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Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality

Laura W. Stein*

Feminist¹ legal scholars have been searching for one all-encompassing legal argument with which to challenge the subordination of women. They have sought a single form of analysis and argument that will persuade judges to end the oppression of women, that will persuade legislators to empower women, and that women will view as authentic. Some claim that such an approach is necessary to focus attention on the fact that many seemingly disparate practices combine to reinforce the subordination of women. Others imply that a single, new approach is necessary to jettison the baggage of past ways of thinking and to enable the system to approach legal matters with sensitivity to women's perspectives.

The feminist search for a single approach has often begun with the two legal doctrines that have done the most to empower women over the last several decades: privacy and equality. Courts have used privacy to guarantee women some degree of procreative freedom.² Congress and the courts have primarily utilized equality to free women from oppression in employment.³ Feminists writing in each area, however, have recently

* Associate Professor, New York Law School. I thank the readers of earlier drafts for their insights and suggestions: Scott Altman, Kathy Baker, Karen Gross, Bruce Hay, Linda Keenan, David Schoenbrod, Jeffrey Winkler, and Jennifer Zacks. For valuable assistance, I thank Joseph Molinari of the New York Law School Library and my research assistants, Donna Kantrowitz and Steven Simpson. I would like to give special thanks for helpful insights and encouragement to Stephen Massey, my colleague and friend, who passed away this year.

1. I use the word "feminist" to denote all persons engaged in the struggle against the social oppression of women.

2. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 154 (1973) (right of privacy "includes the abortion decision"); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of privacy extends to married couples' use of contraceptives).

3. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988) (Title VII's prohibition of sex discrimination in employment); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding that sexual harassment of women in the

identified dangers associated with these doctrines. Their critiques of privacy and equality are similar. Feminists criticize both doctrines for failing to transform power arrangements embodied in the status quo that reinforce the subordination of women to men.⁴ According to these scholars, using privacy and equality doctrines before courts and legislators is a strategy that can easily backfire by strengthening, rather than challenging, the status quo. Furthermore, feminists criticize the doctrines for being non-authentic; they force women to state claims in a way that may seem alien.⁵

These shortcomings have motivated feminists to call for the abandonment of each doctrine for some other approach. Some feminist scholars, writing about reproductive issues, call for a shift in analysis in procreative rights cases from privacy to equality, thus elevating equality as the one best doctrine to challenge women's oppression.⁶ At the same time, scholars

workplace can violate Title VII's prohibition of gender-based employment discrimination); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 717 (1978) (holding illegal under Title VII a pension plan that discriminated against women by requiring women to contribute more than men).

4. See, e.g., CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED 93, 101-02 (1987) [hereinafter MACKINNON, *Privacy v. Equality*] (criticizing privacy rhetoric for reinforcing rather than challenging the "separate spheres" ideology that has traditionally oppressed women); Rhonda Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 303, 314 (Jules Lobel ed., 1988) (arguing that while privacy doctrine has made some gains for women possible, at the same time "it has reinforced the original distinction between public and private that has been essential to the patriarchal differentiation of male from female, the family from the state and market, the superior from the inferior, the measure from the other"); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1158 (1986) (criticizing equality doctrine for being non-transformative because it is based on male norms of experience and perspective); Catharine A. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 48-49 (Jay L. Garfield & Patricia Hennessey eds., 1984) [hereinafter MacKinnon, *Male Ideology*] (criticizing privacy advocates for reinforcing separate spheres).

5. See, e.g., Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137, 140 (1990) (discussing the need to alter women's constitutionally-based arguments to allow a "more authentic feminist voice").

For a brief discussion of the feminist concept of authenticity, see Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 193-94 & n. 10 (1989-90). Cain discusses the view of some feminists that women cannot know their authentic selves now because society's patriarchal structure clouds their vision. Others, including Cain, believe that at least some glimpse of women's authentic selves is currently possible. *Id.*

6. See, e.g., MACKINNON, *Privacy v. Equality*, *supra* note 4, at 102 n.21

writing about employment discrimination urge women to base legal claims on appeals to our responsibilities to each other, rather than on appeals to rights-based claims such as demands for equality.⁷

This Article suggests that feminists need not seek out one doctrine or form of legal analysis to meet all feminist goals. Although feminists have illuminated real risks current legal doctrines present, the answer is not to abandon them for some other, better approach. Instead, to avoid even greater dangers, feminists must try to transform these doctrines. There is no reason why feminists must choose between privacy and equality or between equality and some other way of claiming entitlements. Instead, feminists can and should use the whole range of legal arguments available.

Part I explores the feminist critique of privacy doctrine, developed in the context of the abortion issue, and the feminist critique of equality doctrine, developed in the context of assessing legal responses to oppression in employment. The discussion highlights the parallels between the two critiques. Part II argues that despite the defects in privacy as currently constituted, the doctrine is not beyond redemption. Feminists should work to alter the doctrine's emphasis on the historic separation between state and home to a new emphasis on autonomy and personhood. Furthermore, to the extent that anti-privacy feminists extol equality as a cure-all substitute, they ignore that equality doctrine presents risks for women similar to those presented by privacy. Turning to the critique of equality, this Article recognizes that feminist commentators have identified genuine risks posed by continued appeals to equality. Yet these feminists have not considered adequately the possibility that equality too can be transformed to incorporate feminist values. By advocating responsibility-oriented legal arguments as a substitute for equality, the critics do not seem to fully appreciate the risks that accompany this new form of legal argumentation.

Finally, in Part III, this Article addresses the premise that underlies much of the feminist critiques of both privacy and

(privacy is ill-equipped to focus on women's well-being; equal protection could be "forcefully argued" instead); Colker, *supra* note 5, at 187; cf. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 840 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) and discussing MacKinnon's advocacy of a move from privacy to equality in abortion cases). For a general discussion of the feminist critique of privacy, see Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 117 (1992).

7. See Finley, *supra* note 4, at 1166-67.

equality: that feminists should have a unified legal approach to address all social subordination of women. This is not a desirable goal, from a theoretical or a practical standpoint. Instead, the best way for feminists to proceed is through the selective or joint application of approaches, while remaining conscious of and clear about the risks that each approach entails.

I. THE CRITIQUES OF PRIVACY AND EQUALITY

A. THE NARROWING OF THE DOCTRINES

The Supreme Court has used the right to "privacy" implicit in the constitutional guarantee of due process in part to protect from state intervention women's power to make procreative choices.⁸ At the same time, Congress has enacted various laws that guarantee women some degree of equality in the workplace⁹ and the Court has used the Equal Protection Clause to the same end. Recently, however, the Supreme Court has interpreted both privacy and equality in an increasingly narrow manner.

The Court has narrowed the identified purpose behind the privacy doctrine. In the context of refusing to extend the privacy right to protect consensual homosexual activity from crim-

8. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking down a state law prohibiting all abortions except when the life of the mother was at stake); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down on privacy and equal protection grounds a state law prohibiting dissemination of contraceptives to unmarried minors); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down a state anti-miscegenation law); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state law barring dissemination of contraceptives to married couples).

9. Several laws guarantee women some degree of equality in employment. The Equal Pay Act of 1963, 29 U.S.C. § 206 (1988), made it unlawful for covered employers to pay women less for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Id.* at § 206(d)(1). This was quickly followed by the broader protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1988), which prohibits covered employers from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id.* at § 2000e-2(a)(1). By prohibiting discrimination, Title VII in effect requires that the sexes be treated equally. Additionally, women can challenge discrimination by public employers under 42 U.S.C. § 1983 (1988), which prohibits state actors from depriving persons of their federally-created rights. A victim of a public employer's discrimination can sue under § 1983, alleging that the employer's action deprived her of the federal constitutional guarantee of equal protection of law. See, e.g., *Forrester v. White*, 484 U.S. 219, 220-21 (1988); *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991).

inal prosecution, the Court stated that the purpose of privacy doctrine is simply to protect decisions that historically have been regarded as improper objects of state interference.¹⁰ Under this interpretation, privacy is decidedly non-transformative; indeed, the whole purpose of privacy under this conception is to perpetuate the status quo.¹¹

The Court has also curtailed privacy doctrine by narrowing prior holdings, particularly by dismantling piece-by-piece the limited right to abortion recognized in *Roe v. Wade*.¹² In *Webster v. Reproductive Health Services*, a plurality of the Court formalistically upheld a range of state regulations that made abortions more difficult and costly for women to obtain.¹³ Next, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴ the Court cut back on the *Roe* framework significantly. Courts will no longer strike down restrictions on pre-viability abortions unless they are narrowly tailored to serve a compelling government interest;¹⁵ instead, even at the earliest stages of pregnancy, restrictions are valid unless they constitute an "undue burden" on the right to abortion.¹⁶

At the same time, the Supreme Court has signalled a retreat from the broad promise of equality doctrine. For example, in the last few years the Court has significantly restricted the ability of plaintiffs to prevail in suits brought under the federal anti-discrimination laws.¹⁷ Although many of these cases

10. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). Because states have long made homosexual conduct illegal, the Court found that it was constitutional for them to continue to do so. *Id.* at 192-94.

11. Reading *Bowers* as advocating a historical view of privacy may attribute more coherence to the opinion than it deserves. Justice White made it clear in the opinion that the Court was not deciding whether the state could criminalize *heterosexual* sodomy without running afoul of the Constitution—implying that a case involving heterosexuals might lead to a different result. *See id.* at 188 n.2. As the Georgia law at issue in *Bowers* illustrates, however, states have long criminalized all types of sodomy without distinguishing between them. *See id.* at 186 n.1. Thus, under the "historic" interpretation of the meaning of privacy, it is not clear how the Court can distinguish between heterosexual and homosexual sodomy.

12. 410 U.S. 113, 154 (1973).

13. 492 U.S. 490 (1989).

14. 112 S. Ct. 2791 (1992).

15. *Roe*, 410 U.S. at 155.

16. *Casey*, 112 S. Ct. at 2819-21. The *Casey* Court specifically overruled two earlier abortion cases based on the privacy doctrine: *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983). *Casey*, 112 S. Ct. at 2816-17.

17. *See, e.g., EEOC v. Arabian Amer. Oil Co.*, 111 S. Ct. 1227 (1991) (hold-

concerned race discrimination, most were equally applicable to women bringing claims of sex discrimination in employment. Perhaps the most important effect of these decisions is that they make it more difficult for plaintiffs to prevail in so-called "disparate impact" cases, in which they allege that a facially-neutral employment practice disparately affects a protected group.¹⁸ Thus, plaintiffs who could not prove that their employer intentionally treated them worse because of their gender found it difficult to prevail. These decisions reflect a retreat from a vision of the civil rights laws as designed to alleviate group oppression, the vision often expressed by feminists; instead the Court appears to view the laws as designed to help individual victims of intentional mistreatment.¹⁹ Although Congress has nullified these decisions to a large extent by enacting the Civil Rights Act of 1991,²⁰ the new Act has not fully reversed the Court's cramped reading of disparate impact doctrine.²¹ Furthermore, the Court's recent equal protection jurisprudence reflects its retreat from using equality as a doctrine to

ing that Title VII does not apply to Americans employed abroad by American Companies); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58 (1989) (making it more difficult for plaintiffs to prove "disparate impact" discrimination); *Lorance v. A.T. & T.*, 490 U.S. 900 (1989) (holding that plaintiffs must bring challenges to seniority systems under Title VII of the Civil Rights Act of 1964 within 180 days of the date the system was adopted, rather than 180 days from the date that plaintiff suffered an adverse effect due to the system).

