Feminism,
Freedom,
and the
Limits
of Law

REAL CHOICES

BETH KIYOKO JAMIESON

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The Pennsylvania State University Press
University Park, Pennsylvania

Library of Congress Cataloging-in-Publication Data

Jamieson, Beth Kiyoko, 1968–
Real choices : feminism, freedom, and the limits of law / Beth Kiyoko Jamieson.
p. cm.
Includes bibliographical references and index.
ISBN 0-271-02136-5 (alk. paper)
1. Liberty. 2. Feminist Theory. 3. Feminist jurisprudence. I. Title.

HM1266 .J36 2001
323.44-dc21 2001021005

Printed in the United States of America
Published by The Pennsylvania State University Press,
University Park, PA 16802-1003

It is the policy of The Pennsylvania State University Press to use acid-free paper for the first printing of all clothbound books. Publications on uncoated stock satisfy the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

TO WILL

CONTENTS

ACKNOWLEDGMENTS

I am lucky to have received so much support. This book began years ago as a doctoral dissertation at Rutgers University. I owe a great debt to my advisors, whose questions, suggestions, encouragement, and friendship helped to make an ambitious project manageable. Thank you to Susan E. Lawrence (whose comprehensive and detailed comments were invaluable), W. Carey McWilliams, Mary Lyndon Shanley, and especially Gordon Schochet, chair. I am grateful to those friends and colleagues and reviewers who read and commented on chapters, discussed ideas, shared citations, responded to presentations, and who (sometimes inadvertently) suggested new approaches to conceptual problems. They include Jill Papadopoulos Accarpio, Ed Angelina, Paul Babbitt, Amy Barasch, Dennis Bathory, Susan Behuniak, Susan Brison, Elizabeth Bussiere, Bill Dove, Elaine Jamieson, Marisa Bourgoin Keller, Ricky Lee, Jonathan McFall, Margaret Montoya, and Caryn Ashare Norman. I did not always heed their advice, but it was always appreciated. I also appreciate the support of the 1996–97 University and Bevier dissertation fellowship.

Early versions of parts of chapters 4 and 5 were presented at meetings of the Northeastern Political Science Association (Boston in 1996 and Philadelphia in 1997, respectively). I thank the panel participants and attendees for their comments. Interactions with my students at Princeton University, the University of Pennsylvania, Haverford College, and Rutgers University have also informed and challenged my writing. I have enjoyed the exchanges.

The team at Pennsylvania State University Press has offered a warm welcome and sage advice throughout the publication process. Special thanks

go to Sandy Thatcher and to copyeditor Patricia Mitchell, who was most helpful. Larry Tipton composed the index.

I thank my parents Elaine and Fred Jamieson and my parents-in-law Alexandra and Bill Dove. They have all been supportive and generous in sharing lessons learned from their own graduate school experiences. A warm thank you is also due to my other family members Kara Jamieson Douthitt and Jamie Douthitt, Patrick Dove and Deborah Myerson, Suzanne Dove and Miguel Garcia Gosalvez, and Edith and Frank Bennett. In addition, I am grateful for the support and encouragement of those who helped me to focus my energies on writing, especially Mary Jane Brady, Idiatou Diallo, Lynne Martin, and Sandra Cunningham Thurmond. Louis Jeffrey Jamieson-Dove has provided great joy and new incentive as well.

Most of all, I appreciate the contribution of William Dove, who shared in every day of my life in graduate school and helped me in every possible way. He has been my best critic and my steadfast supporter. Without him, none of this would be possible or meaningful. I dedicate this book to Will, with my gratitude, admiration, respect, and all my love.

INTRODUCTION

Feminist jurisprudence—a philosophy of law, rights, and justice that is useful for and consistent with feminist theories and practices—has been the site of much important theoretical and strategic work in recent years. Efforts in this area have led to significant developments, including new, complex formulations of equality, doctrinal advances in areas such as employment discrimination and rape law, and new insights into the political and social forces that have excluded women from the public legal arena. But often absent from the theory construction is serious and focused attention to liberty. Although feminists have presented important critiques of liberty, many of the criticisms have overstated the case. There certainly are many notions of liberty that are inconsistent with feminist goals, but renewed attention to the concept itself is necessary for a coherent jurisprudence. Justice is not a stand-alone virtue. It requires that we value both equality and liberty. Feminists have largely recognized that we need equality and its assumption of equal moral personhood—of an inherent ethical equivalency—because without it we are resigned to a system of ingrained inequalities. But I argue that we also need to concentrate on liberty and its commitment to the value of individual self-determination and self-direction, through individual judgment, awareness, and expression. Moral and political freedom is not a circumstantial by-product of equal standing. It requires that individuals acknowledge their interests in liberty, that political actions are aimed at increasing liberty for all people, and that institutional structures are re-imagined with an eye toward increasing the sphere of freedom. Without such work, feminism is pursuing a hollow goal: a society where are all equal and yet barely free. And without a feminist theory of liberty, a feminist jurisprudence is illusory.

Introduction

In this book, I justify the need for and construct a feminist theory of liberty in three separate but interrelated sections. In the first, I address the political and theoretical assumption that liberty and equality are inconsistent values and show that feminist goals require progress on both fronts. I identify several conceptual errors and their practical ramifications, and explain why feminists must focus new attention on understanding, exploring, and creating a new theory of liberty. In the second, I argue that political theorists should abandon the notion that liberty is conceptually split between a negative notion of limited government interference in a private sector (I am free when my actions are not restrained) and a positive notion of a universally valid ordering of the self (I am free when my desires are correctly directed toward a generally valued goal). I instead suggest a more cohesive and nuanced notion of liberty. And in the third section, I propose a feminist theory of liberty derived from new understandings of both the liberty-equality and positive-negative freedom debates. In a series of three case studies of legal conflicts, I examine three principles of liberty: identity, privacy, and agency. Careful examination of hard cases in each of these areas (for identity, heightened constitutional protection for homosexuals; for privacy, regulation of assisted reproduction such as surrogacy and sperm donation; and for agency, the rights and responsibilities of battered women) generates contingent conclusions about the function of liberty. These findings then contribute to the formulation of a general normative principle and the concomitant exploration of the value of that principle in the context of the legal conflict. These principles form the basis of a feminist theory of liberty. They do not combine to form an intractable and intransigent feminist definition of the boundaries of liberty; such a goal is incompatible with the aims and approaches of feminist scholarship. Instead, through a collection of concrete proposals and conceptual challenges, I illustrate and demonstrate a more richly textured, nuanced, contextual, and complicated notion of liberty. This feminist theory of liberty will be vital for feminists, as well as political theorists, legal scholars, and practitioners concerned with the treatment of minorities in American democracy—indeed, all those who care about "equal justice under the law."

Although the importance of liberty may have elided the specific attention of many feminist political theorists, it has been a leitmotif of women's fiction.[1] Margaret Atwood's dystopian novel, *The Handmaid's Tale,* is a

1. Examples include Margaret Atwood, *The Handmaid's Tale* (New York: Ballantine, 1986),

perennial favorite of women's studies reading lists. Although her tone is sometimes heavy-handed, Atwood's tale of post-revolutionary theocratic Gilead demonstrates the catastrophic results of naively assuming that equality is the foremost feminist virtue. In Gilead, great swaths of women are categorized on the basis of their reproductive capacities, and enslaved based on their attributes of sex and gender. Handmaids—women who are encouraged to be sexually fertile and psychically barren—are kept sheltered from the world so to provide their uteri to the state. Their sole purpose is to bear the children of the Commanders. When they long for the days when their minds and bodies were free, they are quickly reprimanded by other more powerful women wardens. These authorities, the Aunts, communicate the orthodoxy: "'There is more than one kind of freedom,' said Aunt Lydia. 'Freedom to and freedom from. In the days of anarchy, it was freedom to. Now you are being given freedom from. Don't underrate it.'"[2] But that is precisely what readers of *The Handmaid's Tale* are supposed to do. We know that freedom from stranger rape is a poor panacea for women consigned to institutionalized rape by their master-owners. This so-called freedom from seems to us a weak substitute for the broader freedoms of liberal self-government. Atwood's tale emphasizes that freedom is politically necessary and theoretically central. Feminist readers endorse her message. The irony, of course, is that in their scholarship, many feminists have forgotten that lesson. Their mistake is the impetus for my analysis in the first section of this project.

In Chapter 1, I consider the work of feminist theorists and jurisprudential scholars, and show that in their work there is an implicit assumption of a dichotomous—even combative—relationship between equality and liberty.[3] These theorists seem to assume that, in the course of political action, one

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and Toni Morrison, *Beloved* (New York: Plume, 1988), both of which are discussed herein, as well as Anita Brookner, *Look at Me* (New York: Vintage, 1983); Arundhati Roy, *The God of Small Things* (New York: Random House, 1997); and Anne Tyler, *Ladder of Years* (New York: Knopf, 1995). These are all excellent novels.

2. Atwood, *Handmaid's Tale,* 33.

3. See, for example, Catharine MacKinnon's work on pornography and sexual harassment, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); Mari Matsuda's critical race scholarship, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method," *Women's Rights Law Reporter* 1, no. 1 (spring 1989): 7–10; Christine Littleton's writings on equality theory, "Equality and Feminist Legal Theory," *University of Pittsburgh Law Review* 48, no. 4 (summer 1987): 1043–59; and Robin West on women's happiness, "Jurisprudence and Gender," in Patricia Smith, ed., *Feminist Jurisprudence* (New York: Oxford University Press, 1993), 493–530.

must choose to pursue either the interests of equality or the interests of liberty. And these feminist scholars almost always choose to focus on equality, as they often have accepted the observation that "women cannot be free unless we are equal." This attention to conceptions of equality is important, and theoretical understanding of equality has developed significantly in the last decade. It is now generally accepted that equal political and legal treatment of women should not depend on proof that women are "the same" as men—that is, sameness (political, moral, legal, physical) is no longer a logical requirement for being treated equally. However, it is striking that these more sophisticated conceptions of equality have not provoked a swell of interest in further defining and refining notions of liberty.

I examine the works of a sampling of feminist legal scholars as they focus on the foundational question: What is (included in, meant by, the appropriate methodology for, the goal of) feminist jurisprudence? I explain how they dichotomize the liberty-equality relationship and disregard liberty. I am less concerned with *why* they exalt equality and denigrate liberty—rather, my argument begins with an explication of *how* they do it. Responses to liberty tend to fall into three categories. First, some theorists equate liberty with the straw men of liberalism. Second, some scholars seem completely unconcerned with liberty—their work makes no mention of the word or the concept. And third, when some feminist legal scholars do discuss issues of liberty in women's lives, their focus is generally on reproductive rights. This is certainly an important ethical realm, yet its narrow focus is striking. Liberty is broader than and conceptually prior to decisions about procreation and sexual expression. That is, we cannot have reproductive freedoms unless we are free people.

A new feminist theory of freedom is needed, for which scholars must theorize conceptual bases and examine practical political consequences. Feminist scholars need to theorize freedom in its many and varied manifestations. Let me emphasize that much important feminist scholarship has addressed issues relevant to liberty. Theorists have worked around the boundaries of the concept; but they have rarely (very rarely) drawn explicit links to conceptions of liberty nor have they often stated a commitment to the values liberty implicates. My thinking on these subjects has been much influenced by a number of other works that address the relationship of feminist theory and legal studies (even as they bypass specific and explicit attention to liberty), including Mary Joe Frug's work on the legal meanings of female bodies, Martha Minow's insightful discussions of difference, Ruth Colker's

discussions of pedagogy and methodology, Patricia Williams's explorations of the intersections of life and law, and Joan Scott's arguments about equality and difference.[4] These feminist scholars have made important contributions but, in the absence of an explicit concern with liberty, their works falter. I argue in Chapter 1 not that the conventional ordering of liberty and equality should be reversed: it is not enough to change mantras, to begin chanting "women cannot be equal unless we are free." Rather, a new approach to liberty is needed—one which is grounded on an understanding that liberty and equality are not necessarily antithetical, and that a more elegant, contingent, and nuanced conception of liberty is important for the theory and practice of feminist scholarship. I explore and describe the conceptual and substantive boundaries of this new approach to liberty.

One of my goals in writing this book is to remind feminists of liberty's importance, individually and collectively. My arguments that liberty is an adjunct to equality and that a feminist definition of liberty must encompass both negative and positive characteristics (both Aunt Lydia's freedom from and freedom to) may be unusual in feminist political and legal theory, but they are consonant with the impulse toward freedom found in literature. After completing an early draft of this book, I read Toni Morrison's *Beloved* for the first time. This powerful novel reminded me of the complexities—and the necessity—of freedom. *Beloved* is the story of Sethe, a woman who liberated herself from chattel slavery. She fled Kentucky for free Ohio with her children, hoping to protect them from the sadism of the slave master Schoolteacher. Shortly after Sethe and her children arrived in Ohio, Schoolteacher followed, bolstered by the fugitive slave laws and determined to bring the lot back. When Sethe saw her captors approach, she did what was necessary—she slit the throat of her baby daughter. Why did she do it? Why was killing her child Sethe's answer? She did it to make her children free—free of the physical and bodily restraints of slavery. But Sethe also did it to

4. See, for example, the following sample of works: Mary Joe Frug, "A Postmodern Feminist Legal Manifesto," in her *Postmodern Legal Feminism* (New York: Routledge, 1992), 125–53; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990); Ruth Colker, *Pregnant Men: Practice, Theory, and the Law* (Bloomington: Indiana University Press, 1994); Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass.: Harvard University Press, 1991); Joan W. Scott, "Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism," in Marianne Hirsch and Evelyn Fox Keller, eds., *Conflicts in Feminism* (New York: Routledge, 1990), 134–48.

save their psyches, to give her children the dignity they never could have imagined under Schoolteacher's tyranny. Death was preferable to slavery.[5] As one character put it, Sethe's dream was "to get to a place where you could love anything you chose—not to need permission for desire—well now, *that* was freedom."[6] Freedom means more than just the absence of physical or legal restriction. It demands recognition of the breadth of individual conscience, the depth of personal desire. It is these qualities, together, which make life worth living. Political theorists, feminist or not, must recognize this. That is the impetus for the argument in the second section of this book.

In Chapter 2, I show that liberty is not synonymous with the caricatures of liberalism advanced by its opponents. Using examples from the treatment of liberty in Western political thought, I demonstrate that (1) liberty's premise of autonomy does not demand that individuals be atomistic, selfish, and hypercompetitive; (2) liberty means more than the mere absence of restraint; and (3) the popular distinction between positive and negative liberty misrepresents the real threat to freedom—the exclusion of individual conscience from politics. Rather than picking up past definitions of liberty whole cloth, I examine some traditional conceptions of liberty[7] to show that, historically and theoretically, the conception is much more complex than often acknowledged. In order for a rich understanding of liberty to be useful—to be more than an academic curiosity—it must be theorized and understood in the context of women's and men's lives. Old notions of liberty are sometimes susceptible to charges of irrelevance because they rely on abstractions and do not make explicit their connection to politics. Useful theory demands concrete applications; a feminist theory of liberty must be grounded in lived experience. Some critics might caution that too much emphasis on experience could turn a theoretical enterprise into a series of piecemeal observations. But the way to avoid this is feasible: a useful feminist theory of liberty combines a grounded examination of context with an

5. I am struck by the contrast of Sethe's actions (which were greeted with near-universal horror and condemnation) and the shining aura of patriotism that envelops Patrick Henry's cry "Give me liberty or give me death!" Sethe is portrayed as the specter of infanticide; Henry is an invigorating example of bravery and principle. Gender matters.

