance on First Amendment grounds).

naturally shifts again, to an attack on social institutions that appear responsible for unsatisfactory results.

Nevertheless, while there are useful ideas to be drawn from each of these strands of feminist theory, no step beyond the first—equal treatment—provides a sustainable a program for law. Equal outcomes for the group "women" cannot be defined without severing the group from its members, and in any event the practical obstacles to equal outcomes are immense. Social practices and beliefs cannot be altered suddenly and significantly by law, because law relies on social support. While these conclusions will no doubt be disappointing to many, it seems to me that the best legal state of affairs for women is the set of liberal freedoms that support equal treatment and allow unlimited argument, including radical argument, about women's conditions and ambitions.