18. See *Wards Cove*, 490 U.S. at 645-46.

19. See Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 *FORDHAM L. REV.* 523, 526-27, 531-33 (1991) (arguing that in *Wards Cove* the Court endorsed a "fault theory" of discrimination); see also Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* 96, 98-99, 104 (David Kairys ed., 1982) (identifying traditional disparate impact analysis as representing the victim's perspective, whereas disparate treatment analysis represents the perspective of the perpetrator of discrimination). But see Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 *FLA. ST. U. L. REV.* 1, 3 (1989) (arguing that *Wards Cove* might not have fundamentally changed disparate impact law).

20. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981, 1988, 2000e, 2000e-1 to -2, -4 to -5 & 16 (Supp. 1992)).

21. In particular, the statute largely codified the requirement first announced in *Wards Cove*, 490 U.S. at 656-58, that there is ordinarily a burden on the plaintiffs to show which of the employer's specific practices has led to the adverse impact. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. 1992). This may be a difficult burden for plaintiffs to meet, particularly if their employer has a complex decision-making process or has not kept good records of the results of each step in the process. The statute relieves plaintiffs of this burden only if they "can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis." *Id.* Although no court has yet interpreted this section, it would seem an extraordinary case

challenge group-based harms.²²

in which the elements of a decision-making process cannot be separated out at all.

Furthermore, under the Act's codification of disparate impact doctrine, even if a plaintiff does prove that a particular practice has a disparately negative impact on a protected group, the employer will still prevail if it can prove the practice is "consistent with business necessity." *Id.* at § 2000e-2(k)(1)(A)(i). The Court created this "business necessity" defense in 1971, at the same time it created disparate impact theory. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Initially the Court interpreted the business necessity exception very narrowly. In *Wards Cove*, however, the Court suggested that the defense was not overly difficult for defendants to establish. *Wards Cove*, 490 U.S. at 659 (holding that, in order to establish the business necessity defense, the employer need not show that the practice in question is "'essential' or 'indispensable' to the employer's business").

Rather than squarely settling this conflict, the 1991 Act leaves the term "business necessity" undefined. The Act's "Purposes" section does state that Congress intended to codify the concept of business necessity as courts understood it prior to *Wards Cove*. *See* Pub. L. No. 102-166 § 3(2), 105 Stat. 1071, 1071 (1991). Furthermore, the Act provides that only one specific interpretive memorandum "shall be considered legislative history of . . . any provision of this Act that relates to *Wards Cove*—Business necessity," *id.* at § 105(b); that memorandum mirrors the language of the "Purposes" section of the Act. *See* 137 CONG. REC. S15,276 (1991). Members of Congress and the President, however, nonetheless added legislative history concerning the business necessity defense. Legislative history that liberals in Congress contributed seems to agree with the interpretive memorandum. *See id.* at S15,233-34 (statement of Senator Kennedy that "[o]ne of the Civil Rights Act's fundamental purposes was to overrule *Wards Cove* and restore the law to its status under *Griggs versus Duke Power*"). Legislative history Republican Senator Dole added, however, states that Congress intended the Act to codify judicial understanding of business necessity expressed in all prior cases, *including Wards Cove*. *See id.* at S15,475-76 (statements of Senator Dole that "the bill is no longer designed to overrule the meaning of business necessity in *Wards Cove*," and "the present bill has codified the 'business necessity' test . . . reiterated in *Wards Cove*"). Because a conservative Court might find enough ambiguity in the Act and its legislative history to continue interpreting the business necessity defense broadly, plaintiffs in disparate impact suits may find victory difficult.

In other ways, however, the statute clearly overruled some conservative Supreme Court decisions. For example, the Act specifically reverses *Lorance*, which required individuals whom a seniority system disadvantages to challenge that system within 180 days of its adoption; instead, the Act provides them 180 days from the date the system was adopted, when they became subject to it, or when it adversely affected them. *See* 42 U.S.C. § 2000e-5(e)(2) (Supp. 1992). Similarly, Congress clearly decided that Title VII applies to Americans who work for American companies abroad. *See id.* § 2000e-1 (legislatively overruling *EEOC v. Arabian Amer. Oil Co.*, 111 S. Ct. 1227 (1991)).

22. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the Court applied the Equal Protection Clause to invalidate a program that gave minority-controlled businesses an advantage in obtaining municipal construction contracts. *Id.* at 511. A plurality held that municipalities cannot constitutionally remedy societal, as opposed to governmental, discrimination

B. THE CRITIQUES

Feminist critiques of privacy and equality coincide with this judicial retreat and may in part be motivated by it. The critiques do more, however, than express concern that courts may no longer construe the privacy right as encompassing a right to abortion or that equality guarantees may no longer effectively prohibit discriminatory practices that disparately impact women. The belief at the heart of both critiques is that, even beyond the danger of losing ground before a conservative Court, privacy (for some critics) and equality (for others) are not suitable or desirable conduits for feminist arguments.

Feminist scholars criticize privacy and equality doctrines on three grounds. First, both the privacy and equality critics claim that the approach they are criticizing entrenches the "separate spheres ideology," which has disadvantaged women throughout American history. Second, the privacy critics argue that placing abortion (or, presumably, any issue of importance to women) in the privacy framework allows jurists and others to consider it falsely as a sex-neutral issue, rather than claiming it as an issue that is profoundly related to the oppression of women. The equality critics make the opposite argument that, under an equality approach, issues of importance to women are often devalued as "women's issues." Third, some members of both groups of critics argue that the approach they criticize fosters values of autonomy and independence of self that have been important to men, while ignoring values that have been important to women, such as interconnection and relationships.

1. Reinforcing the Separate Spheres

For many years, feminists have criticized the legally en-

against particular racial groups by enacting race-conscious forms of relief that benefit the group in general. *Id.* at 504.

It seems likely that the current Court would be hostile to preferences for women, making it similarly difficult for feminists acting on a state political level to eradicate societal discrimination against women. It is true that, as a matter of doctrine, states and municipalities should have more latitude to enact gender preferences than racial preferences, since courts subject gender classifications to intermediate scrutiny while racial classifications receive strict scrutiny. See *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Croson*, 488 U.S. at 493-94. Nevertheless, the Court could easily extend *Croson* and refuse to recognize a constitutional difference between invidious discrimination and efforts to remedy discrimination in the gender context. If the Court views gender-conscious remedies designed to protect women from societal discrimination as equivalent to gender oppression, then it would be unlikely to sustain such remedies even under intermediate scrutiny.

trenched ideology of the separate spheres as harmful to women.²³ This ideology maintains that the world consists of two distinct and separable parts: public and private. The public sphere is the world of government and commerce, in which the power of the state is routinely involved. The private sphere is the realm of home and family, which, according to the ideology, should be free from state intervention.

The separate spheres ideology has been used to oppress women in several related ways. Historically, the ideal of separation served as a justification for excluding women from the public sphere—the locus of monetary and governmental power—on the ground that these public pursuits do not befit the gentler sex.²⁴ Although most explicit exclusions of women from the public sphere have become illegal over the last quarter-century,²⁵ the ideology has continued to make it difficult for women to enter or remain in the working world because it legitimizes discrimination by employers against female employees who have “private” responsibilities such as giving birth or raising children.²⁶

Furthermore, this exclusion from the public sphere has subordinated women in the private sphere.²⁷ Women come

23. For brief discussions of the development of the separate spheres ideology, see DEBORAH RHODE, *JUSTICE AND GENDER* 9-11, 14-16, 19-28, 125-31 (1989); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 958-59 (1984); Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW*, *supra* note 19, at 294, 297-99; Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW*, *supra* note 19, at 104, 118-24.

24. See Copelon, *supra* note 4, at 310-13.

25. But see *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding under the exception to Title VII women's exclusion from jobs as prison guards in male prisons in Alabama on the ground that prisoners might rape women in these positions and undermine order). Up until the Supreme Court's recent decision in *UAW v. Johnson Controls*, 111 S. Ct. 1196 (1991), it also appeared that businesses might exclude women (or, at least, women unable to demonstrate infertility) from thousands of jobs involving exposure to materials that are potentially harmful to fetuses. Lower courts had approved such exclusions. See *UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989) (en banc) (upholding the legality of a fetal protection plan on the ground that it constituted a bona fide occupational qualification), *rev'd*, 111 S. Ct. 1196 (1991); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190-91 (4th Cir. 1982) (holding that fetal protection programs are lawful if an employer can establish “business necessity”). The Supreme Court, however, found that Title VII prohibited fetal protection plans. *Johnson Controls*, 111 S. Ct. at 1209-1210.

26. See Finley, *supra* note 4, at 1120.

27. See Sunstein, *supra* note 6, at 827 (explaining the feminist argument that “the domestic sphere has been devalued and used as a major arena for the subordination of women”).

under the power of men in the private sphere because exclusion from the public realm leads to dependence on men for most social goods, such as money, legal rights, and prestige. Perversely, after relegating women to a subordinate status in a lower-status sphere, the separate spheres ideology causes society to ignore even gross instances of oppression of women within the private sphere.²⁸

The feminist critics of privacy argue that privacy doctrine reinforces the ideology of the separate spheres.²⁹ They contend that the underlying assumption of privacy doctrine as currently constituted is that non-interference by the government in the private sphere will guarantee autonomy to private citizens.³⁰ This theory, however, does not work for women. Privacy doctrine carves out a sphere relating to marriage, family, and heterosexual activity that is free from government interference. Yet at the same time, it entrenches the existing male-dominated power structure within the private sphere as *prima facie* just simply because the power structure is not the direct result of governmental coercion.³¹ According to its critics, privacy

28. For example, because government is not supposed to interfere in "private" matters, the law in several states permits husbands to rape their wives. See RHODE, *supra* note 23, at 249-51 (discussing changing legal attitudes toward marital rape). Furthermore, in many communities, police have been unwilling to respond to physical abuse of women by their husbands or boyfriends. *Id.* at 237-44.

For a critical response to the feminist argument against the public/private distinction, see generally Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

29. See, e.g., MACKINNON, *Privacy v. Equality*, *supra* note 4, at 96-97; MacKinnon, *Male Ideology*, *supra* note 4, at 48-49; Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 111-13 (1989); Polan, *supra* note 23, at 299.

30. MACKINNON, *Privacy v. Equality*, *supra* note 4, at 96; MacKinnon, *Male Ideology*, *supra* note 4, at 51; Olsen, *supra* note 29, at 112.