6. Morrison, *Beloved,* 162.

7. I use examples from the writings of Thomas Hobbes (*Leviathan*), John Locke (*Second Treatise*), Jean-Jacques Rousseau (*On the Social Contract*), Karl Marx ("Manifesto of the Communist Party" and "The German Ideology"), and John Stuart Mill (*On Liberty*). I do not attempt or intend to provide a sweeping survey of their works, or even of their notions of liberty. Rather, I cite specific instances from their works in order to support my arguments about liberty.

appeal to more generalizable, guiding principles. These principles of liberty function as guideposts, helping us to remain focused on some ethical precepts as we navigate legal conflicts of liberty.

But we must also be careful to rein in the principles. General observations and standards can become oppressive if they are imposed thoughtlessly and without regard for the nuances of context. Applications must depend on the contingencies of the situation: all women's experience is not identical, and liberty cannot be imposed or deployed uniformly. Therefore, a feminist theory of liberty will combine elements of the old and the new. It will not rely on the atomistic individual, it will go beyond the absence of restraint, and it will not attempt to crudely separate positive and negative notions of freedom. Liberty demands both limits on governmental interference with self-regarding actions and reform of institutional structures to encourage and nurture freedom. Contemporary treatments of liberty tend to collapse into discussions of rights, but this project is much broader. I suggest that a feminist theory of liberty must be contextual, principled, and contingent.

In the third and largest section of this project I describe a feminist theory of liberty. I refine my suggestion that, rather than a new, limited definition of liberty, a more useful conception would be based on an open set of principles and questions, which are simultaneously reflective of past political theory and grounded in lived experience. I propose three of these contingent principles, all premised on a commitment to autonomy, in Chapter 3. They are: (1) The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning; (2) The Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity; and (3) The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process.

Chapter 3 also introduces the theoretical and methodological concerns driving in-depth examinations of these three principles. I use a nontraditional method of reading and interpreting to explore the notion of liberty in actual legal settings. That is, I show that a new, useful conception of liberty can be found or understood by paying close attention to the language used

by "objects"[8] in legal struggles. I approach this through a method informed by the work of James Boyd White and Clifford Geertz.[9] Unlike other cursory treatments, close readings of court transcripts, analysis of judicial reasoning, and private narratives of lives intersecting with law reveal meaning in the interstices of communication.[10] There is as much to be learned about liberty by what is not articulated as by what is said. This is, of course, intrinsically problematic.[11] Part of my argument is that a great danger to liberty is posed by commentators imposing their own interpretations on the experiences and perspectives of others (for example, the problem of ascribing "false consciousness"). Yet in this project, the process of discovery is part of the substance of this new approach to "liberty." In order to understand the theoretical dimensions of liberty in practical politics, each principle is explored in a specific context.

In a series of three case studies I examine each of the three principles of liberty mentioned previously: identity, privacy, and agency. Each case study focuses on one principle of liberty in the context of a specific legal dispute. I chose to study conflicts of law because American Constitutionalism provides an ideal context for consideration of questions of negative and positive liberty. The force of the law illustrates both the need for limits on state power as well as the potential inherent for institutional encouragement of individual and group psychological and political development.[12] Because I

8. By "objects" I mean individuals involved in legal conflicts. I am aware of the political dangers of naming people "objects," but I think that they function in legal discourse in precisely that way. The notion of liberty is necessarily related to marginality—insiders and power players (subjects, if you will) are not often in need of transgressive, reactive tactics.

9. In particular, White's *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), and Geertz's "Thick Description: Toward an Interpretive Theory of Culture," in his *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 3–32.

10. That is, narratives that intersect and bypass the legal setting. For a good example of this, see Kristin Bumiller's thoughtful article, "Victims in the Shadow of the Law" (*Signs* 12, no. 3 [1987]: 421–39), with its discussion of why some victims of employment discrimination do not appeal to the law for redress.

11. There are important ethical and epistemological problems associated with this section. Does the appropriation of personal narrative necessarily publicize the content and make it less individual? Is it possible to include personal narratives without conquering individual voices? Or do I risk making universal claims about a singular situation? (See Kathryn Abrams's "Hearing the Call of Stories," *California Law Review* 79, no. 4 [July 1991]: 971–1052, for a discussion of some of these pitfalls.) This element of the project is a tightrope, treaded carefully and with great awareness of the precariousness of all this.

12. Remember the landmark 1954 case of *Brown v The Board of Education of Topeka, Kansas.*

want to demonstrate the depth and breadth of the law's influence, each case study focuses on a different stratum of legal action. The first study examines a U.S. Supreme Court case in which the standard of comparison was the Federal Constitution. The second case study involves interpretation of state statutes as they reflect both political mobilization and underlying community values. And the third case study explores a legal conflict that took place almost entirely outside the view of the law. That story shows the force of law that can be felt through its minions—local police, civil lawyers, and conventional impressions of common law rules. These three different strata of the law, examined in three case studies, show the limits of old notions of liberty and the possibilities of a new feminist theory of liberty.

In each of the case studies, it is my hope that careful examination of genuine legal conflicts will shed light on how liberty functions, might function, is abused, and holds promise. Please note that the principles of liberty were generated from within the context of the case studies. I investigated the legal conflicts; reached contingent conclusions about the function of liberty in its aspects of identity, privacy, and agency; formulated a general normative principle; and concomitantly explored the value of that principle in the context of the legal conflict. The articulation of principles of liberty is not the end of the project but represents a refocus of attention on the elements of a feminist theory. It is emphatically not my intention to present a concrete definition of the boundaries of liberty; rather, I explore those boundaries. Neither is it my goal to articulate when liberty interests should be asserted and for what specific purposes. Instead, through a collection of conceptual challenges, I will illustrate a more richly textured, nuanced, contextual, and complicated notion of liberty.

The first aspect of liberty—identity—is investigated in Chapter 4 in an examination of the conflicts between individual self-definitions and group identities in the context of the recent United States Supreme Court decision in *Romer v Evans*, which invalidated Colorado's antigay amendment. I argue that identity politics, as it is usually understood, is threatening to liberty because it masks differences within groups and minimizes the importance of individual proclamations of identity. Beginning with the Supreme Court's

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The opinion in that dispute demonstrated the combined potential of the Court to protect negative liberty (limiting states' ability to promote and protect segregation) and to act in a way that values positive liberty (emphasizing the psychological harm that results in children subjected to separate schools, and underscoring the government's responsibility to remedy the wrongs of segregation).

position that sexuality is an irrelevant legal difference, I examine the shifting boundaries of identity formation and imposition. Is identity to be found in the eye of the beholder? Is it related to self-definition? What happens when those two (or more) identities collide? Is there an individual responsibility to claim and proclaim all applicable racial, ethnic, gendered identities? (Does being a woman mean my interests are best represented by Women's Interests? Does being a teacher require me to join the teachers' union?) Why are reactions so forceful when individuals refuse to fit their identities to stereotypes or communal definitions?[13] This case study attempts to re-frame, and I hope to answer, some of these questions, as we move beyond identity politics. Because self-knowledge must precede the exercise of freedom, I argue that The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning—is a necessary component of a feminist theory of liberty.

The second aspect of liberty—privacy—is studied in Chapter 5 through the complications surrounding state regulation of surrogate parenthood. The legal, moral, and political issues implicated in surrogate parenthood seem to be *Lochner* revisited. How far can substantive due process be pushed? Where do private penumbras end? Are there any limits to individuals' freedom to control their bodies and the products thereof? Many critics have argued that surrogate motherhood could not, by definition, be a "choice" for women because of our less privileged political and socioeconomic status. But does that mean that, when it comes to *having* babies, women do not have a right to make reproductive choices? And what of the men involved in noncoital reproduction? Are sperm providers not surrogate parents as well? What happens when a sperm donor petitions for custody? What happens when a sperm donor is asked to bear financial responsibility for the child? What progeny has *Lochner* wrought? Using two "hard cases"—the case of a gestational mother who petitioned for custody after signing a surrogacy contract, and the case of a sperm donor who sought parental status when his biological daughter was nine years old—I examine the dramatic repercussions of giving women but not men a biological justification to trump familial arrangements. I argue that such disparity is not unjust, because liberty

13. I am thinking here of Clarence Thomas and O. J. Simpson embracing color when backed into a corner, of Hillary Rodham Clinton's cookie-baking snafu, and of the many times people have asked me "What *are* you?" when my ethnicity was not easily discerned.

manifested through "privacy" is not absolute. The limits of liberty must be drawn by a commitment to avoid the subordination of human dignity, not to formal equality-as-sameness. I demonstrate that full reproductive rights can only be possessed by free people, and that liberty requires that the state not be a party to exploitation of persons, even if free people choose to participate in exploitative relationships. The Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity—is the logical result.

The third aspect of liberty—agency—is explored in Chapter 6 from the perspective of a woman victim of intimate violence who does not run from the abusive situation immediately. I chose this situation because I am generally troubled by observers who claim to be able to detect false consciousness in others and to know what is best for others (in this case, to leave the abuser immediately). In its most basic form, freedom means being able to do what one wants in matters that (primarily) concern one's self. Battered women are not so unusual that they must be deprived by society and the law of that freedom. While I do not advocate that victims reenlist for more abuse, I do argue for observers and critics to be aware of the inherent and inescapable complexity of relationships (even those in which power seems self-evidently to be imbalanced). Situations of battering are not simple. Using the personal narrative of a woman victim of intimate violence, I argue that some women *do choose* not to leave a violent situation. And the fact that their reasons may be unthinkable to feminist critics does not preclude their validity. Respect for liberty demands respect for individuals' personal choices. I certainly do not propose that battering be treated as an inconsequential family dispute, or that battered women be consigned to situations of violence; rather, I argue that there must be room for individual choices, no matter how repugnant to others.[14] The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process—incorporates these concerns in a feminist theory of liberty.

14. Think of the prurient and puritanical reactions to varied types of (nonprocreative, perhaps nonheterosexual) sexual expression. Sexual masochism may not be your choice, but it should be an available option to a consenting subject. See Pat Califia's article "Feminism and Sadomasochism" (*Heresies* 123 [1981]: 4), for an interesting complication of these issues.

I have chosen these three case studies in order to further examine how liberty interests might be articulated and performed. It is my hope that, through the discussion of Chapter 7, the contours of a feminist theoretical definition of liberty will emerge in the connections and in the interstices of the principles presented. Modern definitions of liberty are generally clear and consensual at the center (for example, that the sale of human organs is impermissible; that prior restraint on political speech hobbles the democratic process), but disagreements arise as the limits of liberty are pushed. The contextual studies herein examine hard cases—situations in which the liberty principles are required to guide us in making difficult ethical and political judgments. In judging, my goal is not to unduly limit the meaning and significance of liberty, but instead to focus on theoretical skirmishes and political disruptions around and between the boundaries of the concept. By demonstrating how liberty can prevail in difficult disputes, I show the importance of a new feminist conception of liberty. But this is not a simply theoretical project. I argue that the naming of a liberty interest is a political action, a verbal stand-and-be-counted, an assertion of personhood. "Live free or die" may not be mere hyperbole.

I must emphasize that this is very much intended as a "feminist" project. The fact that the substantive material does not focus only on women or on reproduction does not mean that my concerns have left the realm of feminism for a generalized, fuzzy, progressive politics. The theoretical and practical concerns of feminism are not, of course, inherently restricted to women. In contrast, feminism involves a special sort of critical thought, committed to resist patriarchy in all its manifestations (including its ties to oppression based on racial categories, class, sexuality, and the like), and grounded in a vision of justice. My arguments aim to go beyond gender-specific policy problems while simultaneously asserting that gender is a social category that cannot be transcended. Feminism, to me, is about choices, not restrictions—it is enmeshed in liberty interests. And the examination of individual experiences and individual voices will more richly illustrate and give testament to the diversity of life.

So, in response to those feminist legal scholars who have consistently exalted equality and ignored liberty, I say: Understand the liberty-equality relationship in a different way. Know that they are not necessarily opposed; indeed, liberty is no threat to equality. More instances of individuals claiming liberty interests demonstrate increasing formal equality, a manifestation of substantive equality, and political action that depends on a willingness to

accept the equal moral personhood of individuals. Liberty is in part a function of equality, but more importantly, a partner to it. Both are driving us toward the same thing: a recognition of the value of individual human dignity in all its diversity. This project illustrates some of the reaches of liberty, equality, dignity, and diversity, and their connections to justice. I refuse to construct an architectonic feminist theory of liberty, but instead present, explore, and defend some contingent, contextual, feminist principles—The Identity Principle, The Privacy Principle, and The Agency Principle. Indeed, substantively, methodologically, and theoretically, this is an exploration that, I expect, will move us toward a feminist theory of liberty.

1

THE LIBERTY-EQUALITY DILEMMA

Feminist Theory's Fatal Flaw

In the days of second-wave feminism, two sets of political priorities and theoretical assumptions competed for the hearts and minds of women. In one group, focus was on women's liberation—on freeing women (and men) from destructive social roles and expectations. Those were the days in which models of femininity were encouraged to stand up for themselves, when possibilities of freedom from rigid gender roles were embraced. It was about shrugging off the limits of the past and turning toward the liberated promise of the future. But these liberation feminists were attacked by their opponents.

They were seen to have embraced liberal ideology to a fault—to have bought into the notion that law can emancipate women, that changing laws will change society, that the mere presence of a woman in the boardroom would alter institutional structures. But, according to Audre Lorde, what these women failed to recognize is that the master's tools cannot be used to dismantle the master's house.[1] New approaches were needed. Otherwise, equal-rights feminists in group two argued, there would be no progress for women. There would simply be females in gray flannel suits, toeing the company line, protecting the status quo. Instead, they asserted, focus on equality was required. Rather than encouraging individual women to liberate themselves from oppressive social structures, it was necessary to concentrate on the status of women as a group, and to remedy their inequality relative to men. For these feminists, personal liberation took a backseat to the goal of raising up the subjugated sisterhood. Literally and figuratively, women's lib gave way to the fight for equal rights.

When equality (with men) became the primary goal of the women's movement, focus on liberty was dimmed and the promise of individual freedom for women was muted. There were sound political reasons for this. One problem with focus on women's liberation was the tendency to concentrate on individual women rather than on women as a political coalition. Focus on specific forms of sexism in women's lives (for example, the macho posturing of a husband who wants his wife to meekly agree to sex on demand), encouragement to practice consciousness-raising (an inherently individualistic method of understanding), and support for women determined to change the conditions of their own lives all underscore the fact that the unit of agency was an individual not a group.

I applaud that emphasis on each woman's ability and desire to change her own circumstances. But, as the sole method of a political movement, it is ineffective. As long as women are seen as a rag-tag group pursuing multiple goals through individual actions, they are not a political force with which to be reckoned. A group of women in consciousness-raising, encouraging each other toward the "click" of understanding patriarchy, is unlikely to be able to effectuate substantive institutional change. If patriarchy (rather than separate and distinct husbands, fathers, and bosses) is the problem, then a united front of determined and dedicated women (rather than lone wives, daugh-

1. Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, N.Y.: Crossing Press, 1984).

ters, workers) is needed to push for a solution. And if that is the goal, then (some) emphasis on equality for women as a group is required.

But political utility is not the only standard for judgment. Although I grant that many of the strides made by the women's movement are due to the efforts of a group of women dedicated to making things better for women generally and less concerned with their own specific and individual interests, the important value of liberty is sometimes forgotten along the way. To what does an incessant focus on group equality lead other than an outcome that may be better for "women" but worse for the actual women participants? Equality without liberty is an empty promise. What good is equal treatment or even equal status if the result is a dull sameness—a gaggle of women made to walk the straight and narrow, sacrificing their complicated identities, their potentially powerful agency, and, ultimately, their liberty? A better solution is needed—one that gets beyond this see-saw understanding of liberty and equality as competing and mutually exclusive values. It must offer a way to fix feminist theory's fatal flaw—to resolve the unsatisfactory choice for women between being free and being equal.

Feminist scholars' attention to conceptions of equality is important, and theoretical understanding of equality has developed significantly in the last decade. It is now generally accepted that equal political and legal treatment of women should not depend on proof that women are "the same" as men; that is, sameness (political, moral, legal, physical) is no longer a logical requirement (though it is often a legal requirement) for being treated equally. However, it is striking that these more sophisticated conceptions of equality have not provoked a swell of interest in further defining and refining notions of liberty. This project is a heartfelt call for renewed attention to the promise of feminist freedom.

In this chapter, I discuss the various approaches to liberty of feminist legal scholars. Feminist responses to liberty can be organized into three categories: (1) disregarding (making no mention of) the concept; (2) treating liberty as synonymous with caricatures of liberalism; and (3) focusing on reproductive rights or the problem of pornography, which unacceptably narrows women's liberty interests to those that coincide with issues of procreation or commercial sexual expression. I suggest that a new feminist theory of freedom is needed, for which theoretical foundations and political consequences must be examined. We need to study freedom in its many and varied manifestations. Let me emphasize that much important feminist scholarship has addressed issues relevant to liberty.

Feminist theorists have worked around the boundaries of the concept, but they have too rarely drawn explicit links to conceptions of liberty nor have they often stated a commitment to the values liberty implicates. (There is one significant area of feminist study that does concern itself with issues of freedom—feminist theoretical work on autonomy.[2]) I do not suggest that liberty should simply be valued more than equality. Such a reversal only replicates the misunderstanding of liberty and equality as opposed. Instead, I shall suggest a new way to think about liberty—one that begins from the premise that liberty and equality are not necessarily antithetical and recognizes that a contingent and complicated conception of liberty is necessary for the theory and practice of feminist scholarship, and especially for feminist legal theory.

THE LIBERTY-EQUALITY DILEMMA

The liberty-equality dilemma assumes that liberty and equality are dichotomous concepts, values that cannot occupy the same space at the same time. The relationship between them is seen to be a zero-sum game: if more equality (whether of substance or degree) exists, then liberty must be reduced. If liberty is vaunted, then equality must suffer. When assumed and unquestioned, this narrow and erroneous conception becomes the fatal flaw of some feminist theory. As long as the two crucial concepts are taken to be oppositional, justice for women is illusory. For justice cannot arise without the values of both liberty and equality. If you believe that there are firm limits to substantive amounts of equality and liberty, and that any gain in one requires lessening of the other, then you are in an intractable position.

2. Jennifer Nedelsky, for example, has done important work reconceptualizing "autonomy" for feminism. Her arguments are thoughtful and useful but ultimately incompatible with the ideas I advance herein because they are, I think, unduly critical of liberal notions of individualism. See Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," *Yale Journal of Law and Feminism* 1 (1989): 7–36.

Other important feminist works on autonomy are Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca: Cornell University Press, 1991); Catriona Mackenzie and Natalie Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000); Virginia Held, *Feminist Morality: Transforming Culture, Society, and Politics* (Chicago: University of Chicago Press, 1993), esp. 57–63. I thank Susan Brison for her suggestions.

Any gain in equality triggers a simultaneous decline in liberty; any increase in freedoms to be exercised means that equality ebbs.

Remnants of these understandings can be seen in debates about priorities of the women's movement. When asked hypothetically to order the values of liberty and equality, few would give them simultaneous stress. The choice seems to be between two conflicting presumptions: (1) that women cannot be free unless we are already equal, and (2) that women cannot be equal unless we are first free. Much of feminist scholarship has concentrated on the first proposition, and focused its attention on equality for women. Those scholars ask: What use are freedoms when women are second-class citizens? What good are rights that cannot be exercised because of sociopolitical inequality?

These questions are important, but liberty is sometimes demonized as the bait dangled by patriarchal institutions bent on keeping women in second place. Freedom is seen as an empty promise used to keep the power of women contained. The roots of the problem are deep. As feminist legal theorist Robin West has observed, the effect of the disconnection between modern constitutional notions of liberty and individual's interests is problematic and pervasive.

> The tension between women's interest and the modern interpretation of ordered liberty is not unique to women but, instead, exemplifies a much larger and deeper phenomenon, which is the tension, conflict, and contradiction between our constitutional commitment to liberty on the one hand and our political commitment to equality on the other. The conflict is not, in other words, between women's liberty and ordered liberty . . . but between liberty and equality. Individual liberty, no matter how construed, always comes at the cost of equality.[3]

This tension is particularly problematic for feminists who respond to the historical fact that it is women who have most often been denied *both* liberty and equality. When we accept the tension between liberty and equality as both true and inevitable, our ability to envision meaningful social and

3. Robin West, "Reconstructing Liberty," *Tennessee Law Review* 59, no. 3 (spring 1992): 441–68.

political change for women is hobbled. The hopeless dichotomy affects the way we talk about and work for equality, as well as the way we understand and strive for liberty.

My point is this: even feminist scholars who are explicitly concerned with the values of liberty are hampered by the unquestioned belief that liberty and equality are in some way incompatible. When feminist legal theorists do discuss liberty, they often limit the context to reproductive rights. Liberty and its cousin "privacy" are valued when theorists and practitioners need a way to argue for limitations on the power of the state. When we want the state to stop controlling women or interfering in our lives, then "liberty" is deployed. Its rhetorical power and symbolic weight (hearkening back to the days of liberal yore) are embraced by feminists in this area. But liberty is rarely connected to equality in this realm either. Even from the perspective of the most infamous reproductive rights case, *Roe v Wade*, commentators who applaud constitutional protection for abortion are easily divided into partisans of equality and partisans of liberty. Those who favor liberty argue that *Roe* was correctly decided on substantive due process grounds (protecting liberty); those who favor equality argue that the decision in *Roe* should have been based on an equal protection claim (prioritizing equality). An example of this kind of thinking is evident in the work of feminist theorist and legal scholar Catharine MacKinnon. Writing about *Roe*, she argues:

> Arguments for abortion under the rubric of feminism have rested upon the right to control one's own body—gender neutral. I think that argument has been appealing for the same reasons it is inadequate: socially, women's bodies have not been ours. . . . So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. In other words, under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression.[4]

That is, according to MacKinnon, freedom for women is impossible in a situation of inequality. Rather than basing the constitutional argument in

4. Catharine A. MacKinnon, "Privacy v. Equality: Beyond *Roe v. Wade*," in her *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), 98, 99.

Roe on liberty interests articulated in the Fourteenth Amendment's substantive due process protections, reasoning should have begun from the perspective of equality. What is required, then, is a sea change—without radical reconstruction of society around commitments to equality, liberties for women only reinforce and reinscribe gender inequality. Women do not become more free; "freedom" is simply another way to keep us tame (or timid). Theoretical attention to freedom is considered pointless without an intervening change in the quality and quantity of women's equality.

In recent feminist theory, then, discussion has focused on the ways to rethink and realize equality for women. Over the last decade, countless books and articles have been devoted to examining the "equality-difference dilemma"—challenging the assumption that equal treatment is reserved only for those people who can demonstrate that they are "the same" as the norm. In the case of gender justice, it has meant requiring women to show that we are "like" men in order to be treated similarly.

THE EQUALITY-DIFFERENCE DILEMMA

When constructing strategies for political engagement, feminists of all stripes confront the equality-difference dilemma.[5] Whether engaged in struggles for equal pay or pregnancy leave, or fighting battles for legal recognition of same-sex partners or reproductive freedoms, feminists find themselves pushed to address the prevailing dichotomy between equality and difference. Do we want parity with men or do we want to be recognized as *women*? Is it politically more expedient to emphasize our similarities or to proudly reclaim our differences? The eminently quotable Catharine MacKinnon sums up the dilemma (which she calls "the sameness/difference approach") thus:

> [I]t is obsessed with the sex difference. Its main theme is: "we're the same, we're the same, we're the same." Its counterpoint theme (in a

5. My discussion of the equality-difference debates is quite brief here. There are many excellent articles and books devoted to thorough examination of the conflict. See, among others, Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993), esp. chaps. 5–7; Gisela Bock and Susan James, eds., *Beyond Equality & Difference: Citizenship, Feminist Politics, and Female Subjectivity* (New York: Routledge, 1992); Leslie Friedman Goldstein, ed., *Feminist Jurisprudence: The Difference Debate* (Lanham, Md.: Rowman & Littlefield, 1992).

> higher register) goes: "but we're different, but we're different, but we're different." Its story is: on the first day, difference was; on the second day, a division was created upon it; on the third day, occasional dominance arose. . . Difference *is*.[6]

Here MacKinnon underscores the ubiquity of the debate, while also pointing out its implicit problem—sex difference. The difference of sex[7] has been used to justify depriving women of equal treatment. The difference of sex has been used to deny women (the need for, the ability to exercise, the legal guarantee of) freedom. The difference of sex has been considered the barrier to liberty, equality, and justice for women, pragmatically and theoretically.[8]

The so-called liberal feminists of the 1980s proposed that equal treatment for women depends on the recognition that biological differences are politically irrelevant—that is, that minds can be separated from bodies in the political realm. In the equality-difference debates, liberal feminists are squarely on the side of equality. As MacKinnon writes, this position "applies liberalism to women. Sex is a natural difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness."[9] In this view, ideally, gender category membership holds no special promise: everybody should get equal treatment all the time. But, adds MacKinnon, "Missing in sex equality is what Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes unlike. . . . [W]omen have to show in effect that they are men in every relevant aspect, unfortunately mistaken for women on the basis of an accident of birth."[10]

What passes for gender neutrality here is the male standard: women must emphasize their similarity to "men." Difference becomes an "accident of birth."[11] (The Oz refrain: "If I only had a phallus.") But although the

6. Catharine A. MacKinnon, "Sex Equality: On Difference and Dominance," in her *Toward a Feminist Theory of the State* (Cambridge, Mass., Harvard University Press, 1989), 220.

7. By "the difference of sex" I mean both the biological categorization of people into male and female (defined most commonly by the presence or absence of a phallus) and the (usually coincident) gender difference played out through the social valorization of things male and the denigration of attributes and activities associated with women.

8. For a related argument about the dangers of assuming a link between sex and gender, see my unpublished paper "Complicated Bodies: Hermaphroditism and the Equality/Difference Dilemma."

9. MacKinnon, "Sex Equality," 220.

10. Ibid., 225.

11. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971),

importance of bodies is minimized, they do not go away. Instead, issues of bodies (and female bodies in particular) arise in matters such as pregnancy discrimination, where the male standard remains silent. This is a particular problem for liberal feminism: if women are treated equally on the basis of their similarity to men, how can pregnancy leave be protected? Zillah Eisenstein summarizes one response, which emphasizes the deficiencies of liberal feminism's denial of the body in the pursuit of equality.

> Man is never viewed as "*not* pregnant," so pregnancy must be constructed as women's "difference" and not man's lacking. Part of the misrepresentation of the female body, as one and the same as the mother's body, is to define it *as* "*different*."
>
> In this usage, being "different" is the same as being unequal. Although woman's body as a biological entity is engendered through a language that differentiates it from man's, woman's body is also unique and particular in terms of its capacity to reproduce sexually. This capacity should not be reduced to a problem of gender, yet gender plays an active part in defining the pregnant body.[12]

Eisenstein's response illustrates the difficulty of basing appeals for equality for women on our similarity to men. Any disjuncture between women's lived experience and the (male) standard is seen as "a problem of gender." And achieving justice depends on denying the material effects of gender categorization.

Difference feminists, on the other hand, have attacked the liberal notion of mind/body dualism and have asserted that the biological specificity of the category "women" holds revolutionary promise for the reversal of the subjugation of women. Difference feminism (represented by such varied thinkers

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for an example of how ignorance or irrelevance of gender difference can result in a society in which all the individuals who count are presumed to be "heads of families" and, perhaps, men. See, too, Susan Moller Okin, "John Rawls: Justice as Fairness—For Whom?" in Mary Lyndon Shanley and Carole Pateman, eds., *Feminist Interpretations and Political Theory* (University Park: Pennsylvania State University Press, 1991).

12. Zillah R. Eisenstein, *The Female Body and the Law* (Berkeley and Los Angeles: University of California Press, 1988), 79, emphasis in the original. Note the problems of inexact language. Eisenstein seems to be assigning women the special task of "sexual reproduction." She must mean to say something like "to gestate a fetus," as most of the animal kingdom engages in sexual reproduction, not parthenogenesis.

as Carol Gilligan, Sara Ruddick, and much of French feminist thought) advances the position that women's special difference holds extraordinary promise for transforming political society. As MacKinnon observes: "[T]his concept of sex . . . presupposes difference. Difference defines the state's approach to sex equality epistemologically and doctrinally. Sex equality becomes a contradiction in terms, something of an oxymoron."[13] Difference feminists tend to fall into the "where there's a womb there's a way" method of thinking—extolling women's life-giving, nurturing capacities as the counterpoint to masculine rationalism. Unlike liberal feminism, women's bodies, grounded in material existence, are central to political and theoretical concerns. Theorist Shane Phelan agrees that the centering of the body in discourse is valuable in this position's refusal to countenance a world of bodiless minds. She notes: "It is the rejection of the body, of concrete existence, that allows those of us in hegemonic positions to imagine that we are 'really all the same.'"[14] I agree with Phelan that we must (as difference feminists do) reclaim the body. But needed too is an examination of the theoretical assumptions and cultural baggage surrounding that body. Without any sort of close analysis of how gender constructs are related to sexual constructs, and why these constructs may be problematic in the context of traditional understandings of equality, difference feminism offers no political promise to women in search of justice.

The choice between giving equal treatment to male imitators and justifying inequality on women's difference from men is unresolvable. Resolving the tension between these positions requires a way to interpret what is meant by "equality." As historian Joan Scott has shown, much of the difficulty is due to the terms "equality" and "difference" themselves.

> When equality and difference are paired dichotomously, they structure an impossible choice. If one opts for equality, one is forced to accept the notion that difference is antithetical to it. If one opts for difference, one admits that equality is unattainable. . . . How then do we recognize and use notions of sexual difference and yet make arguments for equality? The only response is a double one: the

13. MacKinnon, "Sex Equality," 216.

14. Shane Phelan, "Specificity: Beyond Equality and Difference," *differences* 3, no. 1 (1991): 133.

> unmasking of the power relationship constructed by posing equality as the antithesis of difference and the refusal of its consequent dichotomous construction of political choices.[15]

Scott argues that the difficulty of the equality-difference dilemma resides in its assumption that equality presumes sameness—that equal treatment is reserved for equivalent or similarly situated political actors. Difference is seen as the antithesis of equality. But, Scott continues, "the contrast and the context must be specified. There is nothing self-evident or transcendent about difference, even if the fact of difference—sexual difference, for example—seems apparent to the naked eye."[16] Without critical analyses of "difference"—theoretically, epistemologically, materially, experientially—a resolution to the equality problem remains out of reach. Therefore, Joan Scott offers an alternative to the equality-difference dilemma. The answer, she writes, is

> to refuse to oppose equality to difference and insist continually on differences—differences as the condition of individual and collective identities, difference as the constant challenge to the fixing of those identities, history as the repeated illustration of the play of differences, differences as the very meaning of equality itself.[17]

Scott's insight is an important example of how feminist theory has contributed to a vital shift in the contemporary understanding of equality. No longer must equal treatment depend conceptually on the demonstration of similarity to the (white male) standard. No longer is difference inevitably used to justify treating people unequally.[18]

This brief overview of the equality-difference dilemma is included in

15. Joan W. Scott, "Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism," in Marianne Hirsch and Evelyn Fox Keller, eds., *Conflicts in Feminism* (New York: Routledge, 1990), 142.