31. See MACKINNON, *Privacy v. Equality*, *supra* note 4, at 99-100. According to Catharine MacKinnon, privacy doctrine views injury as arising when government violates the private sphere. The doctrine is blind to injury "within by and because of" the private sphere. *Id.* at 100. See also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) [hereinafter MacKinnon, *Reflections*] (explaining that privacy will not protect women because it necessarily "belongs to the individual with power. Women have been accorded neither individuality nor power.").

Similarly, Frances Olsen explains:

Much of privacy doctrine is based on the assumption that "so long as the public does not interfere [with private life], autonomous individuals interact freely and equally." Yet, in so many aspects of life, certainly including sexuality, most women are not actually autonomous individuals able to interact freely and equally with men. To change this situation "will require intervention, not abdication."

doctrine thereby legitimizes the private oppression of women. The inevitable result is that rights based on privacy will be extremely limited. Thus, for example, the privacy-based right to abortion does not empower women to control their own sexual destinies; women are still coerced into sexual relationships.³²

Similarly, the feminist critics of equality argue that equality doctrine perpetuates the ideology of the separate spheres. Equality critics object to two versions of equality that have been used by advocates and scholars seeking to empower women in the workplace: the equal treatment and special treatment approaches.³³ The proponents of equal treatment demand that women and men be treated with strict formal equality, contending history demonstrates that any departure from such an approach will be used as an excuse to disadvantage women.³⁴ Equality critics respond by noting that formal equality does not challenge the separation of the spheres. Instead, it merely allows women who are like men to adopt the

Olsen, *supra* note 29, at 112 (quoting MACKINNON, *Privacy v. Equality*, *supra* note 4, at 99, 100).

32. See MACKINNON, *Privacy v. Equality*, *supra* note 4, at 95-96, 99. Indeed, MacKinnon contends that the abortion right primarily serves to make women more sexually available to men by depriving women of the one male-accepted reason for saying no to sex—fear of pregnancy. *Id.* Of course, MacKinnon does not advocate the wholesale abandonment of the right to abortion because of this effect. As she explains, "*Roe v. Wade* presumes that government nonintervention into the private sphere promotes a woman's freedom of choice. When the alternative is jail, there is much to be said for this argument." *Id.* at 100.

MacKinnon's assertion that the primary effect of the privacy-based abortion right is to liberate sexual aggression is questionable. Many women desire heterosexual sex without the risk of forced motherhood; it is presumptuous to think all such women are victims of false consciousness. See Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 768-70 (1990). For these women, the right to abortion, even if they never exercise it, allows them to enjoy their sexuality in ways that otherwise might have been impossible. Although for some women the right to abortion deprives them of their last excuse to abstain from sex, thus exploiting them further, other women experience the right to abortion (even a right rooted in privacy) as liberating. See also Copelon, *supra* note 4, at 331 n.37 (disputing MacKinnon's argument that "heterosexual relations in a gender oppressive society are by definition oppressive" as a "flat and dangerous stereotype").

33. For a discussion of the opposition between the equal treatment and special treatment camps, see Finley, *supra* note 4, at 1143-48; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1291-1301 (1987); Diana Majury, *Strategizing In Equality*, in AT THE BOUNDARIES OF THE LAW 320, 320-23 (Martha A. Fineman & Nancy S. Thomadsen eds., 1990).

34. A leading example of this school of thought is Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

male institutional role.³⁵

The special treatment proponents argue that to attain actual equality in employment opportunities, the law must take into account some real differences between men and women, most notably biological differences.³⁶ To have substantive equality between the sexes, they argue, the law must accommodate women's particular reproductive role.³⁷ Critics of the special treatment approach contend, however, that "the special

35. As Lucinda Finley explains, the equal treatment school tells us specifically to treat women the same as men, so that women can have the same opportunities men have had to compete in the male-valued work world, and so that women can escape the female populated, and male-devalued, home world. Thus, it implicitly accepts the male norms of "competition" and "success." "To demand only the chance to compete is to embrace the status quo in a way that tends to sanction oppressive arrangements—for example, the necessity of choosing between children and career." In this way a *focus on equal treatment accepts the idea that work and family are dichotomous spheres*, and asks primarily that women be allowed out of one world and into another.

Finley, *supra* note 4, at 1155-56 (emphasis added) (quoting Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 427 (1981)); see also Littleton, *supra* note 33, at 1292.

36. See, e.g., ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 156-58 (1980); see also Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 430-34 (1981) (discussing a view of equality under which women are granted both equal and special rights); Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in FEMINISM AND POLITICAL THEORY 117, 136-37 (Cass R. Sunstein ed., 1990) (advocating a special treatment approach to the issue of maternity leave).

37. The implications of this debate are most clearly illustrated in the controversy over state laws requiring employers to provide leave for maternity-related disability, but not for other temporary disabilities. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (upholding, over a Title VII preemption challenge, a California law requiring employers to provide pregnant women with unpaid "reasonable maternity leave" for up to four months). Proponents of equal treatment have argued unsuccessfully that such state laws are inconsistent with Title VII's declaration that "women affected by pregnancy, childbirth, and related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1988). See, e.g., Brief for the National Organization for Women, et al., as *Amici Curiae* in Support of Neither Party, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (arguing that California's law guaranteeing a period of unpaid maternity leave should only survive preemption if it is read to grant leave for *all* temporary disabilities). They are concerned that guarantees of "special" benefits will ultimately stigmatize women. See, e.g., Williams, *supra* note 34, at 367. In contrast, special treatment advocates favor such "pregnancy preferences," reasoning they are necessary to protect women from the significant risk of being forced out of the workplace by pregnancy. See, e.g., Linda J. Kreiger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE L. REV. 513, 519-21 (1983); *The*

treatment approach may help perpetuate the separate spheres ideology, both because it can be interpreted as accepting that women, as childbearers, are and will always be the primary childrearers, and because it leaves unchallenged workplace values in areas besides childbearing that stem from the separate spheres."³⁸

According to equality theory critics, neither form of equality doctrine will liberate women from oppression by men within the private sphere. At best, the doctrine may allow some women to operate in the public, rather than the private, sphere.³⁹ Neither version of equality challenges the values of the public sphere. Rather than achieving power for women generally, the minority of women who do operate in the public sphere will, in order to succeed, necessarily be co-opted into the preexisting male-defined value system.

The equality doctrine arguably makes the institution of separate spheres appear not only inevitable but also just. The promise of equality recently embedded in our law has allowed some women to succeed in the public sphere. This feeds into the mythology that women who do not succeed in the public sphere choose to stay in the private sphere and are thus happy with the existing power arrangement. According to this reasoning, if some women succeed and achieve power in the world as currently structured, then the fault for the disempowerment of the others lies in themselves, not in the system.⁴⁰ If a group's disempowerment is a result of its own freely made

Supreme Court, 1986 Term—Leading Cases 101 HARV. L. REV. 119, 326-27 (1987) (discussing *California Fed. Sav. & Loan Ass'n*).

38. Finley, *supra* note 4, at 1157 (footnote omitted).

39. It is true that over the last couple of decades increasing numbers of women (even married women with children) have entered and remained in the workforce. To that extent, one might argue that a large number of women do operate in the public sphere or, perhaps, in both spheres. But women's presence in the public sphere remains marginalized because women remain in low paying service professions where they have little real power. See RHODE, *supra* note 23, at 163. Furthermore, women who attempt to live in both worlds often find the experience difficult and damaging rather than empowering. "The separation [of the spheres] has rendered working women's lives into a stressful, exhausting juggling act that leaves them little time or energy for feeling fulfilled and expanded by their dual roles and their relationships within each role." Finley, *supra* note 4, at 1165.

40. This is an argument against comparable worth that students in my employment discrimination class have voiced. Their theory is that society has no obligation to ensure that a fair amount of money is paid for traditionally female work; after all, if women want more money, Title VII has opened the door for them to go out and find higher-paying, traditionally male work.

choices, how can it be unjust?⁴¹

2. Identifying Gender Issues

Privacy critics also fault the doctrine for its failure to identify abortion as an issue about women's subordination.⁴² They argue that privacy doctrine will never transform the world into a less oppressive place because it turns women's attention away from issues of sexual oppression.⁴³ Privacy doctrine views abortion as an abstract question about the role of the state. This vision wholly ignores the sexual oppression that leads to unwanted pregnancy, oppression that takes many forms from rape to the social conditioning that makes women unable to say no, or, worse, unable even to want to say no.⁴⁴ By ignoring women's oppression, privacy doctrine makes it more difficult for feminists successfully to attack that oppression.⁴⁵

41. For an explanation of the flaws with this reasoning, see RHODE, *supra* note 23, at 164-67. Rhode points out that this mythology of "choice" ignores social constraints on women's employability, such as "cultural expectations" and "cultural stereotypes" that may cause many women to invest less in developing their human capital. *Id.* at 165-67. In addition, it ignores the fact that many women bear a disproportionate burden with regard to family responsibilities. *Id.* at 167; see also Freeman, *supra* note 19, at 98 (criticizing the argument that people choose disempowerment as applied in the context of race discrimination).

42. See, e.g., MACKINNON, *Privacy v. Equality*, *supra* note 4, at 98-102; Olsen, *supra* note 29, at 111-13.

43. See MACKINNON, *Privacy v. Equality*, *supra* note 4, at 93 (criticizing privacy doctrine for its failure to "situate abortion and the abortion right in the experience of women").

44. See *id.* at 94-96.

45. MacKinnon also argues that when the Supreme Court embraced abortion as a private privilege as opposed to a public right, it eliminated the argument that the government has an obligation to fund abortions. *Id.* at 100-01. Under *Roe*, "women are guaranteed by the public no more than what we can get in private—that is, what we can extract through our intimate associations with men." *Id.* at 100. Privacy theory does not mandate state aid for abortion because the state need not give women any options beyond what they have in private—and poor women have no private option to have an abortion. See *id.* at 101. MacKinnon, however, never explores the possibility of transforming the right to privacy in a more positive way that would require public abortion funding. See *infra* text accompanying notes 87-88 (discussing Dorothy Roberts's proposal for transforming privacy); see also McClain, *supra* note 6, at 135-37 (discussing privacy-based arguments for the funding of abortion).

Furthermore, MacKinnon uses this funding argument to advocate abandoning privacy doctrine in favor of an abortion right rooted in equality theory. See MACKINNON, *Privacy v. Equality*, *supra* note 4, at 100-02. But it is far from clear that the Court would hold, even on equal protection grounds, that the government has an obligation to fund abortions. The Court might eventually accept the argument that by prohibiting abortions states deny women equality by denying them the choice that men have to control their reproduc-

In a similar vein, equality critics contend that equality in its equal treatment form does not do enough to help women. They argue that the equal treatment principle accepts men as the norm, and gives women rights only to the extent that women are like men.⁴⁶ As a consequence, although the principle of formal equality helped eradicate some of the most gross and senseless oppression of women (for example, irrational exclusions from traditionally male jobs), it has not and cannot help in instances in which there are "real" differences between men and women, whether biologically or socially constructed.⁴⁷ Instead, the equal treatment approach forces women to deny those differences.

Yet equality critics also condemn the special treatment form of the doctrine. They argue that it causes issues of importance to women to be labeled as "women's issues," thus ensuring the legal system will undervalue these concerns.⁴⁸ The entitlements special treatment adherents claim in the name of ultimate equality are special only because men do not desire them for themselves.⁴⁹ Viewed in this light, the term "special" inevitably becomes pejorative "because of the history of glorifying that which is male and devaluing the experiences and qualities of women."⁵⁰ Because "special" entitlements are, by definition, non-male, and thus, in our social context, non-legitimate, it will always be an uphill battle for women to get them. Moreover, once obtained, these entitlements will always stigmatize women by reinforcing detrimental stereotypes.⁵¹

Thus, while the privacy critics criticize privacy for its failure to label abortion as a women's issue, the equality critics condemn special treatment equality precisely because it identi-

tion. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2846 (1992) (Blackmun, J., concurring in part and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."). However, even if the Court accepts the equality rationale, the government could still deny abortion funding on the theory that a woman's poverty, not any state action, stands in the way of her exercise of equal legal rights. See Gavison, *supra* note 28, at 32-33.

46. See, e.g., Law, *supra* note 23, at 967-68; Scales, *supra* note 36, at 427-28.

47. See Law, *supra* note 23, at 988-1002 (documenting the equal treatment approach's failure to deal adequately with cases involving classifications based on "real" differences).

48. Finley, *supra* note 4, at 1158.

49. See *id.* at 1156; Majury, *supra* note 33, at 322-23.

50. Finley, *supra* note 4, at 156-57; see also MARTHA MINOW, MAKING ALL THE DIFFERENCE 58 (1990).

51. See Finley, *supra* note 4, at 1157.

fies pregnancy as a women's issue. Ultimately, these two critiques represent the double bind of disempowerment. On one hand, if we fail to name our needs as women's needs we allow the powers-that-be to ignore the fact that women are subordinated. On the other hand, if we do identify our needs as women's needs, we risk either having them denied or being stigmatized by the request, because women, and thus women's needs, are devalued by the system.⁵²

3. Ignoring Women's Values

Finally, a group of feminists sometimes referred to as "different voice" feminists⁵³ or "cultural feminists"⁵⁴ criticize privacy because it embraces the traditionally male view of humans as independent, autonomous right holders, while ignoring the traditionally female view of humans as interconnected and flourishing through relationships.⁵⁵ For example, in reacting to privacy-based arguments for a right to abortion, the critics argue that "the pro-choice perspective assumes 'that we are all, in some sense, atomized individuals with competing rights, rather than beings whose very existence is rooted in profound interconnections with each other.'"⁵⁶ The critics contend that privacy-based arguments for abortion rights ignore or trivialize

52. See MINOW, *supra* note 50, at 20-23; Mary E. Becker, *Politics, Differences, and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 169.

53. This appellation refers to Carol Gilligan's book, *In a Different Voice*, in which she argued that women and girls often resolve moral dilemmas in a different way from men and boys. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Specifically, she argues that whereas men's moral reasoning often refers to abstract rights (termed an "ethic of justice"), women often couch their analysis in terms of their responsibilities to others and to themselves (termed an "ethic of care"). *Id.* at 35-38. For a series of feminist assessments of Gilligan's work, see generally the essays contained in *FEMINISM & POLITICAL THEORY*, *supra* note 36, at 15-113.

54. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835-38 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13-15 (1988).

55. See, e.g., Colker, *supra* note 5, at 158 ("Feminists need to replace the phrase 'pro-choice' with a phrase that is more centrally 'pro-women.'"); see also Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81-83 (1990).

For a general critique of cultural feminism, see Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, in *FEMINIST THEORY IN PRACTICE AND PROCESS* 295, 298-304 (Micheline R. Malson et al. eds., 1986). For a critical analysis of the cultural feminist approach to law, see generally Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

56. Colker, *supra* note 5, at 165 (quoting KATHLEEN McDONNELL, *NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION* 53 (1984)).

the connection between the pregnant woman and the fetus, thus overlooking the moral value of human connection and the importance of interpersonal responsibilities.⁵⁷

Similarly, some feminists criticize equality for emphasizing male values like autonomy over female values like interconnection. They argue that claims for equal rights, like all rights claims, are premised on the liberal conception of the self as essentially separated from others.⁵⁸ Hence, under traditional formulations, the equal treatment mode of equality at best gives some autonomous right holders the entitlement to the same rights as other autonomous right holders. In the special treatment mode, equality simply gives particular autonomous right holders some extra rights. Thus, because of their basis in traditional liberalism, equality claims do not easily accommodate values like "interconnectedness and care."⁵⁹ Once again drawing on cultural feminist thought, the equality critics link the treasured value of autonomy with men and the ignored value of interconnection with women.⁶⁰

C. THE PROPOSED SOLUTIONS

1. The Privacy Critics

In light of their critique, several of the privacy critics argue feminists should try to assert that procreative rights derive from the constitutional guarantee of equal protection rather than privacy.⁶¹ These privacy critics urge that by comparing men's and women's status, equality doctrine will focus atten-

57. See *id.* at 165-68, 179. As an example of the devaluation of interpersonal responsibility, Colker points to amicus curiae briefs filed on behalf of the National Organization for Women and on behalf of Catholics for a Free Choice in *Webster v. Reproductive Services*, 492 U.S. 490 (1989). These briefs analogized abortion prohibitions to compelled organ donation and reasoned that, because the right of privacy would clearly prohibit forced organ donation, it must also prohibit forced pregnancy. Colker faults this analysis for "denying the importance of values of donation" and asserts that it "refuses to acknowledge that we may want to live in a world in which we have interconnected responsibilities to each other." Colker, *supra* note 5, at 179, 180.

58. Finley, *supra* note 4, at 1159.

59. *Id.* at 1161.

60. *Id.*

61. See Colker, *supra* note 5, at 142, 174-75 (arguing that by couching arguments for abortion rights in privacy terms, feminists "risked losing our own understanding of the radical *equality-based rights* we should be seeking in the abortion area") (emphasis added); MACKINNON, *Privacy v. Equality*, *supra* note 4, at 102 n.21 ("The discussion in this speech is a beginning attempt to recast the abortion issue toward a new legal approach and political strategy: sex equality.").

tion on the social oppression that has led to a world in which "[w]omen often do not control the conditions under which they become pregnant."⁶² They claim such an inquiry would challenge women's subordination rather than reinforce the ideology of the separate spheres.⁶³ Furthermore, they argue that a sex inequality approach to abortion will identify reproductive issues as gender issues.⁶⁴ Finally, they contend that an equality approach will encourage judges to listen to women's experience regarding abortion as they compare unwanted pregnancy to experiences that affect men's liberty.⁶⁵ Thus, judges would develop an appreciation of women's situations and women's values.

2. The Equality Critics

In light of the flaws and dangers identified in both strands of equality theory, one of the principal equality critics, Lucinda Finley, proposes two ways to "enlarge our legal discourse."⁶⁶ First, lawyers and judges must stop treating differences as problematic and stop focusing on assimilation as the ideal. Instead, they should view differences as relational and not as necessarily justifying negative treatment.⁶⁷ To do this, lawyers and judges must switch from talking about "differences," with all the negative connotations of that term, and instead talk about "varieties" or "nuances."⁶⁸ Furthermore, to ensure that people are not stigmatized because they vary from the dominant group, lawmakers will have to listen to the perspectives of the disempowered.⁶⁹ Second, Finley urges that lawyers and judges supplement claims for "rights" with a language of "responsibilities."⁷⁰ By asking the law to acknowledge the ways in which people are responsible to each other, the law will recognize important values such as community and interconnection.⁷¹

62. MacKinnon, *Reflections*, *supra* note 31, at 1312.

63. See Olsen, *supra* note 29, at 120.

64. See MacKinnon, *Reflections*, *supra* note 31, at 1311.

65. See Colker, *supra* note 5, at 174-75.

66. Finley, *supra* note 4, at 1166.

67. *Id.* at 1166; MINOW, *supra* note 50, at 52-53.

68. Finley, *supra* note 4, at 1170.

69. See *id.*

70. *Id.* at 1166-67.

71. *Id.* at 1171. Robin West, a critic of liberal privacy doctrine, similarly advocates couching women's arguments against abortion restrictions in a language of responsibilities rather than rights. West, *supra* note 55, at 82-85. But cf. John Hardwig, *Should Women Think in Terms of Rights?*, in FEMINISM AND POLITICAL THEORY, *supra* note 36, at 53, 58 (arguing that women should

II. CRITIQUING THE CRITIQUES

The feminist critics make a convincing argument that the legal concepts of privacy and equality as currently constituted are neither liberating nor authentic to women. Their arguments, however, are vulnerable to criticism on two grounds. The critics accept the current versions of privacy and equality as given, without assessing whether there is a way to transform, and thus redeem, these doctrines. In fact, feminists can shift these approaches in directions that would address much of the critiques.⁷² Second, the proposals for change do not solve the problems the critics identify. The privacy critics' advocacy of equality as a cure-all is not convincing because equality doctrine as currently constituted suffers from many of the same defects as privacy. The equality critics' suggestion that we abandon traditional doctrines in favor of appeals to responsibility and interconnection is far riskier than attempting to transform equality doctrine.

A. PROBLEMS WITH THE CRITIQUE OF PRIVACY

1. The Possibility of Redeeming Privacy

It is not clear whether the feminist critique of privacy solely concerns privacy as a constitutional doctrine or whether it is directed more broadly at the entire legal, or even philosophical, concept of privacy. In any case, the critique accepts current definitions of privacy as given and does not explore whether there are ways of changing privacy to accommodate women's experiences and women's arguments.⁷³

not think in terms of rights in the context of intimate relationships because "[t]hinking in terms of rights rests on a picture . . . of the person as atomistic, primarily egoistic, and asocial—only accidentally and externally related to others.").

72. This is not to suggest that changing doctrines is a simple task. Legal method, with its reliance on precedent, tends to reinforce the status quo. See generally Mary J. Mossman, *Feminism and Legal Method: The Difference it Makes*, in *AT THE BOUNDARIES OF THE LAW*, *supra* note 33, at 283. Yet the difficulty of the task is no reason for abandoning it when it holds real promise for feminists.