16. Scott, "Deconstructing Equality-Versus-Difference," 143.

17. Ibid., 144.

18. Obviously these changes have not swept the world. But they have swept large segments of feminists, who now have a new tool to challenge squabbles about how to "handle" differences *among* feminists. One beneficiary is the issue of how to institutionalize respect for racial and ethnic diversity without resorting to essentialism.

order to show that feminist theory can reconceptualize, redefine, and redeploy notions arising from other traditions in new and important political contexts. Old and patriarchal notions of equality have depended on the demonstration of sameness. Such conceptions have been, at their core, threatened by liberty. After all, liberty has often been expressed in differences. But now many feminist scholars and activists agree that equality should be determined not by sameness but by a complicated and contextual notion of fairness. This revolution in our understanding of equality illuminates a shocking lack of refinement and revision in our notion of liberty. If equality can be resurrected, why not liberty as well? This task, too, is a goal of this project.

FEMINIST (DIS)ENGAGEMENT WITH LIBERTY

As I mentioned previously, feminist responses to liberty tend to fall into three categories: (1) those responses that do not engage with the concept of liberty—scholarship that mentions neither the word nor the concept; (2) where caricatures are deployed that equate liberty with the straw men of liberalism; and (3) writings that focus on an understanding of liberty that is limited to reproductive rights.[19] In this section, I will give several examples of scholarship that illustrates these failings. The works discussed are by no means exhaustive. It would be impossible (and imprudent) to categorize all feminist scholarship. My intention is not to produce a literature review that reduces each work to a single dimension but instead to offer a few examples of selections that are relevant to the categories I have introduced. Please remember that these three categories are heuristic devices only, they are not intended to contain or constrain all feminist theory. They are meant, instead, to demonstrate what I perceive to be a theoretical and political problem for feminism—the absence of enough close, considered, and critical attention to liberty.

19. Another area in which feminists have written in support of liberty: free speech rights due to those who produce, consume, and participate in the commerce of pornography. Important work has been done in this field, including that by Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995); Varda Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985); Judith Butler, *Excitable Speech: A Politics of Performance* (New York: Routledge, 1997); Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995).

The first category or type of feminist response to liberty—the apparent absence of concern with the concept, demonstrated by near silence on the subject—is difficult (if not impossible) to demonstrate. Readers familiar with feminist legal scholarship will recognize that very few theoretical writings address liberty explicitly.[20] Instead, reams are produced examining issues surrounding equality.[21] As law professor Patricia Cain observes:

> Feminist legal theorists, at least in this country [the United States], seem to be obsessed with the concept of equality. Given the preeminence of the equal protection clause in twentieth century constitutional litigation, this obsession is not surprising. One Australian feminist . . . concluded that "the preoccupation with equality has constituted an impediment to the development of feminist theory."[22]

The focus on equality has yielded important understanding, but little attention has been paid to what more equality is good for. Left too often unspoken and unexamined is the crux of the matter: what use is equality without liberty? What do we want guaranteed by equal (or fair) treatment? Equality is a distributive concept. It concerns how and to whom goods are allocated, not what those goods are. But the noun "equality," by itself, holds very little meaning. If equality is to have any substantive import, it must be attached to a real value. Only when it is used in conjunction with specific values does it become potentially meaningful for women's lives. Catharine

20. Again, with the exception of work on autonomy, discussed previously. Other theorists have written on themes connected to liberty, but there has been little direct and focused engagement with the topic.

Theorist Nancy Hirschmann has written recently on the subject. Hirschmann is concerned with many of the issues that trouble me. The biggest difference in our approaches is that she places more value on the negative-positive liberty distinction than I do. I am also more concerned with legal issues than is Hirschmann. See her "Toward a Feminist Theory of Freedom," *Political Theory* 24, no. 1 (1996): 46–67; "Domestic Violence and the Theoretical Discourse of Freedom," *Frontiers* 16, no. 1 (1996): 126; and "Western Feminism, Eastern Veiling," *Constellations* 5, no. 3 (1998): 345–68.

21. See, for example, the following: Sylvia Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132, no. 5 (June 1984): 955–1040; Christine A. Littleton, "Reconstructing Sexual Equality," *California Law Review* 75, no. 4 (July 1987): 1279–1337; Susan M. Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); Deborah L. Rhode, *Justice and Gender* (Cambridge, Mass.: Harvard University Press, 1989).

22. Patricia A. Cain, "Feminism and the Limits of Equality," *Georgia Law Review* 24 (summer 1990): 803. The quote is from Margaret Thornton, "Feminist Jurisprudence: Illusion or Reality," *Australian Journal of Law and Society* 3 (1986).

MacKinnon stands as an evocative example of a theorist who sees equality as the goal.

> Equality understood substantively rather than abstractly, defined on women's own terms and in terms of women's concrete experience, is what women in society most need and most do not have. . . . Women are not permitted to know what sex equality would look like, because they have never lived it. . . . They know inequality because they have lived it, so they know what removing barriers to equality would be. Many of these barriers are legal; many of them are social; most of them exist at an interface between law and society.[23]

But what does "equality understood substantively" mean? MacKinnon does not elaborate. But as I understand it, the phrase means equality of *something*—opportunity, access, outcome, rights, respect, and so on. And if that substantive equality is to be useful for women seeking justice, it must involve a notion of liberty. Equality without liberty yields a community of slaves—deprived (by the state and by society) of the power to name themselves; forced to behave in ways that compromise human dignity; and forbidden to direct the narrative of their own lives. Equal freedom must be a goal of feminist politics, and deserves close attention.

Some feminists (demonstrating the second type of response) do discuss liberty in their work but often rely on caricatures of liberal freedom to serve as the opposition to their goals of "equality." As Judith Grant observes, "Feminists have a tendency to charge anyone who talks about freedom of the individual with being a libertarian."[24] Freedom is often assumed to be anti-egalitarian and tending to produce injustice. When feminists do discuss freedom, the conception assumed remains largely unexamined. Patricia Cain notes:

> "Liberty" is another central concept in American jurisprudence. The dominant political discourse, however, interprets liberty to mean negative liberty. . . . Part of the feminist attraction to equality stems

23. Catharine A. MacKinnon, "Toward Feminist Jurisprudence," in her *Toward a Feminist Theory of the State*, 244, 241.

24. Judith Grant, *Fundamental Feminism: Contesting the Core Concepts of Feminist Theory* (New York: Routledge, 1993), 189.

> from the possibility of interpreting equality to grant women more substantive rights than those that can be derived from negative liberty.[25]

Since when do feminists happily appropriate the definitions assigned by "the dominant political discourse"? As a critical theory, feminism should require careful examination of the ways concepts are deployed to further or challenge the interests of patriarchy. But when feminists resort to one-dimensional understandings of uncontested concepts, they threaten the integrity of their work. This occurs in many feminist discussions of liberty. This misunderstanding of liberty in general (and negative freedom specifically) is born, I think, of an unreasonable hostility to liberalism. Although liberal theory has perpetuated many inequalities, it is not without redeeming virtues.

In her important book, *Killing the Black Body,* feminist and critical-race theorist Dorothy Roberts follows that tendency to align liberty with liberalism. Roberts criticizes traditional liberal conceptions of liberty that, she claims, fail to protect the reproductive choices of black women.

> Liberty protects all citizens' choices from the most direct and egregious abuses of government power, but it does nothing to dismantle the social arrangements that make it impossible for some people to make a choice in the first place. Liberty guards against government intrusion; it does not guarantee social justice. . . . Liberty is understood as a guarantee of government neutrality, as limited only to tangible harms, and as a negative right. . . . Liberal theory assumes that people are rational, autonomous beings who make procreative decisions of their own free will.[26]

To any student of liberal political theory, this is obviously a distortion.[27] Roberts takes a strict legalistic definition of liberty, puts it into an extralegal, contextless realm, and then faults it for being ineffective. She does this for a particular reason: to show how liberal definitions of liberty fail to help black women as they struggle for justice. Her goal is important, but Roberts'

25. Cain, "Feminism and the Limits of Equality," 803.

26. Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Pantheon, 1997), 294–95.

27. See Chapter 2, for further discussion of this point.

means of argument highlight the ease with which shallow definitions of liberty are used. Much of her audience will probably accept her characterization of liberal liberty as true—nodding in agreement as visions of atomistic, bourgeois individuals and disembodied wills dance in their heads. Roberts continues: "Not only does this concept of liberty leave inequality intact, but it overlooks and sometimes precludes efforts to eradicate inequality."[28] This simplifies the situation. There is no foundational definition of liberty that requires injustice. Roberts again has caricatured the liberal definition of liberty in order to make her argument for a related kind of liberty (specifically, reproductive liberty for black women) stronger. But in the process, she delegitimizes the very concept of liberty. She makes it sound like something both unnecessary and undesirable for feminism.

Frances Olsen, in her classic article on statutory rape, makes a similar claim. She argues that feminists need to "go beyond liberal-legalism" and should "stop trying to fit our goals into abstract rights arguments and instead call for what we really want."[29] Olsen claims that, in conditions of social inequality, freedom is meaningless (if not dangerous) for women. Freedom "turns out to be freedom for men to exploit women," because without equality women have little room to exercise their rights. And formal freedoms are not very beneficial when they cannot be used. That is true, but it is not a problem of "liberal-legalism"—it is an issue of social justice. The same scholars who would be quick to argue that the Soviet experience is not a necessary indictment of communism seem equally eager to hold liberalism responsible for social injustice. "Liberal-legalism" may institutionally have been correlated with forms of inequality, but that doesn't lead us to the conclusion that all concepts associated with liberalism are worthless. In a similar manner, Catharine MacKinnon attacks liberal privacy doctrine, the most obvious legal source for notions of liberty.

> Privacy doctrine . . . is hermetic. It *means* that which is inaccessible to, unaccountable to, unconstructed by anything beyond itself. . . . It is personal, intimate, autonomous, particular, individual, the original source and final outpost of the self, gender neutral. It is, in short, defined by everything that feminism reveals women have never been

28. Roberts, *Killing the Black Body*, 297.

29. Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis," *Texas Law Review* 63, no. 3 (November 1984): 430.

> allowed to be or to have, and everything that women have been equated with and defined in terms of *men's* ability to have.[30]

It sounds, in short, unpleasant. In MacKinnon's rendering, privacy doctrine—Fourteenth Amendment protection of liberty interests through substantive due process—appears thoroughly severed from social reality and political relevance. Note too that MacKinnon uses words intended to remind the reader of values she believes antithetical to sex equality: "autonomous," "individual," "gender neutral."[31] Those words signal a connection with caricatures of liberalism, and cast doubt on the value of anything associated. It is a heavy-handed response to the concept of liberty.

This challenge to liberty is also manifested in a repudiation of "rights talk" in favor of an ethics of care or a psychoanalytic approach. This book does not discuss those concerns in detail. Although I appreciate the contributions of feminist scholarship on care, and value the insights of many of its practitioners, some of the conclusions reached are at odds with notions of individual entitlement that I believe are required for a commitment to freedom.[32]

The third way liberty is treated in feminist scholarship seems, in comparison, quite mild. For some theorists, discussing liberty means addressing primarily reproductive rights. That is a laudable project—but it is not enough. Many scholars seem to assume that assuring policies protecting reproductive freedom is tantamount to insuring that women are free. They assume that women can be free if we merely have sovereignty over all decisions regarding the procreative capacity of our bodies. This is not the case. Liberty encompasses more than reproductive freedom. The rights to control our sexuality and our bodies are central to women's freedom, but they are not fully coincident. Although some theorists, who see gender as the

30. MacKinnon, "Privacy v. Equality," 99; emphasis in the original.

31. For further discussion of the significance of such terms, see Robin West, "Jurisprudence and Gender," in Patricia Smith, ed., *Feminist Jurisprudence* (New York: Oxford University Press, 1993), 493–530.

32. Some valuable examples of scholarship that examine carefully notions of care include Susan Behuniak, *A Caring Jurisprudence: Listening to Patients at the Supreme Court* (Lanham, Md.: Rowman & Littlefield, 1999); Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley and Los Angeles: University of California Press, 1999); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

prism through which all truth shines, would disagree, I believe that liberty is both broader than and conceptually prior to decisions about reproductive rights. Reproductive freedom that occurs prior to individual freedom reduces women primarily to the value of our ovaries. In contrast, notions of liberty that begin with equal moral personhood and encompass reproductive freedom (as well as freedoms of thought, expression, association, and so on) reflect the complexity of individuals and the connections among bodies, hearts, and minds. We must be free people before we can freely control the means and ends of our reproductive capabilities.

Discussion of reproductive rights can be important and enlightening. In her book, Roberts takes bold steps to show that typical notions of reproductive rights exclude the interests and experiences of black women. Roberts attempts to reclaim "The Meaning of Liberty" (the title of her concluding chapter) for black women.

> Despite the serious flaws in the dominant view of liberty, it would be a mistake to abandon the notion of liberty altogether. We should not relinquish its important values for the sake of promoting equality. I see two benefits of liberty for advocating Black women's reproductive rights: liberty stresses the value of self-definition, and it protects against the totalitarian abuse of government power.[33]

Despite her previous caricature of liberal freedom, Roberts is right to recognize that there are important values associated with liberty. But why does she assume that the values are at all juxtaposed to "promoting equality"? And why does she limit their benefits to black women's reproductive rights? I agree with her aims, but wonder why she limits herself. Soon thereafter, in the theory-building part of her argument, Roberts observes:

> Liberals are right in that protecting procreative liberty is crucial to ensuring human dignity and freedom. But a vision of procreative liberty that sets aside considerations of social justice and equality will achieve just the opposite: it will reinforce social hierarchies that deny many individuals the ability to be self-determining human beings. Once we understand liberty as requiring the eradication of oppressive

33. Roberts, *Killing the Black Body*, 302.

> structures rather than opposing these changes, it makes no sense to privilege liberty over equality.[34]

Again, Roberts is on the right track. But her theoretical view is far too narrow, so its implications are unduly limited. Why does she focus only on procreative liberty rather than on liberty generally? And why does she carry over the old notion that liberty and equality are oppositional? Roberts is correct to note that "it make no sense to privilege liberty over equality." But she leaves unexamined and undiscussed the proposition that it also makes no sense to privilege equality over liberty, or that it makes no sense to have to choose to prioritize *either* liberty or equality. Despite the important insights she advances, Roberts' work perpetuates feminist theory's fatal flaw.

CONSTRUCTING A FEMINIST THEORY OF LIBERTY

Is there a way out of this intractable morass? Yes. The answer lies in more thoughtful and considered attention to the concept of liberty. Echoing my suggestions, Robin West proposes that "instead of trying to limit liberty by urging equality as a counterweight, we should undertake, instead, a reconstruction of the modern interpretation of ordered liberty presently dominating both doctrine and understanding so as to include the liberties women distinctively lack."[35] West suggests that a reconstruction of liberty should be addressed to remedy the disadvantages women experience. She writes: "What women lack is the enjoyment of positive rights of autonomy, self-possession, economic self-sufficiency, and self-governance, to say nothing of the full rights and responsibilities of citizenship."[36] A new understanding of liberty is required—one that will avoid caricatures of liberal-legalism, one that reflects sophisticated notions of equality, one that is grounded in and directed toward improving the conditions of women's lives.

This project of "reconstructing liberty" seems daunting, but it does not require an entirely new field of scholarship. Many feminist thinkers have been indirectly or inexplicitly concerned with liberty, and their work can

34. Ibid., 311–12.
35. West, "Reconstructing Liberty," 465.
36. Ibid., 467.

contribute much to a new feminist understanding of freedom.[37] Although many theorists talk around the subject of liberty, we can catch glimpses of applicability to a new theory. Patricia Cain, for example, criticizes feminist theory's steely focus on equality, and called for wider attention to other concepts.

> I . . . [made] the observation that feminist legal theorists have spent too much time debating equality and not enough time debating the meaning of self-definition for women. The equality debate has at times assumed *sub silentio* varying definitions of what "woman *is*" and what "woman *should be*." . . . [F]eminist legal theories . . . should reflect our obligations to listen and to participate positively in the construction of another's self-identity. Our theories must not rely on definitions that limit another's self-conception.[38]

When Cain speaks of the necessity of avoiding impositions of identity that "limit another's self-conception," she is talking about liberty. When she talks of self-definition at all, she is talking about liberty because defining one's identity is central to being free. Cain's argument contains the seeds of a feminist notion of liberty, but she does not allow them to grow in that article.

A feminist theory of liberty must be both grounded in feminist scholarship and women's experience and progressive in its focus. The works of several feminist scholars have influenced my thinking about liberty and have (obliquely) contributed to principles of a new conception of liberty. These works address the relationship of feminist theory and legal studies (even as they bypass specific attention to liberty) and include Martha Minow's insightful discussions of difference, Patricia Williams's explorations of the intersections of life and law, and Mary Joe Frug's work on the legal meanings

37. Please note, however, that feminist criticisms of classic notions of liberty, expressed in patriarchal liberalism, have been important. The first crucial step of theory construction was performed by feminist critics of liberal notions of freedom. Diverse examples of such criticism include Jean Bethke Elshtain, *Public Man, Private Women: Women in Social and Political Thought* (Princeton: Princeton University Press, 1981); Catharine A. MacKinnon, "Toward Feminist Jurisprudence," in her *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), 237–49; and Elizabeth Fox-Genovese, *Feminism Without Illusions: A Critique of Individualism* (Chapel Hill: University of North Carolina Press, 1991).

38. Cain, "Feminism and the Limits of Equality," 843, 846, emphasis in the original.

of female bodies.[39] These feminist scholars have made important contributions but, in the absence of an explicit concern with liberty, their works falter. What these works have in common is their attention to contingency and context, as well as a refusal to rely on caricature for contrast rather than persuasion. I discuss here only a few brief selections from their works, chosen from those that illustrate the way feminist theory has circled the concept of liberty without fully engaging it. These examples are intended to show the ease with which connections to liberty can be made.

Martha Minow, in her excellent book *Making All the Difference,* advances an understanding of difference(s) that challenges prevailing definitions. Briefly, Minow argues that respect for differences is required if we want a way to challenge the exclusion of certain individuals and groups from legal protection. She suggests that a reconceptualization of difference is necessary. Among other steps, we must recognize that difference carries with it no natural normative content (as it reflects social values and prejudices); that it is a relational concept (having meaning only in comparison to something "not different"); and that it is contextual (and can only be understood in particular and specific situations).[40] Minow's notion of difference resembles the conception of liberty I advance. Minow's difference requires interpretation to determine its contingent meaning, it is socially situated, and it demands close attention to the details of the context in which it arises.

Minow's work is crucial for theorists concerned with a feminist conception of liberty. She offers reasoned justifications for substantive liberty being the good distributed by her sophisticated notion of equality as fairness. She suggests a way to incorporate pluralist values (integral for any arrangement embracing liberty) into a system concerned with justice in a way that does not become chaotic. She underscores the importance of shifting the focus from an analysis of how some Other fails to mirror the unnamed standard of comparison, preferring instead to make central the Other's perspective. Although she does not explicitly draw the connection to liberty herself, I do not think Minow would be opposed to such a reading of her work. From my

39. See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990); Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991); and Mary Joe Frug, "A Postmodern Feminist Legal Manifesto," in her *Postmodern Legal Feminism* (New York: Routledge, 1992), 125–53. See also Joan W. Scott, "Deconstructing Equality-Versus-Difference," 134–48, and Ruth Colker, *Pregnant Men: Practice, Theory, and the Law* (Bloomington: Indiana University Press, 1994).

40. For more details, see Minow, *Making All the Difference*, chaps. 1–3, and the Afterword.

perspective, Minow's insights are connected to The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning—discussed in detail in Chapter 4.

Another example of a feminist legal scholar talking around the subject of liberty is law professor Patricia Williams. Her phenomenal book *The Alchemy of Race and Rights* is packed with stories of the intersection of life and law, of the failings and railings of the law, and of the perplexity with which any contemplative person must respond to social customs. Williams's book is remarkable for the breadth and depth with which it surveys legalism. Her storytelling (interspersed with her own piercing? naive? questions) illustrates the complicated ways in which the law creates, enforces, and reacts to categories. In her chapter "The Pain of Word Bondage," she responds to the assertions of some critical legal theorists that rights are useless for (if not dangerous to) African Americans. Williams calls for a redefinition of rights.

> The task . . . is not to discard rights but to see through them or past them so that they reflect a larger definition of privacy and property: so that privacy is turned from exclusion based on self-regard into regard for another's fragile, mysterious autonomy; and so that property regains its ancient connotation of being a reflection of the universal self. The task is to expand private property rights into a conception of civil rights, into the right to expect civility from others.[41]

Williams is describing here an equality based on mutual respect and regard, filtered through the vital and politically useful concept of rights. The rights Williams describes are not disembodied chits used to hold off state power, but are instead indicators of political obligation and moral due. And privacy rights are recast as both limits on state power and as choices embodying moral principles of human dignity. As such, Williams's discussion of rights fits well with my Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity—explained in Chapter 5.

Mary Joe Frug discusses the way law *produces* sex differences that seem

41. Williams, *The Alchemy of Race and Rights*, 164–65.

natural or inevitable in her "A Postmodern Feminist Legal Manifesto." Frug argues that legal rules allow and often require the maternalization, terrorization, and sexualization of female bodies. Using examples such as prostitution, she shows that the law itself limits the freedom of women by (among other things) limiting the possible interpretations of our social and legal roles. Frug also examines the manner in which feminist antipornography activists tweaked the legal tendency to maternalize or sexualize women's bodies in order to make their position more persuasive and questions the polarization that results—a rough and angry distinction between anti-pornography/anti-speech/anti-sex feminists and pro-pornography/civil libertarian/pro-sex feminists. She writes: "The closing lesson I want to draw from the anti-pornography campaign . . . is the observation that exploring, pursuing, and accepting differences among women and differences among sexual practices is necessary to challenge the oppression of women by sex."[42] Here, Frug acknowledges the importance of liberty, which encompasses the freedom to possess and express opinions different from the norm. Whether those differences are between women and men or among women, they must be accepted. That requires a respect for liberty. Frug's work is related to The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process—explored in Chapter 6.

A goal of this book is to fill the void described by Robin West: to reconstruct liberty for feminist theory. As discussed in this chapter, we must revalue liberty. We must refuse to accept the faulty characterizations of the liberty-equality dilemma that present the two values as inimical and mutually exclusive. Rather than being the counterweight to equality, liberty is required for substantive equality to make meaningful effects in women's lives. But, again, this does not mean that liberty should assume the preferred position that the concept of equality has held for so long. Reversing the hierarchy would move us no closer to equal justice for women and men. Only the combination of liberty and equality holds promise for those concerned with achieving substantive justice.

42. Frug, "A Postmodern Feminist Legal Manifesto," 153.

2

CONTEXTS AND CONTINGENCIES

Understanding Canonical Conceptions of Liberty

Contemporary feminist definitions of liberty often perpetuate awkward understandings of liberal notions of freedom. Casual definitions of liberty run the gamut from Patrick Henry–style dramatic declarations to pat dismissals of the concept itself as being politically naive. Knee-jerk reactions of "You're not the boss of me" run into cynical comments that liberty is only valuable for (and only exists for) the white wealthy. Too many feminist theorists, even those raised on the ideology of women's liberation, tend to view liberty as irrelevant for social justice, dangerous to political progress, or useful only

instrumentally for reproductive freedom. I argued in Chapter 1 that those feminist theorists misunderstand liberty and its potential. I suggested that a new notion of liberty was needed: one that was a partner to equality rather than a threat; one that was grounded on an attention to the context and details of women's (and men's) lives; one that encompassed both limits on government action and the blueprints for renovation of existing institutions, in order to support arrangements conducive to promoting liberty and justice.

However, the only conception of liberty with which we are left after examination of these feminist responses is this one: liberty is not the antithesis of equality. We have granted that liberty and equality are not fundamentally locked in a zero-sum game, whereby any gain in equality must be accompanied by a simultaneous decline in liberty. Traditionally, liberty and equality are distinct yet related concepts, combined in a complicated connection in that more liberty is associated with more equality, but less liberty is associated only with less liberty. At least for men. As Isaiah Berlin argues persuasively:

> Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom, in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs.[1]

Liberty cannot be traded for more equality. In Berlin's terms, I cannot make myself less free so that you can be more equal. Freedom sacrificed for noble causes is still freedom sacrificed. But this formulation becomes more complicated when gender politics, ever present, are considered. For example, it is important to distinguish among different meanings of "liberty." It has been argued that limiting the ability of a man to traffic in and use violent and degrading pornography (an industry that "depends on the misery of a number of other human beings") may in fact reduce the stigma of that inequality and even increase the liberty of some women (say, those subjugated by the

1. Isaiah Berlin, "Two Concepts of Liberty," in David Miller, ed., *Liberty* (New York: Oxford University Press, 1991), 37–38.

pornography industry).[2] Yet still Berlin's point is valid: we must demand that a decrease in liberty be accompanied by substantive gains in freedom for others. In the pornography example, without attention to the material conditions of women used in pornography, limits on publication alone will change little. An absolute loss of liberty will occur in the absence of concerted efforts to offset losses of liberty for some with gains for others. And equality will suffer as well.

These complications remind us that we still lack a coherent description of what a conception of freedom relevant to feminist thought might look like.[3] What are the qualities of this notion of freedom? How does it differ from prevailing and inadequate feminist interpretations? In order to better understand the roots of such a conception of liberty, it is necessary to turn our attention to the source—the history of political thought.

The following discussion of political theory is both crucial and limited. The history of political thought encompasses a long and dense set of writings. It is, obviously, impossible to survey the entire realm of political theory in order to present and understand various conceptions of liberty. I assume that the reader has a basic and working knowledge of the history of political thought. My goal here is not to provide a detailed history of the development of conceptions of liberty. I am less concerned with the overarching evolution of the concept than I am intrigued by the ways it has been underused during and subsequent to its consideration by feminist theorists. In order to make this discussion more detailed and more useful for the larger project, I will use examples from the works of only five theorists: Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Karl Marx, and John Stuart Mill.

The political thinkers were chosen because their works represent the depth and breadth of the roots of contemporary American conceptions of liberty. Hobbes was selected because his work represents an interesting paradox—a

2. See Catharine A. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993).

3. Virginia Held, for example, has questioned liberal notions of liberty, specifically ideas about the genesis of freedom. She writes: "From the point of view of those who give birth, it is absurd to assume that we are born free. We are born helpless infants, and will remain unfree for many years. We are only relatively free if those who have cared for us have empowered us to be so" (*Feminist Morality: Transforming Culture, Society, and Politics* [Chicago: University of Chicago Press, 1993], 173). Held makes a good point. But the conception of liberty I describe in this book can be reconciled with Held's concerns. Even if the existence of freedom depends on the quality of the caregiver, that quality can be determined with respect to a feminist theory of liberty.

nonliberal, absolutist political theory grounded on an empirical epistemology.[4] Hobbes's dichotomy of liberty and security foreshadows the dread with which many contemporary thinkers view liberty, always on the verge of spinning into license. Locke was chosen because his work is among the most influential sources of American constitutionalism. A liberal thinker, Locke provides a useful example of a theory of liberty that combines both positive and negative elements.[5] Rousseau, in contrast, is not a liberal. His positive theory of freedom, centered on the role of the general will, is a striking contrast to current libertarian notions of freedom as the absence of restraint.[6] As an expression of idealistic, perfectionistic views of humanity, Rousseau's work provides an important (and cautionary) counterpoint to liberal notions. Marx's work functions similarly, though his concerns do not coincide with Rousseau's. Marx's doctrine of dialectical materialism, coupled with his certainty of the proletariat's rise, leads to an odd and partial discussion of liberty.[7] The materialism of his conception of freedom shares important values with the conception I advance later. And Mill is included because his work *On Liberty* is the most familiar ode to freedom for most of us.[8] Mill's famous "harm principle" is a libertarian truism, even as it is worn down by his own argument. Mill's use of great resonating principles is inspiring, even as his applications are unsatisfying to those (like me) who want a firm (though not fixed) boundary around the realm of personal freedom. I do not attempt or intend to present each thinker's approach to liberty in any systematic or sweeping way.[9] Rather, I will refer to examples of their work as they illustrate points of my argument.

After presenting two methods of categorizing traditions of thinking about

4. See Thomas Hobbes, *Leviathan,* ed. Richard Tuck (Cambridge: Cambridge University Press, 1991).

5. See John Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus,* ed. Peter Laslett (Cambridge: Cambridge University Press, 1960).

6. See Jean-Jacques Rousseau, *On the Social Contract,* ed. Roger D. Masters; trans. Judith R. Masters (New York: St. Martin's Press, 1978).

7. See Robert C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: W. W. Norton, 1978).

8. John Stuart Mill, *On Liberty,* ed. Currin V. Shields (New York: Macmillan, 1985).

9. For background on and examples of feminist critiques of political theory, see, Susan Moller Okin, *Women in Western Political Thought* (Princeton: Princeton University Press, 1979); Arlene W. Saxonhouse, *Women in the History of Political Thought* (New York: Praeger, 1985); Mary Lyndon Shanley and Carole Pateman, eds., *Feminist Interpretations and Political Theory* (University Park: Pennsylvania State University Press, 1991); Zillah R. Eisenstein, *The Radical Future of Liberal Feminism* (Boston: Northeastern University Press, 1981).

liberty, those of David Miller and Isaiah Berlin, I shall demonstrate that "liberty" is separable from caricatures of liberalism. I argue that liberty does not rest on a conception of the individual as atomistic, self-interested, and über-acquisitive. Further, the definition of liberty is much broader than merely the absence of state restraint. Purely negative conceptions of liberty are unsatisfactorily partial because they bypass the question of what sort of institutions best support liberty and because they minimize the threats to liberty from nongovernmental sources. Using examples from canonical political thinkers, I argue that their notions of liberty illuminate our discussions at the points they fail to fit neat rubrics. I show too that dichotomizing theories of liberty into negative and positive is brusque and ungainly. Instead, a new understanding of liberty is needed—one which combines some facets of definitions culled from the history of political thought with a renewed attention to political reality and social context, as well as a recognition of the contingency of liberty's applications. I introduce the parameters of such a notion at the end of this chapter.

Canonical conceptions of liberty are many and varied. David Miller suggests that political conceptions of liberty can be categorized into three traditions: republican, liberal, and idealist.[10] Republican ideas, Miller proposes, are the most directly political, in that liberty is determined in the context of political structure. In this equation, to be free is to be a citizen of a self-governing political regime; that is, the type of government determines whether people will be free. This sort of liberty does not presuppose a democratic system. Consistent with this definition would be an oligarchic regime in which a minority of the residents were citizens, as long as the citizens were free. A republican notion of liberty does not require all residents to have equal liberty.

The liberal notion of liberty, in contrast, is defined as an absence of restraint and is seen to be separate from political legislation. Liberty is the province of individuals—government protects individuals from social interference, but is also itself a threat to liberty in its law-making and law-enforcing realm; that is, freedom is prior to governmental arrangements. This liberal tradition imperfectly coincides with definitions of "negative liberty"—liberty defined by the absence of restraint on the individual. Note too that this conception of liberty also does not require a democratic government. (And this is a sticking point for partisans of a liberal definition.) What

10. David Miller, "Introduction," in Miller, *Liberty,* 1–20.

matters is the realm of personal freedom separate and distinct from state interference. It is not determined by whether the state force is democratic, participatory, or even legitimate.