73. This is particularly surprising in MacKinnon's case because she has never accepted the concept of equality as a given. See CATHARINE A. MACKINNON, *Difference and Dominance*, in *FEMINISM UNMODIFIED*, *supra* note 4, at 32, 41 [hereinafter MACKINNON, *Difference and Dominance*] (advocating an approach to equality that asks whether any group is dominated rather than whether one group is different from another). MacKinnon has eloquently criticized early feminist legal theory and practice precisely because it accepted doctrine as given. As she explains:

Feminists criticize privacy doctrine for entrenching the ideology of the separate spheres, for failing to recognize the gender dimensions of the issues that it touches, and for ignoring women's values. This indictment is clearly true of the current constitutional doctrine of privacy. In *Bowers v. Hardwick*⁷⁴ the Court appeared to define constitutional privacy as solely concerned with keeping the state out of the sphere from which it has been traditionally excluded.⁷⁵ This view of privacy by definition entrenches the ideology of the separate spheres. Furthermore, it does nothing to heighten awareness of gender implications or to admit female values into legal discourse. As Judge Blackmun's dissenting opinion in *Bowers* indicates, however, this is not the only way to interpret a constitutionally based privacy right. In his dissenting opinion, Justice Blackmun demonstrated a very different understanding of the constitutional right to privacy. He specifically rejected Justice White's historically oriented theory.⁷⁶ Instead, Justice Blackmun viewed the privacy right as the right of individuals to autonomy over "the most intimate aspects of their lives."⁷⁷ Such an approach may hold some promise for women.⁷⁸

The initial transmutation of the feminist impulse into law lost a lot in translation, creating an approach that has not changed much to the present. Remaining largely within traditional legalism, early practice and scholarship tended to accept reigning legal assumptions and method: laws developed when women were not allowed to learn to read and write, far less vote, enunciated by a state built on the silence of women, predicated on a society in which women were chattel, literally or virtually. In these early legal forays, existing doctrine was largely accepted as given—with the not minor exception that it be applied to women. Creativity meant shoeorning reality into doctrine.

MacKinnon, *Reflections*, *supra* note 31, at 1285-86.

74. 478 U.S. 186 (1986).

75. See *supra* notes 10 and 11 and accompanying text for a discussion of the *Bowers* Court's conception of privacy.

76. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) ("Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'") (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

77. See *id.* at 199-200, 203-13 (Blackmun, J., dissenting). Thus, Blackmun criticized the anti-sodomy statute at issue on the ground that it "denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity." *Id.* at 199.

78. In addition to linking privacy to autonomy, however, Blackmun also delineated a notion of privacy that protects activities occurring within one's home from state interference. See *id.* at 206-08. This conception of privacy clearly reinforces the ideology of the separate spheres.

A recent decision by the Texas Court of Appeals further illustrates that courts need not interpret the right to privacy in the *Bowers* majority's cramped manner. That court struck down a Texas statute that prohibited

The critiques of the Court's current interpretation of privacy do not constitute an indictment of privacy as a general concept. Privacy need not be rooted in history to have meaning. The concept of privacy can be understood as designed to advance certain values that can have content independent of historical attitudes.⁷⁹ Some of these values can resonate with women. Perhaps the most common value identified with privacy is that described by Justice Blackmun in *Bowers*—autonomy over important personal decisions. Indeed, a majority of the Court previously linked privacy with autonomy.⁸⁰ Numerous commentators have refined this "autonomy" approach, arguing that decisional privacy doctrine should be seen as protecting "personhood." Constitutional privacy doctrine does not protect autonomy absolutely; it does not protect a person's right to make *any* choice that he or she wants. As a limiting principle, personhood theorists suggest that privacy protects us from government interference with things that "are so important to our identity as persons—as human beings—that they must remain inviolable, at least as against the state."⁸¹ Indeed, the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* endorses to a degree this personhood conception of privacy.⁸²

same-sex intercourse, finding that the statute violated the right to privacy implicit in the Texas state constitution. See *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992). The Supreme Court of Texas has granted a petition to review *Morales*. 35 TEX. SUP. CT. J. 117 (1992).

79. For example, Ruth Gavison describes the values privacy protects as including "a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 442 (1980). Gavison's notion of privacy, however, does not include protection of abortion rights. See *id.* at 436.

80. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

81. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989); see also *id.* at 752-54 (discussing the personhood approach to privacy).

82. *Casey*, 112 S. Ct. 2791, 2807 (1992). As the joint opinion of Justices O'Connor, Kennedy and Souter explains, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* (emphasis added). This section of the joint opinion was joined by Justices Blackmun and Stevens. *Id.* at 2802.

Unfortunately, the authors of the joint opinion ignored the greater implication of "personhood" privacy theory. Although they recognized that the ability to make the choice whether to end a pregnancy is related to per-

Yet the concept of privacy as autonomy troubles some feminists almost as much as Justice White's historical approach to privacy. According to cultural feminists, because autonomy is valued more by men than by women, the result of emphasizing autonomy is that the law excludes the female value of interpersonal responsibility.⁸³ Although there is a risk that stressing autonomy or personhood as a value, to the exclusion of other values, can reinforce an atomistic conception of society, autonomy still has value for women. Some degree of autonomy, for example, must be presupposed for people to enter into fulfilling relationships.⁸⁴ The desirable interconnectedness of persons that cultural feminists identify as a core female value also requires a guarantee of autonomy. Furthermore, recognizing the personhood of citizens can be especially important to women of color, whose personhood was long denied by the legal system.⁸⁵

sonhood, they nonetheless upheld certain restrictions on abortions—such as waiting periods and onerous reporting requirements—which, as a practical matter, foreclose many poor and young women from obtaining abortions.

83. See *supra* text accompanying notes 53-57 (discussing the cultural feminist critique of privacy).

84. See, e.g., Susan G. Kupfer, *Autonomy and Community in Feminist Legal Thought*, 22 GOLDEN GATE U. L. REV. 583, 585-86, 592-99 (1992); see also Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1246-51 (1992) (arguing that in many ways the defense of abortion rights rooted in an appeal to autonomy is similar to the defense rooted in an appeal to responsibilities); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7 (1989) (arguing for a reconception of autonomy in feminist terms).

85. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1468-69 (1991).

Jed Rubenfeld has offered a critique of the "personhood" version of privacy. See Rubenfeld, *supra* note 81, at 754-61. Rubenfeld recognizes that proponents of a personhood approach to privacy advocate either a value-driven or a value-neutral approach to the doctrine. *Id.* at 756. He rejects the value-driven approach, which urges courts to protect those things that the commentators, based on their values, believe are related to personhood. Such an approach, Rubenfeld warns, ultimately licenses judges to infuse the doctrine with their own values; these may differ strongly from the commentator's own. *Id.* For example, while a commentator may think that homosexual sex fosters personhood and thus deserves protection, it seems highly unlikely that a majority of the current Supreme Court would agree. *Id.* Rubenfeld also rejects a number of formulations of a value-neutral approach, on the ground that they are incoherent. *Id.* at 756-82. It is unclear, however, if judges are any less likely to infuse personal values into their decision making when the applicable doctrine employs value-neutral terms. Compare Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (arguing that it is better to leave judges with the impression that law is determinate because that will better constrain their power) with MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 199-206

The slogans chanted or held aloft on signs at any pro-choice rally reflect the power that the concept of autonomy can hold for women.⁸⁶ Even if such appeals originally stemmed from the law's treatment of abortion as a privacy/autonomy issue, their continuing presence as a rallying cry indicates that autonomy has some intrinsic force that attracts many women. Hence, although it is important to recognize the risk that appeals to autonomy can create (particularly if valuing autonomy is seen as a reason to ignore or discard other more communitarian values), the concept should not be discarded. Feminists simply must be wary.

Moreover, a negative right of autonomy is not the only value privacy can protect. Certain feminist scholars have articulated visions of privacy that accord with feminist concerns and values. For example, Dorothy Roberts offers a vision of a "positive" right to privacy that would authorize the government not simply to refrain from interfering with personhood, but also to act when action is required to ensure personhood.⁸⁷ This vision would take into account that, at least for poor women, "being left alone" may not guarantee dignity and autonomy.⁸⁸

Retaining some form of privacy doctrine, despite its risks,

(1987) (reiterating the critical legal studies argument that judging is inevitably a political act). Thus, Rubinfeld may reject the value-driven approach to personhood too hastily.

Rubinfeld's rejection is especially troubling given the much more limited nature of the approach he advocates. Rubinfeld urges courts to transform the privacy inquiry into a consideration of whether the ramifications of a particular state action are so pervasive as to be totalitarian. Rubinfeld, *supra* note 81, at 784-87. He posits that this approach will continue to protect some of the same things that personhood theory protects, such as the right to abortion. *Id.* at 788-91. Rubinfeld concedes, however, that his approach is narrower than personhood in some ways; for example, it would likely have no effect on state laws prohibiting women from having children. *Id.* at 796-97. *But cf.* Roberts, *supra* at 1472 (arguing that punishing drug-addicted mothers for the harm done to their fetuses violates the right to privacy because "[d]enying someone the right to bear children—or punishing her for exercising that right—deprives her of a basic part of her humanity"). Furthermore, Rubinfeld's theory of privacy does not apply outside the framework of government action. By definition, non-totalitarianism views privacy as solely concerned with state-based coercion. In contrast, the personhood version of privacy could apply to state tort schema, and thus could be used to combat private, as well as public, privacy invasions.

86. Slogans that I have seen at rallies include: "Our bodies/our lives/our right/to decide," "Keep your laws off my body," and "Not the church/not the state/women must decide our fate."

87. Roberts, *supra* note 85, at 1479.

88. *Id.* at 1478.

is also desirable because it can provide a more complete way for women to express some injuries, such as the injury caused by sexual harassment. As Catharine MacKinnon has discussed at length, making sexual harassment actionable as a form of sex discrimination names it as a harm to women as a group, as something that happens to women "because they are women."⁸⁹ This is clearly important; it lets women know that they are not isolated in their victimization and that the victimization is not their fault.

The group harm, however, is not the only harm associated with sexual harassment. Although sexual harassment hurts women as a group because of their group membership,⁹⁰ it also hurts individuals in ways deeply related to their personhood. Women have described sexual harassment as depriving them of their dignity or self-respect.⁹¹ A feminist vision of privacy could center around such harms to women's personhood. By using discrimination law and privacy law together, legal decision makers could more fully recognize the harm befalling victims of sexual harassment by recognizing both the group and the individual aspects of that harm.

Finally, as a practical matter, the concept of privacy has been useful in legal challenges to women's subordination. For example, because of the historical narrowness of the remedy provisions in federal antidiscrimination law,⁹² women have sometimes utilized the tort of invasion of privacy in workplace sexual harassment suits. Using the tort, state courts have found sexual propositions and touching in the employment context to be actionable because they intrude offensively into the

89. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* xi (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*].

90. *Id.* at 193-200.

91. "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." *Id.* at 47. For anecdotal evidence about how women react to sexual harassment, see *id.* at 47-55.