The third tradition of liberty Miller discusses is the idealist conception. Rather than being determined by social or political arrangements, this notion of liberty is internal and aspirational. The pinnacle of idealist freedom is the individual acting in concert with his desire to attain his true nature, determined of course by "rational" beliefs. Because it centers on internal judgement, reason, and motivation, this conception of liberty is not as explicitly related to politics as the others are. It can, however, coincide with particularly nasty forms of oppression. The fault of this definition resides in its potential to make "rationality" the subject of external and authoritative interpretations. It is quite possible that there is, from the perspective of the powers that be, a "correct" and "rational" end for persons, which can be used to justify coercion for those who fail to behave in accordance with such "rational" expectations. (Imagine, for example, that a woman might choose not to carry a fetus to term. That, some would say, is an irrational and immoral decision, one that fails to recognize the value of human life. In an idealist mode of thinking about freedom, the use of force to compel the woman to behave in accordance with reason—to see the pregnancy through—would be justified.) This idealist tradition is notable too in that it is attacked from both other camps. Liberals warn (as I just did) that idealist conceptions of freedom can lead easily to totalitarianism. Republicans caution that idealist notions sacrifice public institutions and the public good to personal (and sometimes apolitical) ends. But Miller concludes that freedom must be connected to all three traditions of political thought: "To be genuinely free, a person must live under social and political arrangements that he has helped to make; he must enjoy an extensive sphere of activity within which he is not subject to constraint; and he must decide himself how he is to live, not borrow his ideas from others."[11] David Miller has asserted, then, that the three traditions can coexist peacefully and productively. But is his conclusion realistic?

Miller's schematic is one method of organizing themes of liberty in the history of political thought. A second, more famous, example is Isaiah Berlin's distinction between the traditions of negative liberty and positive liberty. In "Two Concepts of Liberty," Berlin suggests that two "senses" of

11. Miller, "Introduction," 19–20.

the term liberty are central to political thought.[12] These concepts, though sometimes combined in the work of a specific political thinker, are distinct, dissimilar, and severable. Berlin draws the distinction sharply. The simplest definition of negative liberty is the absence of restraint. There is a certain minimum space for personal liberty, a sphere in which individuals are unconstrained in their pursuit of their individual ends.

> Political liberty in this [negative] sense is simply the area within which a man can act unobstructed by others. . . . Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.[13]

Only direct action by others, whether rulers or neighbors, counts as an imposition on liberty. Being unable to do something is not the same as being unfree to do it. You do not lack the freedom to work as a physicist if the stumbling block is an inability to learn calculus. You do not lack the liberty to procreate if you suffer from infertility. You are not unfree to travel by Concorde because the fare exceeds your credit limit. You are unfree only if other persons have interfered with your actions: if you were not hired because the personnel officer is racist; if you were sterilized without your consent; if your credit limit is the result of deliberate and unjust discrimination. "Freedom," Berlin writes, "is not the mere absence of frustration of whatever kind."[14]

Berlin argues that the problems associated with negative freedom arose from the theoretical assumptions about the nature and purpose of humanity. All liberal theory, he claims, begins from the following assumption:

> To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, no matter how noble the prospect upon which it

12. It is important to note that Berlin does not merely distinguish between two interpretations of liberty—he suggests that negative and positive liberty are two separate *concepts*. As he writes elsewhere, "Everything is what it is": that is, negative liberty and positive liberty are not shades of the same notion, or the result of different interpretations of a unified freedom. They are distinct and extricable.

13. Berlin, "Two Concepts of Liberty," 34.

14. Ibid., 37.

> opens, or how benevolent the motives of those who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live.[15]

The doctrine of negative liberty based on this assumption is open to three criticisms from Berlin. First, he notes that Mill's assertion—that individualism and moral maturity flourish in systems of freedom—is historically inaccurate. Berlin offers several examples of repressive communities in which human promise blossomed. Second, he stipulates that the negative concept itself is modern. Third, and most damaging, is Berlin's observation that negative liberty does not require self-government: "[T]here is no necessary connection between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?' "[16] The chasm between those two questions is what separates positive freedom (concerned with the former question) from negative freedom (addressed to the latter). The logical distinction is what renders them two discrete concepts.

Positive liberty, Berlin argues, has occupied another realm concerned primarily with the question "who governs me?" and is addressed to the range of an individual's freedoms to act in accordance with internally generated goals. This freedom is exemplified in the individual being her/his own master, being free of enslavement to any other person or institution. An individual so directed would say:

> I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.[17]

15. Ibid., 40. Note how this quote confirms many feminist fears about liberty. If the concept is grounded on this primal assumption—that a man's life if his own to live as he sees fit—then what use can liberty be to women? Historically, few women have had the freedom (and I do mean "freedom" in Berlin's sense) to choose goals, to direct the events and patterns of our own lives. If we are excluded from the cornerstone of freedom, how can we participate as it flourishes?

I suggest that the passage be read, with the masculine pronoun extant, as a statement of history. I suggest too that substituting a feminine pronoun is problematic only if we read the statement as a declaration of experience, rather than as a statement of principle.

16. Berlin, "Two Concepts of Liberty," 42.

17. Ibid., 44.

This resonating statement of autonomy—of a life directed and executed with self-awareness and self-assuredness—can quickly dissipate into an ethical eddy.

If freedom consists in self-mastery, what masters and what is mastered? The master-self must control/direct the mastered-self; that is, the higher, more rational or autonomous self must control the baser, more irrational, impulsive self. Further, Berlin cautions:

> [T]he real self may be conceived as something wider than the individual (as the term is usually understood), as a social "whole" of which the individual is an element or aspect: a tribe, a race, a church, a state, the great society of the living and the dead and the great unborn. This entity is then identified as being the 'true' self which, by imposing its collective, or "organic," single will upon its recalcitrant "members," achieves its own, and therefore their, "higher" freedom.[18]

This reasoning provides the rationale whereby some members of a community can coerce other members in the name of freedom. If reason is clear (to me, at least) that you should behave in a certain way (you should stop smoking, complete a pregnancy, repent), and you are too blind to see the truth, then I am justified as I compel you to behave in accordance with reason. This view of human agency—as conflicted and sometimes confused, with respect to an overarching code of rationality—means that I can and must force you to be free. I can do this too without tyranny, because I claim (and believe myself) to be acting in your best interests. I am not coercing you. I am merely making you do what you would choose to do yourself—what you want in your heart to do, even as your confused intellect tells you otherwise. Such action can at times be justified (and may even lead to more freedom), as in the situation of forcing a person with dementia into medical treatment. But such reasoning is dangerous because it is so open to nefarious interpretation. As Berlin observes, "Enough manipulation with the definition of [what constitutes a self, a person], and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic."[19] This intrinsic tendency of the

18. Ibid., 45.
19. Ibid., 47.

positive concept of freedom to lead to tyranny makes Berlin wary. The perfectionistic, universal tendency to reason from what humans ought to do to what humans actually (can be made to) do, is the downfall of this concept of liberty.

Berlin's dichotomy of concepts of liberty is strict and unyielding. He is historically correct that two lines of thought about liberty have developed separately and have evolved to confront each other. He has demonstrated the assets and errors of each concept. But he also has granted that, theoretically, the two concepts of liberty are not inimical. I want to find a way to connect the two concepts in order to correct the oversights of negative liberty (especially its potential separation from self-government) with part of the positive concept of liberty. Reference to David Miller's three-part arrangement of traditions of liberty will also help to show how a more nuanced and subtle definition of liberty is possible. Caricatures of negative liberty and liberalism are sometimes assumed, by contemporary critical theorists, to typify definitions of liberty. This is not true. Liberty does not depend on a view that humans are atomistic, selfish, and avaricious. Liberty means more than a mere absence of state restraint. And divisions of liberty, into positive and negative concepts, are more useful for historical understanding than they are for prospective theory-building. Each of these assertions will be discussed, using examples from the history of political thought, in the following section.

THEORIES OF LIBERTY, LIBERAL AND OTHERWISE

Liberty and Liberal Caricatures

Contrary to the claims of its detractors, liberty does not depend on an assumption that individuals are atomistic, selfish, and hypercompetitive. It does, however, rely on a conception of the individual as the basic unit from which political action and intention arise. But such a notion of individualism does not require that the individuals in question be disconnected from each other. Human freedom is the freedom of individual persons social and political by nature. In other words, although our actions or emotions or judgments may be directed or performed or declared by us, they occur in a context in which our actions have social repercussions. Many critics confuse

the liberal value of autonomy with a cartoonish vision of disconnected, disinterested individuals. Autonomy, a necessary facet of freedom, does not mean that humans must be solitary or bereft of the influence of others. It indicates instead that free individuals are to be considered capable of directing their own lives and articulating their own desires. Two examples from the history of political thought, John Locke and John Stuart Mill, illustrate that theorists concerned with liberty do not ground their conception of freedom on a notion of an atomistic individual.

For John Locke, freedom is prior to competition and conquest. In Locke's state of nature, there is perfect freedom (within the bonds of the laws of nature, of course) and equality. Freedom and equality ground the obligation to mutual love and interest, which forms the basis of society. It is important to remember that, for Locke, the state of nature is always already social and political. This pre-civil society is governed by the law of nature, Reason, which teaches that

> being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. . . . And being furnished with like faculties, sharing all in one Community of Nature, there cannot be supposed any such subordination among us, that may Authorize us to destroy one another, as if we were made for another's uses, as the inferior ranks of Creatures are for ours.[20]

According to Locke, then, human beings are thus both independent and social, and their liberty and equality are coincident. Natural equality means that there is no authorization for the deprivation of liberty.

Liberty is possessed by individuals with equal moral standing—creatures intended for self-government, not "for another's uses." And the distribution of liberty within "one community of nature" underscores the relationships and interdependence between individuals that holds the group together. Indeed, when liberty becomes the object of conquest and acquisition, relationships between individuals take on the character of a state of war.

> [H]e who makes an *attempt to enslave me*, thereby puts himself into a State of War with me. He that in the State of Nature, *would take away the Freedom*, that belongs to anyone in that State, must neces-

20. Locke, *Two Treatises of Government,* book II, §6, p. 271.

> sarily be supposed to have a design to take away every thing else, that *Freedom* being the Foundation of all the rest: As he that in the State of Society, would take away the *Freedom* belonging to those of that Society or Common-wealth, must be supposed to design to take away every thing else, and so be looked on as *in a State of War*.[21]

The states of nature and of commonwealth are characterized by a possession of liberty that is relatively (though in the case of the state of nature, perfectly) equally distributed. Only when social relations break down—when some individuals attempt to deprive others of freedom—does the state of war arise. The impulse to take freedom from another person is characterized by a self-interest that focuses on acquisition for acquisition's sake and disregards how one's actions may negatively affect other people. This is the sort of context in which atomistic, disconnected individuals operate to increase inequality. Such behavior is not consistent with liberty as Locke saw it.

A more contemporary theorist of liberty, John Stuart Mill, also conceived the individual desiring and possessing liberty as being basically social and often (overly) interested in the well-being of others. Liberty, to Mill, is a social good. Valued properly, liberty is the means to moral, political, technological improvement.

> The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their* mental expansion and elevation to a little more of administrative skill, or . . . a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished.[22]

Liberty is necessary, Mill argues, for individuals to flourish both personally, through their own intellectual and creative progress, and socially, as they work together to improve the character and accomplishments of the state. Liberty requires that the state do two things: first, that it avoid unnecessary restrictions on the activities of individuals; and second, that the state priori-

21. Ibid., book II, §17, p. 279, emphasis in the original.
22. Mill, *On Liberty*, 140–41, emphasis in the original.

tize the interests of improving the intellects and characters of its citizens. Both prongs underscore Mill's concern for human dignity—that humans be agents, not "docile instruments." The relationships among free people indicate that, for Mill, liberty is not premised on atomism or alienation.

Indeed, liberty is vital for Mill because people are not atomistic and interested only in themselves. If people were concerned only with their own actions, few social conflicts would arise. But because we are concerned with what other people do, and how their actions might affect us or our interests, attention to liberty is needed to define the limits of our interference (as well as the restrictions on other people meddling in our own lives). In his first, rousing declaration of the harm principle, Mill writes:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[23]

If Mill believed that human beings were mutually disinterested and socially disconnected, the harm principle would be unnecessary. But because individuals are social and inquisitive, limitations are needed on our liberty to interfere in other people's lives in order that each of us too can have a sphere of influence and activity over which each alone is sovereign.[24] Examples from

23. Ibid., 13.

24. Even at the end of *On Liberty*, when his harm principle has been whittled down and his argument threatens to disintegrate, Mill's beliefs in the social character of individuals and the social value of liberty remain. His two concluding maxims have veered from the harm principle:

> [1] The individual is not accountable to society for his actions in so far as these concern the interests of no person but himself. . . . [2] For such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of opinion that the one or the other is requisite for its protection (114).

Note that "harm to others" is no longer the requirement for justified interference—it has been replaced by the nebulous "prejudicial to the interests of others." Although Mill's concluding arguments are unsatisfactory to those (like me) who applaud the principled defense of liberty embodied in the harm principle, they do underscore the errors of critics who believe liberty is connected to antisocial behavior. Liberty is crucial precisely because it is so difficult (and for Mill,

the writings of Mill and Locke demonstrate that those feminist theorists who equate liberty with caricatures of liberalism are textually and conceptually wrong. Autonomy and atomism are not synonymous.

Beyond the Absence of Restraint

Many feminists have criticized the concept of liberty for focusing on abstractions and ignoring political and social reality. What use are freedoms if they cannot be exercised?, such critics ask. When women's affirmative options are limited by political impotence (thirteen women U.S. senators are "enough"), economic disadvantage (salaries of 74 cents on the male dollar), and the threat of physical harm (from strangers and relatives), how much difference do negative liberties—limitations on state power—make? Does it really matter what the state "may not do" to citizens when the state is continually interfering in women's lives?[25] But such questions rely on dangerous oversimplifications of conceptions of liberty. I know of no political thinker who values a participatory/democratic system and defines liberty as only the absence of restraint.[26] In such a context, liberty means more than the mere absence of restraint, and involves a component of positive freedom as well.

Even John Stuart Mill's notion of liberty contains both negative and positive elements. Mill's harm principle is a famous justification of negative liberty, in that it forcefully (if inconsistently) draws the line that the state must not cross—the line demarcating actions that are purely self-regarding. But Mill's description of the realm of human liberty reveals the positive aspect of his conception. Mill describes this region as "comprehending all that portion of a person's life and conduct which affects only himself or, if it

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ultimately impossible) to distinguish concretely between self-regarding conduct which may inadvertently affect other people and actions that substantively affect others (and because a test of intentions is impracticable).

25. Think of the "welfare reform" legislation, which has had a dramatic negative effect on the lives of poor women and children. Think of the regulations of women's health care (from disallowing abortion to denying coverage for "optional" mammograms) that are continually proposed.

26. Thomas Hobbes has the most narrow conception of liberty as the absence of restraint. The only right (or liberty to do) that the state may not limit is the right to self-preservation. Hobbes can take his conception of liberty to these extremes because his notion of government is premised on absolutism. Given that feminism and absolutism are logically inconsistent, it makes no sense for feminist theorists to conceive of liberty in this narrow Hobbesian sense.

also affects others, only with their free, voluntary, and undeceived consent and participation." It contains three subregions.

> [F]irst, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects. . . . Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others.[27]

Those three types of liberty (thought and feeling, tastes and pursuits, and association) depend not only on the lack of state interference, but also on a particularly positive conception of liberty. Mill's description of an individual with "absolute freedom of opinion" then "framing the plan of [his or her] life to suit [his or her] own character" is indicative of self-government. Only if we rule ourselves—if we determine our own values, make our own choices, direct our own actions—can we be free. The state must act to encourage and protect such freedom. Refraining from intrusive legislation is not enough; the state must encourage the development of individual capacities by acting affirmatively to prevent majority tyranny or by encouraging religious toleration. Because liberty is an individual good as well as a social good, it is in the state's interest to promote and pamper the spheres of liberty. According to historian of political thought George Sabine, this emphasis on the positive role of the state in guarding liberty is one of Mill's most important contributions to liberalism.