92. Courts have recognized sexual harassment of working women as a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964 since the early 1970s. See *id.* at 59-82 (describing the development of sexual harassment law under Title VII). The remedies sexual harassment plaintiffs may receive under Title VII, however, have been inadequate. Prior to the adoption of the Civil Rights Act of 1991, Title VII plaintiffs could only recover backpay and frontpay. 42 U.S.C. § 2000e-5(g) (1988). Thus, victims of sexual harassment were unable to recover under Title VII for emotional or physical harm resulting from the harassment. Although the Civil Rights Act of 1991 allows some recovery for such harm, it caps damages at fairly moderate levels. See 42 U.S.C. § 1981A (Supp. 1992).

victim's private affairs.⁹³ On this ground, courts have awarded full damages for all mental and physical injuries related to the incidents.⁹⁴

Similarly, in *UAW v. Johnson Controls*,⁹⁵ the Supreme Court invoked notions of privacy as part of its justification for holding that it is illegal under Title VII⁹⁶ for employers to institute "fetal-protection" plans that ban fertile or pregnant women from potentially fetal-toxic workplaces.⁹⁷ Appealing to the ideal of equality underlying Title VII, the Court observed that Johnson Controls's fetal protection plan discriminated on its face.⁹⁸ It further noted that under Title VII employers may facially discriminate against women only if "'sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'"⁹⁹ The Court found that Johnson Controls could not use this defense because its exclusion of fertile women was not "occupational."¹⁰⁰ Relying specifically on the concept of privacy, the Court asserted that decisions about how best to protect fetuses are not the concern of employers; instead, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."¹⁰¹

This echo of privacy rhetoric seems strange in a Title VII opinion; Title VII on its face concerns equality, not privacy. Yet the Court's invocation of privacy norms likely did more for women than would an appeal to equality alone. Indeed, relying

93. See *Stockett v. Tolin*, 791 F. Supp. 1536, 1556 (S.D. Fla. 1992); *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 528 (D.D.C. 1981); *Phillips v. Smalley Maintenance Serv.*, 435 So. 2d 705, 708-11 (Ala. 1983).

94. See, e.g., *Stockett*, 791 F. Supp. at 1557-60; *Pease*, 667 F. Supp. at 1203; *Phillips*, 435 So. 2d at 711-12.

95. 111 S. Ct. 1196 (1991).

96. Title VII, in relevant part, prohibits sex discrimination in the terms and conditions of employment. 42 U.S.C. § 2000e-2(1) (1988).

97. 111 S. Ct. at 1207. Several employees and their union challenged Johnson Controls's policy of excluding fertile women from jobs involving exposure to lead on the ground that lead could pose a hazard to a developing fetus. The employees also challenged the company's failure to allow men to transfer out of lead-hazardous jobs when they wanted to conceive children. *Id.* at 1200.

98. *Id.* at 1202-04.

99. *Id.* at 1204 (quoting 42 U.S.C. § 2000e-2(e)(1) (1988)) (emphasis added). Courts and commentators refer to this exception as the bona fide occupational qualification or "BFOQ" defense.

100. *Id.* at 1207.

101. *Id.*

only on equality, a majority of the Court of Appeals for the Seventh Circuit sitting *en banc* held that Johnson Controls's plan was legal, reasoning that men's and women's differing reproductive roles justified the differential treatment.¹⁰² The lower court decision illustrates the danger of using equality doctrine in isolation: courts may justify disadvantages for women by resorting to "real differences."¹⁰³ By appealing to privacy and equality together, the Supreme Court avoided any "difference" question and instead held that employers are never allowed to treat a protected group less favorably than the dominant group when the treatment's purpose is to interfere with private matters.

Thus, a feminist conception of privacy seems not only possible, but desirable. Privacy doctrine theoretically can be used, and practically has been used, to further values critically important to many women. Although the approach has risks, it is difficult if not impossible to identify any legal doctrine that is risk-free for women. Rather than discard potentially useful doctrines, feminists must be cognizant of the risks.

2. Equality Doctrine is Not a Cure-All

Privacy critics criticize privacy and simultaneously offer equality as the superior doctrinal basis for feminist claims. Yet they cannot substantiate the proposition that equality provides an easy (or at least easier) solution to the legal oppression of women. Other feminist commentators have identified shortcomings in equality arguments that parallel those identified in privacy doctrine. Additionally, in making their argument for a doctrinal switch, feminists commonly rely on particular conceptions of equality—for example, equality as freedom from domi-

102. *UAW v. Johnson Controls*, 886 F.2d 871, 885 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991). The Seventh Circuit's opinion quickly devolved into a discussion of competing scientific studies purporting to demonstrate the harm that lead poses to fetuses or to gametes. *Id.* at 875-83. The court assumed that if fetal exposure to lead caused greater harm than spermatogenic exposure to lead the company could justifiably exclude fertile women. *Id.* at 885. Under this approach, bias in scientific research, which has tended to look for explanations of birth defects in women's behavior rather than in men's, becomes a justification for discrimination in the workplace. See Lucinda M. Finley, *The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, in *PROC. OF N.Y.U. 38TH ANN. NAT'L CONF. ON LAB.*, at 16-1, 16-6 (Richard Adelman ed., 1985).

103. For a thorough discussion of the problem of justifying disadvantageous treatment of women through appeals to real biological differences, see Law, *supra* note 23, at 987-1002.

nance¹⁰⁴—as the doctrine of promise. Courts have not widely accepted these visions of equality, however, and there is no reason to think that equality will prove easier to transform than privacy.

Some privacy critics admit that privacy doctrine as currently constituted already contains an undercurrent of equality. Giving force to the idea that abortion decisions should be protected as private is a belief that “abortion promises women sex with men on the same reproductive terms as men have sex with women.”¹⁰⁵ The right to abortion appeals to women because it promises women the freedom to explore and enjoy their sexuality within the private sphere without fear of pregnancy, a freedom men have always had.¹⁰⁶ If the power imbalance within the private sphere is ignored, then it does seem that allowing women, rather than the government, to decide whether to continue a pregnancy puts women on par with men.¹⁰⁷

The same commentators criticize this promise of equality as bankrupt because “under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression.”¹⁰⁸ Accordingly, privacy doctrine fails to empower women because embedded within it is a shallow concept of equality, which does not take into account the distribution of power in society. Indeed, the critics recognize that courts have generally interpreted equality in this shallow manner.¹⁰⁹ In light of this critique, it is clear that simply shifting

104. For a full discussion of this concept, see *infra* text accompanying notes 119-24. In contrast, Ruth Colker relies on a concept of equality that she terms “equality as compassion.” See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011, 1027-28 (1989).

105. MACKINNON, *Privacy v. Equality*, *supra* note 4, at 99.

106. See Olsen, *supra* note 29, at 110.

107. As one commentator put it, “[t]he Court’s privacy analysis . . . appeals to women’s desire for equality and for sexual freedom.” *Id.* (emphasis added).

108. MACKINNON, *Privacy v. Equality*, *supra* note 4, at 99.

109. In an essay concerning discrimination, MacKinnon specifically addresses the narrow vision of equality that courts generally adopt. She notes that “mainstream legal and moral theory” see inequality as a question of “sameness and difference,” rather than as a question of subordination or oppression. MACKINNON, *Difference and Dominance*, *supra* note 73, at 32. The perseverance of this shallow approach, which ignores the systematic subordination of women in society, explains why “sex equality law has been so utterly ineffective at getting what we need and are socially prevented from having on the basis of a condition of birth: a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity.” *Id.*

from privacy to equality doctrine would not cure the ills that the anti-privacy feminists identify. Instead, legal decision makers must recognize that women are oppressed and must consciously grapple with the implications of that fact.¹¹⁰

By attempting to rework equality while advocating the abandonment of privacy, the anti-privacy theorists imply that feminists can more easily transform equality doctrine than privacy doctrine. It is not clear whether they believe this is true as a matter of logic or as a matter of political reality. In either case, however, it is far from evident that they are correct. Because equality doctrine as presently constituted suffers defects similar to privacy, it is an immense challenge to reform either doctrine. In both cases the starting point is a non-transformative, male-oriented doctrine, hence it is difficult to claim that one is inherently easier to salvage than the other.

Similarly, the internal logic of one doctrine is not clearly superior to the other from a feminist standpoint. The *Bowers* and *Webster* limitations on privacy doctrine do not reflect some underlying necessity about the meaning of privacy. Indeed, there is no logical reason why privacy doctrine cannot be transformed to accommodate more feminist values.¹¹¹

Furthermore, logic alone does not control whether a doctrine can or will be transformed. It is not necessary to embrace fully the teachings of the critical legal studies movement to realize that law is not simply a matter of judges applying developed doctrines in a logical manner to new factual situations, thus reaching the one true (inevitable, logically compelled, naturally ordained) result. Thus, "[w]hether the Court overrules *Roe v. Wade* and whether it unravels more of privacy doctrine depends not upon any kind of abstract logic but upon political policy choices."¹¹² After all, "[t]he content that the Supreme Court gives to equality is a political question, not a kind of puz-

110. Indeed, although many feminist writers continue to see equality as a promising doctrine, most urge that its promise will be fulfilled only if the doctrine is altered in some way. See, e.g., Colker, *supra* note 104, at 1027-28 (advocating a model of "equality as compassion"); Law, *supra* note 23, at 1008-13 (arguing that equality doctrine must be transformed so that courts consider discrimination on the basis of reproductive capacity an equal protection violation); Littleton, *supra* note 33, at 1312-36 (advocating a model of "equality as acceptance"); MacKinnon, *Reflections*, *supra* note 31 (elaborating an approach to equality law based on preventing domination, rather than on treating like people alike).

111. See *supra* text accompanying notes 76-78 (discussing differing judicial treatment of privacy).

112. Olsen, *supra* note 29, at 107.

zle to be solved by some clever theorist."¹¹³ Whether one doctrine will be easier politically to change than the other is a difficult question. The current political climate can induce pessimism about our ability to progress under either doctrine. In the privacy area, we have watched the Court chip away at the right to abortion.¹¹⁴ It is unlikely, however, that conservative political forces will be able to unravel much more, at least in the short run.¹¹⁵

These same conservative political forces are at work in the equality area, not only making it difficult to change the doctrine, but also requiring feminists to fight to maintain gains won in the early 1970s.¹¹⁶ The retreat from recognition of discrimination as a group-based harm meriting group-based remedies constitutes a step away from a world that accepts a feminist vision of equality. The versions of equality most feminist critics extol use equality doctrine to challenge the power distribution among the sexes in our society.¹¹⁷ In contrast, the Court's current approach to equality considers individuals and ignores questions of group subordination. Additionally, the Court is more concerned with the perpetrator's perspective (whether the discrimination was intentional) than with the victim's (whether there was a discriminatory effect).¹¹⁸

The same conservative politics threaten feminist gains in

113. *Id.* at 126.

114. See *supra* text accompanying notes 13-16 (discussing recent Supreme Court decisions on abortion).

115. For example, some commentators posit that Judge Robert Bork's widely discussed belief that privacy doctrine might be invalid, and perhaps should be undone, contributed significantly to his defeat in his bid to become a Supreme Court Justice. See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 427 (1988); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1228 (1988). Similarly, when arguing that *Webster* was a suitable case with which to overrule *Roe v. Wade*, the Reagan administration, through Solicitor General Charles Fried, felt compelled to aver that "the government did not seek to unravel all of the right to privacy, but merely to pull one thread." Olsen, *supra* note 29, at 106 (citing *Transcript of Oral Arguments Before Court on Abortion Case*, N.Y. TIMES, Apr. 27, 1989, at B12). The plaintiff's attorney responded "It has been my personal experience that when I pull a thread, my sleeve falls off." *Id.*

116. See *supra* text accompanying notes 17-22 (discussing the Supreme Court's narrowing of equality doctrine).

117. For a fuller discussion of feminist approaches to equality doctrine, see *infra* text accompanying notes 119-31.

118. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW*, *supra* note 19, at 121, 123-26; cf. RHODE, *supra* note 23, at 176-84 (faulting the Supreme Court's current approach to equal protection from a feminist perspective because it focuses on discriminatory intent rather

both privacy and equality. To transform either is an uphill political battle. Hence, the privacy critics have not adequately explained why we should switch to equality arguments rather than attempt to transform privacy.

B. PROBLEMS WITH THE CRITIQUE OF EQUALITY

1. The Possibility of Redeeming Equality

The critics who urge equality's abandonment similarly can be criticized for not exploring the possibility of transforming the doctrine in a manner beneficial to women. Feminists have identified several ways of reconceiving equality that move beyond the special treatment/equal treatment debate, without wholly abandoning equality.

For example, MacKinnon advocates what she terms the "dominance" approach to equality.¹¹⁹ Like the equality critics, MacKinnon criticizes both the equal treatment and special treatment camps of equality theory for using man "as the measure of all things."¹²⁰ By asking decision makers to ignore gender (that is, asking whether if this woman were a man she would have gotten what she was denied), the equal treatment version requires decision makers to systematically ignore the oppression of women. Because of this, the equal treatment strategy often has led to legal results that fail to challenge women's oppression.¹²¹ The special treatment version of equality is no better, however; it creates a "double standard" which necessarily stigmatizes women and which provides an excuse for continuing to exclude women from traditionally male pursuits.¹²² In light of this, MacKinnon urges that we stop asking whether women receive formal equality or whether our differences from men merit special treatment. Instead, she advocates that sex equality should be a "question of [gender] hierar-

than discriminatory effects); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 488-89 (same).

119. MacKinnon most fully develops the theory of treating equality as a question of dominance rather than difference in her essay *Difference and Dominance*, *supra* note 73. This theme has roots in her earlier work, see MACKINNON, *SEXUAL HARASSMENT*, *supra* note 89, at 106-27, and MacKinnon explores it further in her later work. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989); MacKinnon, *Reflections*, *supra* note 31, at 1293-94.

120. MACKINNON, *Difference and Dominance*, *supra* note 73, at 34.

121. *Id.* at 34-38; see also *supra* text accompanying notes 46-47 (discussing the criticism of equality doctrine).

122. *Id.* at 38.

chy."¹²³ In asking the gender equality question, legal (or political) decision makers should ask about the ways men dominate women and should seek to redress that oppression.¹²⁴

Similarly, Deborah Rhode advocates a shift to what she terms the "disadvantage" approach to equality.¹²⁵ Like MacKinnon's dominance theory, Rhode's disadvantage theory primarily concerns replacing formal equality with a commitment to substantive equality that will improve women's lives. Under Rhode's approach, legal decision makers do not automatically accept the proposition that any difference between the sexes justifies legal treatment that disadvantages women.¹²⁶ Instead, they use gender distinctions as a basis for their decisions only when the result will be to reduce gender disparities in "political power, social status, and economic security."¹²⁷

At the core of Rhode's theory is an exhortation that the decision maker be sensitive to the context of the problem being addressed and to the complexity of women's interests.¹²⁸ Rhode asserts that disadvantage theory is a better tool for women than MacKinnon's dominance theory because it invites the decision maker to see women as a complex group whose interests may not be uniform.¹²⁹ Furthermore, Rhode's theory recognizes that in some contexts gender relationships are more complex than simply the relationship of an oppressed class to its oppressor.¹³⁰

123. *Id.* at 41.

124. *Id.* at 40-44.

125. RHODE, *supra* note 23, at 82-86.

126. *Id.* at 83.

127. *Id.*; see also Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 625-26 (1990). Rhode's approach seems to be a further development of the "equality as acceptance" approach advanced by Christine Littleton. See Littleton, *supra* note 33, at 1285. Littleton argues that "[t]he difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons." *Id.* at 1284-85.

128. RHODE, *supra* note 23, at 83.

129. *Id.* at 83-84.

130. *Id.* at 84. The "reasonable woman" standard for judging sexual harassment, which the Ninth Circuit recognized in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), is arguably an example of the dominance and disadvantage approaches in action. In *Ellison*, the court held that, in sexual harassment cases brought by women, it would judge whether the harasser's conduct was so severe or pervasive as to be illegal by asking whether the conduct would have seemed severe or pervasive to a "reasonable woman." *Id.* at 879. The Court reasoned that women and men often have different reactions to sexualized conduct based in part on the fact that women "have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a

Either of these visions of equality answers much of the anti-equality critique. Instead of simply requiring that women be given the same entitlements as men to the extent that we are like men, the dominance and disadvantage approaches specifically require the legal decision maker to ask whether or in what ways women are oppressed or disadvantaged and to do something about it. Rather than stigmatizing women by deriving entitlement to "special" things from women's differences from men (and, thus, in some sense, suggesting women are less competent or less fully human than men), the dominance and disadvantage approaches derive women's entitlement from the non-stigmatizing fact that historically society has oppressed or disadvantaged women.¹³¹

Of course neither the dominance theory nor the disadvantage theory can eliminate all possible risks that stem from the use of an equality doctrine. Decision makers could point to domination of women, or to their disadvantage, as an excuse for

vast pornography industry creates continuous images of sexual coercion, objectification and violence.' " *Id.* at 879 n.9 (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989)). The court rejected the traditional "reasonable person" standard because "[i]f we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy." *Id.* at 878.

This approach seems to accord with both the dominance and disadvantage models. The *Ellison* court looked at women's perceptions of sexualized conduct in the workplace. Based on this contextualized analysis, they recognized that the prevalence of sex-related violence has dominated and disadvantaged women in the past. Most importantly, they refused to allow the common existence of sexual oppression to justify behavior in the workplace that causes women further anguish.

131. These approaches also provide a means for challenging particular oppressions of women that are unredressable under the current scheme. For example, equality doctrine as currently constituted has been ineffective as a tool for raising pay in traditionally female occupations to equal that of traditionally male jobs. See *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (reversing district court and dismissing suit by union seeking pay equity for traditionally female jobs). Under the traditional equality approach courts have found no higher-paid men situated similarly enough to those occupying traditionally female jobs to allow comparison. Under either the disadvantage or dominance approaches, however, courts could institute comparable worth because continued substandard pay for women's work exacerbates women's domination or disadvantage. See *RHODE*, *supra* note 23, at 190-200. This is not to suggest that feminists must endorse only one version of equality. To the contrary, feminists can use the concept of equality flexibly, to address particular situations. See generally *Majury*, *supra* note 33, at 320-37 (applying several forms of equality theory to maternity leave).

continued paternalistic "protection" of women, thereby perpetuating the disadvantage. The risk of false paternalism seems less likely, however, than under either of the traditional schools of equality. Unlike their traditional counterparts, both the dominance and disadvantage theories focus the decision maker on the power imbalance between the sexes. This legal focus would make it more difficult for a decision maker to further the existing imbalance.

Another problem associated with both theories is the possibility that our current judiciary will not recognize situations in which women have been dominated and disadvantaged. The risk that courts may subvert the theories, however, is no worse than under the current, often ineffective use of equality doctrine.¹³² No legal approach to empowering the traditionally disadvantaged is wholly risk-free. The best we can do is to try to minimize the risk.

2. The Problem with Abandoning Equality Doctrine

Despite the appeal of a non-traditional, responsibility oriented approach to legal issues as a substitute for equality analysis, there is a danger that such an approach ultimately will fail because it does not conform to traditional modes of legal argumentation or analysis. It is difficult to envision a court requiring an employer to provide its employees with adequate pregnancy leave because pregnancy is only a variation, not a demeaning form, of human experience, or because the employer has a responsibility as part of a community to provide such leave. As one commentator acknowledges, innovation is difficult in the "litigation arena, where problems are crystalized into disputes that then must be fit into the procrustean bed of comfortable doctrinal frameworks such as equality analysis."¹³³ It may be similarly difficult for such arguments to persuade legislators. Thus, it seems that for now, this new approach is better suited for use by legal scholars, who are con-

132. See Majury, *supra* note 33, at 330.

In an unequal society, equality will always be a double-edged instrument: a tool which can be used to assist women in some circumstances, or some women, or a woman; but also a weapon which can be used to restrict women, to punish them for failure to conform to the male standard, or to take away women's "advantages."

Id.

133. Finley, *supra* note 4, at 1180. Finley concludes that currently it is a regrettable necessity to continue using some form of equality argument when addressing courts. *Id.*

cerned with expanding legal thinking, than for litigators or lobbyists.¹³⁴

An additional risk in replacing equality arguments with arguments about nuances and responsibilities is that women's claims could lose the moral high ground of civil rights claims and appear to be simply the voice of one of many interest groups.¹³⁵ Equality has been seen, albeit erroneously, as a politically neutral concept.¹³⁶ Hence, it was and is useful as a general rallying cry. There is built-in moral appeal to such claims as "equal pay for equal work."¹³⁷ In contrast, a direct demand that those in power listen to the disempowered inevitably seems political, because the claim is not grounded in any "neutral principle," but instead is clearly directed at advocating the interests of a particular social group. Losing this high ground is a practical danger; it is questionable whether women have the political muscle to flourish if we become just another interest group.¹³⁸

134. As Kenneth Karst explains:

the rhetoric of rights remains an indispensable element in the reconstruction of the social order defining "woman's place." So long as the courts know only the language of the ladder [i.e., the rhetoric of hierarchies of rights], it would be foolish not to use that language in framing constitutional claims. Outside the courtroom, too, the language of rights will be useful in bringing all sorts of claims, both personal and political, to the forefront of men's consciousness. . . . To speak to men in terms they understand, it will be necessary to begin by speaking the language of a morality of rights.

Karst, *supra* note 118, at 471-72.

Similarly, Kimberlé Crenshaw argues, "[p]eople can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective." Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1367 (1988) (footnotes omitted).

135. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 599, 610-48 (1986) (discussing how the assertion of rights has been and can be an effective political strategy for women); cf. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991) (discussing the importance for blacks of continuing to assert their claims through the language of rights in order for their claims to be effective); Crenshaw, *supra* note 134, at 1364-66 (1988) (same).