> [T]he function of a liberal state in a free society is not negative but positive. It cannot make its citizens free merely by refraining from legislation or assume that the conditions of freedom exist merely

27. Mill, *On Liberty*, 16.

> because legal disabilities have been removed. Legislation may be a means of creating, increasing, and equalizing opportunity, and liberalism can impose no arbitrary limits on its use.[28]

Only by encouraging the growth of liberty (by avoiding some legislation and instituting other) could Mill's state benefit. The positive and negative "senses" of his conception are intertwined.

With very different aspirations, Karl Marx also has described a notion of freedom that has both negative and positive attributes. He gleefully writes, in the "Manifesto of the Communist Party": "And the abolition of this state of things is called by the bourgeois, abolition of individuality and freedom! And rightly so. The abolition of bourgeois individuality, bourgeois independence, and bourgeois freedom is undoubtedly aimed at."[29] That is, the freedom Marx intends to see destroyed is of a particular type—it is the bourgeois situation of free buying and selling, of free trade. Paradoxically, the overthrow of bourgeois freedom would allow a (better) communist freedom to flourish in its stead. This new sort of freedom demands dramatically different material conditions.

> This transformation, through the division of labour, of personal power (relationships) into material powers . . . can only be abolished by the individuals again subjecting these material powers to themselves and abolishing the division of labour. This is not possible without the community. Only in community (with others has each) individual the means of cultivating his gifts in all directions; only in the community, therefore, is personal freedom possible.[30]

Here Marx is describing a form of liberty. The community-based notion he discusses is far from being a mere lack of restraint. This liberty emanates from an (autonomous but not atomistic) individual who directs and encourages his own attributes and actions. The positive actions of this liberty contrast with the negative conception of liberty as *reactions* to the presence or

28. George H. Sabine, *A History of Political Theory,* rev. Thomas L. Thorson, 4th ed. (Orlando: Holt, Rinehart and Winston, 1973), 646.

29. Karl Marx, "Manifesto of the Communist Party," in Tucker, ed., *The Marx-Engels Reader,* 2d ed., 485.

30. Karl Marx, "The German Ideology," in Tucker, ed., *The Marx-Engels Reader,* 197.

absence of state regulation. And the limits of liberty, for Marx, are determined by ethical standards. He writes in the "Manifesto" that "communism deprives no man of the power to appropriate the products of society; all that it does is deprive him of the power to subjugate the labour of others by means of such appropriation."[31] Freedom is restrained by a principle of antisubordination—that the liberties of one person are limited by a social desire to avoid the subordination of the freedoms of others. But such sensible limitations are a small price to pay for the great gains to be realized when a vast swath of humanity is liberated. The freedom that results includes the ability to be a community member with dignity and self-respect, to be free of class strife, to benefit from the end of oppression. And, in the end, "[i]n place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all."[32] Marx's conception of freedom goes beyond a doctrinaire notion of negative freedom.

John Locke's conception of liberty also combines negative and positive elements. In the state of nature, freedom consists in being unrestrained by the will or law of any human, and ruled only by reason, the law of nature. But in civil society, freedom takes on a different cast—it "is to be under no other Legislative Power, but that established, by consent, in the Commonwealth, not under the Dominion of any Will, or Restraint of the Law, but what the Legislative shall enact, according to the trust put in it."[33] The restrictions on natural human freedom are expected in civil society but are justified only to the extent that they are based on the principles of the law of nature (especially its core of self-preservation) coupled with a requirement of consent. Consent to be governed is the linchpin of legislative legitimacy. The limitation of consent is the natural right to self-preservation, carried through to civil society. And the expression of civil limitations on human activities is constrained by the need to avoid arbitrary exercises of power.[34] But liberty demands more than the absence of arbitrary restriction. According to Locke:

31. Marx, "Manifesto of the Communist Party," 486.

32. Ibid., 491.

33. Locke, *Two Treatises of Government,* book II, §22, p. 283.

34. Locke explains that the legislative power "is *not*, nor can possibly be absolutely Arbitrary over the Lives and Fortunes of the People." The reasoning for this begins in the state of nature:

> A Man, as has been proved, cannot subject himself to the Arbitrary Power of another; and having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself,

> Law, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. . . . *[T]he end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*.[35]

Locke's description of the active element of civil freedom is strikingly similar to Miller's notion of the idealist tradition and Berlin's description of the positive concept of liberty.

But why, then, is Locke not mentioned when litanies of antiliberal errors are recited? Why is Locke not categorized by liberals with Rousseau, as a threat to freedom? Because incorporated into Locke's notion of freedom is an important caveat—that restrictions by (reasoned, rational) law can be justified, but restrictions by (impulsive, arbitrary) will (legislative and otherwise) cannot.

> But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*. . . . But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.[36]

The law governs the boundaries of liberty, and the law, through its genesis in consent and evasion of the arbitrary, can compel citizens to behave in accordance with its strictures. Locke's system is really a government of laws, not men. Peter Laslett observes of Locke's regime: "Men cannot . . . be compelled by will, the individual will of a ruler or the general will of a society."[37] The distinction between the just force of law and the brute force

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> and the rest of Mankind; this is all he doth, or can give up to the Common-wealth, and by it to the *Legislative Power*, so that the Legislative can have no more than this. (*Two Treatises of Government*, book II, §135, p. 357, emphasis in the original)

The avoidance of arbitrary laws and regulations is a paramount criterion for a legitimate legislature.

35. Ibid., book II, §57, pp. 305–6, emphasis in the original.
36. Ibid., 306, emphasis in the original.
37. Peter Laslett, "Introduction," in Locke, *Two Treatises of Government*, 126.

of will is the element of Locke's conception of liberty that allows it to avoid the dangerous consequences of the positive concept, while incorporating idealist and republican elements into a negative conception.[38] Coupled with the examples from Mill and Marx, it illustrates the practical difficulties and theoretical doubts raised by attempts to separate the positive and negative aspects of liberty into two separate concepts.

Reconsidering Positive and Negative Liberty

As demonstrated in the previous section, examples of positive and negative conceptions of freedom are often found in the same works of political thought. But, in examples from the works of Mill, Marx, and Locke, we observe that elements of positive freedom are not as dangerous as Isaiah Berlin warned. Political theory contains the influences of positive liberty because practitioners are often concerned with advancing their solutions to their societies' ills. If institutional reforms or renovations are desired, it is not enough to just spell out how the state may not act. Instead, thinkers often want to craft institutions to encourage and nourish certain attributes of its citizens, in order that they may better themselves and the state. There is nothing inherently wrong with this impulse. And there is nothing inherently wrong with positive liberty, as described by Berlin. The problems arise, however, when conscience is exiled from politics—when individual judgments are considered private (that is, antipolitical) and are ignored, dismissed, or squashed. This is a difficulty in the works of two very different theorists: Thomas Hobbes, whose definition of liberty is stereotypically negative, and Jean-Jacques Rousseau, whose positive conception of liberty makes liberals quake. The exile of individual conscience from the purview of politics is one reason for the potential of their theories to devolve into tyranny.

In *Leviathan,* Hobbes explains why humans, unlike irrational creatures,

38. Although beyond the scope of this discussion, for a related, but more negative, conception of liberty see Locke's *A Letter Concerning Toleration,* ed. James H. Tully (Indianapolis: Hackett, 1983). In that work, Locke discusses the distinction between the speculative (internal) realm and the practical (external) realm. The civil magistrate, Locke asserts, can properly deal with the public parts of the practical realm, that group of actions the consequences of which affect other people. The magistrate cannot, however, interfere in the purely speculative realm, which encompasses the conscience, as well as the individual's relationship to God. That is, a magistrate cannot impose on an individual's beliefs, though the consequences of actions affecting others in the practical realm could be sanctioned.

are incapable of living peacefully in a nonpolitical society and need instead to generate a commonwealth, a body politic.

> [T]hese creatures, having not (as man) the use of reason, do not see, nor think they see any fault, in the administration of their common businesse: whereas amongst men, there are very many, that thinke themselves wiser, and abler to govern the Publique, better than the rest; and these strive to reform and innovate, one this way, another that way; and thereby bring it into Distraction and Civill warre.[39]

Pride in individual judgment poses a threat to the commonwealth. As long as individual men (in this case) are allowed to reach their own conclusions and publicly act them out, the state is not safe. The competing wills must be corralled. Hobbes's solution is to form a common power so that humans may live in relative security. To effectuate the covenant, it is necessary for them "to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will."[40] Once the cacophony is silenced, and the commonwealth speaks with one voice representing one will, dissension is eliminated. Understanding that the proud expression of individual judgment is threatening to the civil order is required to form the union and to preserve it.

In Hobbes's absolutist regime, pluralism cannot be tolerated. Chief among the factors that weaken the commonwealth are two directly related to this issue: (1) the private judgment of good and evil, and (2) foolish devotion to private conscience. Hobbes writes of diseases of the commonwealth:

> [O]ne is, *That every private man is Judge of Good and Evill actions*. . . . From this false doctrine, men are disposed to debate with themselves, and dispute the commands of the Common-wealth; and afterwards to obey, or disobey them, as in their private judgments they shall think fit. Whereby the Common-wealth is distracted and *Weakened*.
>
> Another doctrine repugnant to Civill Society, is, that *whatsoever a man does against his Conscience, is Sinne*; and it dependeth on the

39. Hobbes, *Leviathan,* chap. 17, p. 119.
40. Ibid., 120.

> presumption of making himself the judge of Good and Evill. . . . Otherwise in such diversity, as there is of private Consciences . . . the Common-wealth must needs be distracted, and no man dare to obey the Soveraign Power, farther than it shall seem good in his own eyes.[41]

Conscience must be kept out of the political realm because, according to Hobbes, it can lead to no good. Because citizens are offered protection, they must fulfill their obligations to the sovereign. The liberty of subjects is limited by civil laws, that is, by what the sovereign permits. Questioning the sovereign's dicta is an act of rebellion that cannot be tolerated in an absolutist regime. It is this tendency of Hobbes's commonwealth to control not just the bodies of its subjects but to also limit individual consciences that is so distasteful to contemporary thinkers concerned with liberty. It demonstrates that the mere absence of physical restraint is not enough for those of us committed to protecting and encouraging freedom. The problem with positive liberty is not its aspirational aspect, but the elimination of individual judgment from politics. When our consciences are not our own, freedom is impossible, regardless of how it is defined.

A similar view of the role of private conscience is presented by Rousseau in his *On the Social Contract*, though from a very different perspective. How, Rousseau asks, can individuals preserve their lives and their freedom while living peacefully together?

> Find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each one, uniting with all, nevertheless obeys only himself and remains as free as before. This is the fundamental problem which is solved by the social contract.[42]

By forming an "association" with a common public good and a coherent body politic, Rousseau's individuals avoid the drawbacks of living in an "aggregation," in which interests remain strictly private. As long as people's loyalties and interests are directed toward themselves rather than toward the

41. Ibid., chap. 23, p. 223, emphasis in the original.
42. Rousseau, *On the Social Contract,* book I, chap. 6, p. 53.

community, fragmentation and dissolution is always a threat. Individual freedom is threatened by others who may be stronger or meaner. But when the association is formed, the internal competition is transformed into co-operation. The good of the individuals is aligned with the public good. And the only rational and correct option is to submit one's will to the will of the community—the general will.

This option entails a transformation, from a group of like-minded private individuals to a civil state of citizens who, combined, transcend their aggregate value. In order to hold the group together, Rousseau proposes the following doctrine (familiar to the most casual student of political thought):

> [E]ach individual can, as a man, have a private will contrary to or differing from the general will he has as a citizen. His private interest can speak to him quite differently from the common interest. . . . Therefore, in order for the social compact not to be an ineffectual formula, it tacitly includes the following engagement, which alone can give force to the others: that whoever refuses to obey the general will shall be constrained to do so by the entire body; which means only that *he will be forced to be free*.[43]

This chilling phrase is often cited by critics wary of the tyrannical effects of positive liberty. It is a paradoxical construction, in which stifling liberty is calculated to result in more freedom. In Rousseau's scheme, it is not only good but rational and right,[44] for me to abandon my own opinions, interests, and concerns—my conscience—when they conflict with the general will. The force that compels me to act in accordance with the general will

43. Ibid., book I, chap. 7, p. 55, emphasis added.

44. Rousseau asserts that moral maturity is the result of conforming to the general will. He writes:

> Although in this state he deprives himself of several advantages given to him by nature, he gains such great ones, his faculties are exercised and developed, his ideas broadened, his feelings ennobled, and his whole soul elevated to such a point that if the abuses of this new condition did not often degrade him beneath the condition he left, he ought ceaselessly to bless the happy moment that tore him away from it forever, and that changed him from a stupid, limited animal into an intelligent being and a man. (Ibid., book I, chap. 8, p. 56)

His description of the resulting state is inspiring, until the repercussions are considered. Missing from the litany of attributes improved is any mention of the individual will.

is not considered arbitrary; for Rousseau, it is the culmination of self-government, and the realization of freedom, demonstrated by "obedience to the law one has prescribed for oneself."[45] Personal judgement and conscience are thrown out of the political sphere. Individual perspective and direction is confined to a nonpolitical arena, where the repercussions of such opinions and actions are minimal.

Rousseau's proposition gives us the freedom to govern our selves when the stakes are low. When consequences matter—for us, for the community, for the common good—the sphere of liberty is constrained. Again, the fault lies not with the positive aspects of liberty such as self-governance, personal improvement, fulfillment of civic goals; instead, the problem can be traced to an authoritarian dismissal of individual conscience. By restricting personal ideological and moral positions from the public purview, Rousseau kills the possibilities for real freedom in his regime. Without the possibility of plural opinions and interests, the state necessarily becomes a force of constraint rather than liberation. Trying to convince citizens that their chains make them free does nothing to remedy the fact that excluding conscience from politics limits liberty of any sort, positive or negative.

Those who favor barring the judgment of individuals from the realm of politics must be quite certain that their regime, alone, will produce the "correct" result for any dispute. Ironically, the conditions necessary to justify the exclusion of personal conscience from politics are similar to the circumstances that give rise to the independent judgments in the first place. The regimes of Rousseau and Hobbes condemn the pride that motivates interference of the specific in the transcendent will of the state. But the result of the exclusion is to magnify the hubris of the body politic, as its general or common will is made (definitionally) nearly infallible. When there is no room for independent criticism or contribution, there is no room for meaningful participatory politics, self-government becomes impossible, and liberty is unjustly limited. This is the problem with positive liberty as described by Berlin: it often concentrates the power to declare truth in the hands of those capable of (tacitly consensual) coercion. The internal goals of self-improvement are problematic when the direction and degree of the change are determined by an external party.

Obviously, I subscribe to a contrary point of view—that competition of ideas in a "marketplace" will encourage the good ideas and discourage the

45. Ibid., book I, chap. 8, p. 56.

bad. (It is worth noting, again, that there is a disconnect between a principled notion of the free exchange of ideas and the political reality that so-called open societies are often open to the ideas of only the powerful few. I am not naive enough to believe that we in fact live in a society characterized by the free exchange of ideas and the ability of all to participate. But it is a worthwhile political goal and a useful theoretical aim.) Using John Stuart Mill's argument, exposing ideas to public consideration is necessary for the individual status of the ideas as well as for the good of the society. Unusual ideas deserve a hearing not least because they could be correct. Even if misguided, such ideas play an important function in the improvement of social/political character and discourse. If the idea is wrong, it may still illuminate a small truth, it may force the public to reconsider a much loved dogma, and the contestation of ideas improves the intellectual skills of the population.[46] Free and open exchange and criticism of ideas is fundamental to a society that chooses not to rely on received wisdom. If there is no required foundational truth, then a plurality of opinions and ideas must be encouraged, so that the best will come forth. If disagreements arise, according to Mill, it is illegitimate for the state to silence the opposition. In a great, resounding declaration, Mill writes: "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."[47] He is not misled by the power of independent judgment, however. Mill acknowledges that such ideas can be threatening to the foundations and intentions of the state. But dangerous as they might be, individual consciences are needed to act as a curb on state power. When we give up our freedom to opine and participate intellectually in public debates, other freedoms can easily slip away. In this way, negative freedom and positive freedom are connected, not as distinct concepts, but as facets of the same conception.