136. See Finley, *supra* note 4, at 1152 (explaining why this concept is erroneous).

137. This moral appeal goes all the way back to Aristotle. See Cain, *supra* note 54, at 818.

138. For example, consider the recent passage of statutes in Pennsylvania, Louisiana, and Utah, which have significantly restricted the ability of women to obtain abortions. See LA. REV. STAT. ANN. § 14:87 (West 1991), amended by

The critics might respond once again that continuing to use doctrines like privacy and equality, grounded as they are in the liberal, male oriented conception of persons,¹³⁹ will ultimately fail to address women's needs. They might reason, as Robin West has, that when theorists shoehorn feminist arguments into this male-centric doctrine, the arguments can seem "irrational" because approved doctrinal categories mask women's claims rather than truly explaining how women have been harmed or what they desire.¹⁴⁰ This may make it easier for the legal system to dismiss our claims.¹⁴¹ These critics therefore contend that we must fully abandon such liberal doctrines if women are to progress.

Although this argument points out risks in continued use of traditional doctrines, it fails to acknowledge that there may be ways of minimizing the risks besides turning to the far-riskier strategy of abandoning traditional doctrine entirely.¹⁴² If we accept the assertion that, at least to some degree, women tend to value connection more than autonomy, whereas men tend toward the opposite, the less risky solution is to transform doctrines like privacy and equality to reflect women's values. We can push those doctrines in directions that will better accord with feminist values.¹⁴³ Once the doctrines are shaped in this way, feminist arguments made through them should no longer seem "irrational."¹⁴⁴

1991 La. Acts 26; 18 PA. CONS. STAT. § 3204 (1991); UTAH CODE ANN. § 76-7-302 (1992).

139. For a description of the liberal conception of human nature as essentially atomistic, see West, *supra* note 54, at 4-7. But see McClain, *supra* note 84, at 1203-28 (disputing the claim that liberalism rests on an atomistic conception of human nature).

140. West, *supra* note 54, at 68-69; see also *supra* text accompanying notes 53-60 (discussing different voice and cultural feminism).

141. West, *supra* note 54, at 68-69. For example, an argument for abortion in liberal terms, which analogizes the fetus to an invader from whom the woman needs to defend herself, can seem illogical from a traditional liberal point of view, which does not commonly view a fetus as an aggressor. *Id.* at 69.

142. As Deborah Rhode argues, "[w]hatever its inadequacies, rights rhetoric has been the vocabulary most effective in catalyzing mass progressive movements in this culture. . . . Thus, critical feminism's central objective should be not to delegitimize such frameworks but rather to recast their content and recognize their constraints." Rhode, *supra* note 127, at 635.

143. See *supra* text accompanying notes 80-88 for a discussion of privacy and text accompanying notes 119-31 for a discussion of equality.

144. Cf. Karst, *supra* note 118, at 494 ("Raising our constitutional consciousness of a morality of mutual responsibility and care need not supplant the existing structure of constitutional rights, but can supplement it").

C. CONCLUDING FROM THE CRITIQUES

The feminist critiques of privacy and equality make it clear that continuing to use either doctrine is a risky venture. Feminist scholars have not succeeded, however, in showing that one doctrine is inherently riskier than the other. Furthermore, they have not demonstrated a safe way to abandon the doctrines. At least in the short run, abandoning "rights" claims for "responsibilities" claims is the riskiest course to take. Courts (and perhaps legislators) will not listen to such claims. Stating feminist goals in these terms risks societal rejection of our goals as those of a political interest group. The result would be the loss of the moral high ground that claims of rights provide and the abandonment of important battles to brute political force. To make any progress from within the system, it is necessary to adopt in some way the language the system values, while at the same time seeking to transform that language to accommodate our values.

III. DISPUTING THE NEED FOR A SINGLE DOCTRINE

The praise for equality some of the privacy critics voice seems driven by the idea that women would be better served by a single legal doctrine with which to challenge all oppression. This yearning is implicit, for example, in MacKinnon's related critique of equality doctrine's narrowness.¹⁴⁵ MacKinnon argues that equality doctrine as currently constituted fails "to address sexual abuse and reproductive exploitation."¹⁴⁶ Her concern is that unless all subordinations are labeled as equality deprivations, the legal establishment will ignore the fact that particular types of subordination—such as sexual assault and sexual harassment—happen to women "because they are women."¹⁴⁷ Thus, she argues, without a unified doctrine the full extent of women's socially created and legally enforced subordination will remain unrecognized. Similarly, Sylvia Law contends that analyzing reproductive freedom issues as equality questions will unify issues relating to subordination of women in our society and emphasize that sexual subordination is a single underlying problem that has many manifestations.¹⁴⁸

145. See MacKinnon, *Reflections*, *supra* note 31, at 1298-1300.

146. *Id.* at 1299.

147. *Id.* at 1301 (discussing sexual abuse); see also MACKINNON, *SEXUAL HARASSMENT*, *supra* note 89, at xi (discussing sexual harassment).

148. See Law, *supra* note 23, at 962-63 (urging a "unified approach to sex equality" under which both laws that classify on the basis of sex and laws that

The equality critics also implicitly endorse the notion that feminists should adopt a unified approach to law, although for a different reason. They suggest that by abandoning past approaches and adopting a rhetoric of nuances and responsibilities, we could cleanly break with the past. Legal thinking could escape the baggage of historical doctrines developed of, by, and for men.¹⁴⁹

Thus, underlying the feminist critiques of both privacy and equality is the notion that feminists would be better off with a unified approach with which to challenge women's subordination. Yet both groups of theorists overlook the risks a unified approach presents and underestimate the advantages of using a variety of approaches.

Those who seek out one best approach for all claims relating to women's empowerment sometimes ignore, or at least discount, the fact that one type of argument may be more appropriate and effective in particular fora, while other types of arguments may appeal to other audiences.¹⁵⁰ An example is the recent struggle for the adoption of family leave legislation.¹⁵¹ Those in Congress who supported the vetoed Family and Medical Leave Act of 1991 in large part based their arguments on the importance of leave policies in strengthening the family and benefitting children.¹⁵² Such pure policy argu-

govern reproduction can be analyzed). Similarly, Frances Olsen suggests that framing the abortion question as an equality question might allow society "to recognize antiabortion laws as part of the systematic oppression and devaluation of women." Olsen, *supra* note 29, at 117.

149. See Finley, *supra* note 4, at 1165-67, 1179-80.

150. See Abrams, *supra* note 32, at 800 ("I . . . suggest that feminists and other legal scholars have at our disposal a wider array of tools for expressing our situation and persuading each other than we sometimes suspect; and that we may come to useful insights about using them by considering their effects on our audience . . .").

151. President Clinton signed the Family and Medical Leave Act of 1993 (P.L. 103-3) into law on February 5, 1993. *Clinton Signs Family Leave Bill Into Law, Proclaims End of Gridlock*, Daily Executive Rep. (BNA) No. 24, at D-32 (Feb. 8, 1993). President Bush had twice vetoed the measure. *Id.*

152. See, e.g., S. REP. NO. 68, 102d Cong., 1st Sess. 29 (1991) ("Parental leave is critical to the healthy development of children and families.") (quoting Dr. Edward Zigler, Director of the Yale Bush Center on Child Development and Social Policy); H.R. REP. NO. 135, 102d Cong., 1st Sess., pt. 1, at 2 (1991) ("(2) it is important to the development of the child and to the family unit that fathers and mothers be able to participate in early childrearing and the care of their family members who have serious health conditions; (3) the lack of employment opportunities to accommodate working parents can force individuals to choose between job security and parenting."); H.R. REP. NO. 135, 102d Cong., 1st Sess., pt. 2, at 8 (1991) ("For over thirty years, it has been well known that children who are hospitalized get well faster and have fewer com-

ments, however, would not sustain leave statutes if challenged in court. When California's maternity leave law was challenged on the basis that it was formally unequal, the Supreme Court upheld it not because of the importance of leave in strengthening the family unit, but because of the importance of leave in allowing women to have an *equal* chance at competing in the workplace.¹⁵³

Furthermore, the complexity of women's problems militates in favor of maintaining a variety of doctrinal approaches. As addressed previously, using equality and privacy doctrine together allows women to challenge sexual harassment as something that happens to women because they are women as well as something that deeply hurts women's individual sense of dignity and personhood.¹⁵⁴ Similarly, equality and privacy used together can achieve the empowering result of abolishing fetal protection plans.¹⁵⁵ Such a multifaceted approach can give women greater ability to articulate the harms they have suffered and give the legal system greater understanding of the complex problems that women face.¹⁵⁶

Finally, the advocates of a unified doctrine tend to treat women as a monolithic group and ignore real variety among us. Several women of color have argued that appeals to equality and privacy are deeply important to them, even if they can be threatening to other women.¹⁵⁷

plications when their parents are able to be with them.'") (quoting Dr. Jerome A. Paulson of the American Academy of Pediatrics).

153. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). Privacy theorists might argue this example demonstrates feminists would be better off abandoning equality arguments, since, without Title VII's equality mandate, there would have been no basis to challenge the California law. Even if feminists do abandon equality doctrine as a preferred basis for legal argumentation, however, others are likely to continue using it. For this reason alone it is important to develop a feminist version of equality doctrine; abandoning equality risks having courts apply the doctrine without feminist input.

154. See *supra* text accompanying notes 90-91.

155. See *supra* text accompanying notes 95-103.

156. This point is analogous to Kathryn Abrams's argument that we should resist describing women's choices as determined primarily or entirely by male-centric ideological influence and instead acknowledge that many factors bear on women's decisionmaking; ideological determination is only one part. See Abrams, *supra* note 32, at 796-97.

157. See WILLIAMS, *supra* note 135, at 146-65; Crenshaw, *supra* note 134, at 1357-58; Roberts, *supra* note 85, at 1480-81 & n.305.

To the extent that it is a social construct, equality can be deconstructed and, at least theoretically, reconstructed as a means of challenging, rather than legitimating, social institutions created from the phallogocentric perspective. . . . [R]econstruction is crucial for less powerful groups such as women and Blacks, who are not in a position to

CONCLUSION

Feminist critics rightly point out dangers associated with privacy and equality as currently constituted. Indeed, it should not be surprising that using doctrines adopted by the powerful and defined by their interests is risky for those seeking to redistribute power. The critics are not persuasive, however, when they suggest that we can easily address these dangers by either altering the doctrinal basis of our arguments from privacy to equality or by entirely abandoning these traditional doctrines in favor of appeals to responsibilities and interconnection. There are equal or perhaps greater risks associated with committing to any one approach as the last, best hope for women. It is too soon, however, to discard the privacy and equality doctrines as hopelessly beyond redemption. Instead, working with a realization of the risks inherent in the doctrines, feminists may be able to transform them in ways that will empower women.

abandon hard-won rights for the ephemeral promise of direct political struggle.

Littleton, *supra* note 33, at 1283 & n.24; see also Rhode, *supra* note 127, at 634-35 (discussing the feminist defense of rights); cf. ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* (1988) (discussing the tendency of feminist theory to ignore the viewpoint of all but white, middle class, heterosexual, Christian women); Cain, *supra* note 54, at 838-39 (discussing the argument of "postmodern" feminists that "[t]here is no single theory of equality that will work for the benefit of all women").