A useful conception of freedom must involve more than just portions of either the negative definition or the positive definition. I understand that Isaiah Berlin's argument attempts to clarify the important historical and developmental distinctions between "freedom to" (the positive concept) and "freedom from" (the negative concept). But instituting a dramatic split

46. For more discussion, see Mill, *On Liberty,* chap. 2, "Of the Liberty of Thought and Discussion."

47. Mill, *On Liberty,* 21.

between the two "senses" elides the fact that Berlin's criticisms of each definition could be remedied if the two were prospectively reconciled.[48] Berlin criticizes negative liberty for not requiring a participatory element, but part of that requirement (in a straightforward emphasis on self-government) could be met by the positive notion. He criticizes positive liberty for its tyrannical tendencies, but his criticism conflates the internal situation of personality development with the autocratic perfectionism of some expressions of that definition. In that case, Berlin's criticisms can be met by allowing individual conscience back into politics—that is, by injecting an element of the negative definition into the positive conception. My proposal to reintroduce theoretically these two conceptions is not a vainglorious exercise in theory. It is consistent with and respectful of the tradition of political thought, in which thinkers concerned with conceptual understanding and practical applications often drew aspects of freedom from the positive and negative traditions. When their theories of liberty proved unsatisfactory or ineffective, the faults can be traced to artificially narrow definitions of liberty that ignored elements from other conceptions.[49]

Perhaps the resolution lies in the integration of aspects of liberty from varied traditions: negative, positive, republican, liberal, idealist. As I mentioned previously, David Miller's formulation—"To be genuinely free, a person must live under social and political arrangements that he has helped to make; he must enjoy an extensive sphere of activity within which he is not subject to constraint; and he must decide himself how he is to live, not borrow his ideas from others"[50]—suggests that a coherent theory of liberty must involve all three traditions of thought about freedom: republican, liberal, and idealist. His combination underscores the participatory element, the libertarian element, and the internal element of conscience.

What Miller leaves undefined, however, are the precise proportions with which these traditions should be mixed. This decision is proper. Strictures beyond conceptual guidelines are unreasonable and impractical. Liberty can-

48. By "reconciled" I mean the combination of two related though not identical *conceptions* (not concepts) of liberty. The result is not a fixed and final definition of freedom, but it does acknowledge that political conceptions of liberty differ from each other in their emphases on constitutive elements, such as libertarianism or the extent of participation.

49. Think of Mill's failed harm principle, which disintegrates because he fails to fully protect a sphere of individual freedom in his efforts to encourage institutional attention to improvement of individuals.

50. Miller, "Introduction," 19–20.

not be produced by a recipe—mixing three parts of the liberal tradition with a dash of idealism, baked in a republican crust. The ingredients and results of liberty are impossible to quantify. This makes it difficult to quantify how much liberty any individual possesses, and so to determine whether equal liberty exists and how arrangements might be altered to equalize freedom. But, as Berlin argues, this confusion is a function of the ephemerality of liberty, and is not a reflection of theoretical sloppiness or conceptual insufficiency.

> The extent of my freedom seems to depend on (a) how many possibilities are open to me (although the method of counting these can never be more than impressionistic . . .); (b) how easy or difficult each of these possibilities is to actualize; (c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; (d) how far they are closed and opened by deliberate human acts; (e) what value not merely the agent, but the general sentiment of society in which he lives, puts on the various possibilities. All these magnitudes must be "integrated," and a conclusion, necessarily never precise, or indisputable, drawn from this process.[51]

Berlin's description of the difficulty of determining the extent of liberty focuses on the cultural value of liberty as well as on the conditions for expression of freedom. He recognizes that theoretical speculation alone bears little relevance for socially situated individuals considering their actual and potential activities. It is all very well and good to claim (as I have) that a useful conception of liberty must: (1) recognize that autonomy and anomie are not necessarily coincident; (2) encompass more than the mere absence of external restraint; and (3) recognize that philosophical distinctions between types of liberty are not and should not be carried out in concrete and useful conceptions. But how might these observations relate to the construction of a feminist theory of liberty?

Such a theory must rest on dismantling those old distinctions. My aim herein is to illustrate and advocate a new, feminist notion of freedom that embraces the complexity abandoned by previous partitioned understandings.

51. Berlin, "Two Concepts of Liberty," 42–43 n. 9.

This step involves the need for a new vocabulary—an alternative theoretical understanding.

CONTEXTS AND CONTINGENCIES

As many feminist critics have noted, and as was discussed in Chapter 1, theories that seem intellectually intriguing or potentially beneficial are not necessarily useful for feminism. In order to be relevant and reliable, theories must be applicable to the constrained and unequal situations in which women find ourselves. What distinguishes a feminist theory of liberty from another, generic theory of liberty is that a feminist theory acknowledges that it must be both theorized and understood within and from the context of women's lives. If such a theory is not cognizant of the ways in which women have been systematically excluded from political activity or legal protection (for example, our former exclusion from citizenship, from performing legal roles such as juror or executor, from certain types of employment) or if the theory is inapplicable to the situations in which women often find ourselves (with primary responsibility for the work of child-rearing, under the threat of sexual violence), then it is nothing more than a flight of fancy. That sort of theory may be interesting and compelling, but it has little relevance for women's lives.

Abstractions and philosophical musings—thought-provoking and inspiring as they may be—are not useful alone for women and men concerned with ending patriarchal, racial, and class-based injustice.[52] Unless the theoretical approach is situated in the context of lived experience, it will be weak and ultimately unsatisfying. If the normative implications of the theory are spun out architectonically, without regard for the conflicts and crises that people actually face, they are not useful. Many students of the history of political thought (myself included) enjoy exploring and examining the "cities in speech" spun by theorists. But such pleasure is always moderated by the reminder that these exercises are partially fictional. Speculations as to how

52. Although I list these forms of injustice serially, they should not be considered separate, distinct, or stratified forms of oppression. Although at different times and in different contexts one of these forms may exert a more direct force on people's lives, it is theoretically and practically impossible (and undesirable) to extricate one form of oppression from the others. I subscribe to Kimberlé Crenshaw's "intersectionality" approach, which is detailed in her: "Demarginalizing the Intersection of Race and Sex," *University of Chicago Legal Forum* (1989): 139.

men (and I mean men) behaved in imagined states of nature are informative ways to explain and justify specific political arrangements. But their focus is on explaining how specific regimes came to exist and why (with reference to an ephemeral state of nature) they are or are not appropriate—they look backward rather than forward. Because state-of-nature theorists do not begin their argument from the context of political reality,[53] there is always an epistemological (ontological?) disjuncture between the world in which they live and the world they describe. If political thought (that is, thinking about politics) is to be anything other than a descriptive academic exercise, its normative aspects must be directed toward some purpose(s).

John Rawls, for example, in *A Theory of Justice,* is not concerned merely with describing what could take place behind the veil of ignorance. His theory is informed by his concern with the increasing disparity between the rich and the poor, and his desire to justify how he thinks the modern welfare state should address and limit distributive inequality. As such, his theory is laudable. But his tendency to rely on disembodied abstractions ultimately weakens his argument. Rawls's individuals in the original position are ignorant of their specific strengths and weaknesses, as well as of their socially situated identities. Such an individual does not know if he (and I do mean he[54]) is born rich or poor, fast or slow, smart or stupid. He also does not know his race, his gender, his ethnicity, his religion. He is asked to reason out principles of justice that will protect his interests without knowing his own specific interests. Rawls assumes that all individuals, regardless of their demographic or psychological characteristics, share the same basic interests in being treated fairly. But is this really the case? Do our social experiences shape our experiences of justice in ways that make our interests very different? Does the primary emphasis Rawls's individuals put on the distribution of goods (of values, of things) reflect the worth that socially situated men of color, women of color, or white women would also assign? Do the tangible and acquisitive characteristics of Rawls's goods coincide with those valued by less privileged members of society?

Those questions are impossible to answer hypothetically. But they do point to a problem with Rawls's approach: he insufficiently considers the

53. However, it is important to note that they often do read their contemporary condition of politics back in to their state of nature.

54. See Susan M. Okin, "John Rawls: Justice as Fairness—For Whom?" in Shanley and Pateman, eds., *Feminist Interpretations and Political Theory*, 181–98.

possibility that individuals' interests are breathtakingly plural—and, more important, that they cannot be considered separate from the social context of inequality in which those interests are formed and directed. We do not know, from Rawls's account, how women fare in his proposed theory. Because Rawls avoids considering situated perspectives and experiences in his desire to explore a broad conception of justice, it is unclear if his theory has any practical relevance for individuals who happen to be women and/or nonwhite. Although Rawls's goal was impartiality—judgment divorced from self-interest—the institutional aspects of inequality pose serious questions for his theory. It is not simply the case that individuals have interests. There are also important, institutional ways in which those interests function to exclude certain kinds of people and interests from fair distributions of goods.[55] His work illustrates that for a theory to be useful for feminism, it must be applicable and applied (in contextual and concrete ways) to the circumstances of women's lives.

Like studies of coronary artery disease in men that are generalized to women, political theories of disembodied individuals out of specific, embedded social contexts are interesting but not particularly useful. For example, a formal requirement that positions and offices be open to all is unlikely to have much practical effect unless the institutional culture is changed. Simply adding women to the boardroom is not enough to change corporate environments. The culture of Playboy Enterprises is not fundamentally altered by CEO Christie Hefner. It is vital, then, that concrete applications of theories to women's lives—both during and subsequent to theory construction—be performed if the theoretical approaches are to be considered by feminism. Attention to the context of women's lives (theoretically and practically) is required for a feminist theory of liberty.

The interjection of context into theorizing is nothing new. Good theory has always been aware of and sensitive to the contexts in which it is created and understood. The only added element is a reminder that the contexts selected must take account of women's lived experience.[56] But once we pay close attention to how women live and use that experience to build theory

55. See, for instance, Derrick Bell's *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992).

56. "Women's lived experience" is one of those loaded terms—implicitly dangerous yet useful as a name for a too-often-unexamined space in theorizing. Elizabeth V. Spelman's classic *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988) is the best source for discussion and insight on these sorts of issues. Spelman suggests that dominant

and to understand it, how general can the theories be? Will we be stuck with situation-specific theories in which white women's experience produces categorically different theories than black women's experience, or in which New England women's experience produces theories incomprehensible and inapplicable to California women's context? How do we avoid piecemeal results while emphasizing the importance of specific applications? If theories are to be created and understood in specific and detailed milieux, how expansive or inclusive can they be? If context is required both for theorizing and understanding, are theories doomed to be tessellated explorations of circumscribed and limited subjects? Will we be left with an amalgamation of little theories that exist on their own because the contexts in which they arose are not identical and are therefore not compatible? Does emphasis on context relegate theorizing to second-class status? It does not. The solution lies in a two-fold approach combining the appeal to general principles with contingent applications.

Principles are necessary for theories to avoid spiraling into a collection of fragmented and partial thoughts. If we are to have feminist theories of liberty rather than individual- or subgroup-based specific examples of liberty, our theoretical work must be constructed in relation to some overarching principles. These principles would not be like tunnels, funneling our thoughts and work into predetermined and narrow outcomes. Rather, they should function like guideposts, reminding theorists of the important ethical values and political circumstances that must be acknowledged and considered. Appeal to principles provides both a focus and room to maneuver. They contain, necessarily, generalizations. These broad statements can serve as an articulation of ethical ends and value-laden conclusions. But, using nonspecific language, principles should be applicable to more than one specific context. As clear and general propositions, principles offer a normative standard with which to compare specific interpretations and justifications. They do not represent the end of the debate. Principles can function to focus and direct political applications. The subjects they address are broad. They could be (and in this case are) based on normative assertions: that freedom depends on the agreement that identity is best generated internally rather than imposed; that freedom is threatened when human dignity becomes the object of contractual agreements; that freedom can flourish only in a plural-

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Western feminist thought has suffered from "plethoraphobia"—the fear of acknowledging, examining, understanding, valuing the manyness of women.

istic society. They provide guidance as we wrestle with ethical and political dilemmas. They are a reminder of a more universal approach, of the search for meaning in the big picture.

In that sense, principles can also be dangerous, especially for feminist theorists concerned with considering and respecting the contexts of women's lives. Principles represent a transcendent element—the belief that it is appropriate to make certain value claims that exceed a particular situation and encompass a multitude of experiences. As a declarative proposition this can be useful, but as a descriptive statement it can run the risk of effacing experiences that do not neatly fit its mold. For example, the principle stated in the Declaration of Independence, that "all men are created equal," has great rhetorical power. It is a rousing, inspirational claim that can do much to motivate people to seek institutional change. But as a descriptive statement it reveals a cognitive dissonance with the social reality of the time. The principle may have been strongly believed, but the follow-through on its values was shoddy at best.

The solution to this problem is quite simple: appeal to principles but avoid universal or transcendent applications of those principles. Even if a principle is held to be generally true or desirable, it does not follow that it should be uniformly applied in all contexts. A feminist theory of liberty is one that is theorized and understood in the context of women's experiences. But women's experiences are not monolithic. The case cannot be made that a single woman's experience is more like a general Women's experience than it is like any man's.[57] Women's experiences and the political, economic, or ethical problems we face are heterogeneous. As it is inappropriate to treat all women's issues as if we were men, it is also unacceptable to treat all the conflicts of all of us as if we were one.

This suggestion does not elide ethical concerns. I am not proposing that moral standards be shirked, simply that all situations are not equivalent and applications of general principles (not the principles themselves) may need to be altered to better fit the context. An attention to contingency means that the application of principles will take place with the knowledge that situations are not uniform, circumstances change, solutions are often dependent on uncontrolled variables. Proposing a principle of liberty is not like writing

57. Men and women alike are shaped by the forces of patriarchy. For an interesting exploration of the way gender affects men, see Susan Faludi's *Stiffed: The Betrayal of the American Man* (New York: Perennial, 2000).

a hard and fast rule, to be used completely and consistently in any situation. It is rather like offering a general set of values and considerations, to be used in specific situated contexts in ways that are respectful of the different details and the varied outcomes. In other words, a principle is not a concrete and timeless rule and should not be used as such. Contingent applications of general principles will help theories of liberty to be more directly relevant and politically successful in the contexts of women's lives.

In order to theorize liberty from a feminist perspective and toward feminist ends, a new approach is needed. A feminist theory of liberty must begin from the premise that liberty and equality are sympathetic and related values, and that autonomy and rich interpersonal relationships are not mutually exclusive. It must go beyond the mere absence of restraint. It must make room for individual judgment in things political. It must recognize that it is possible (indeed desirable) to reconcile positive and negative conceptions of liberty, and that such a reformulation will yield a more sophisticated and textually conscious notion of liberty. It must be theorized and understood from the context of women's lives, in order that men's experiences not stand in for human experience. It must contain an appeal to higher principles, such that they function as guides for judging and responding to the practical conundrums of women's lived experience. This feminist theory of liberty must contain principles that reinforce the centrality of self-definition, that protect the values of human dignity, and that are committed to encouraging and sustaining a pluralist society. And those principles must be marshaled contingently, with an awareness that liberty is not a force to be used to constrict and constrain women's choices and with the understanding that women's lives and men's lives are varied. These parameters shape the three principles of liberty, partially constitutive of a feminist theory of liberty, which are discussed in the following chapters.

3

PRINCIPLES OF LIBERTY

Theoretical Explorations and Practical Considerations

The division of political liberty into positive and negative concepts is ungainly when considered from the perspective of texts of political thought and inefficient when judged from practical policy applications. Exaggerated definitions of positive liberty (the extreme conclusion of being "forced to be free") make humans the moral equivalent of sheep—always in need of a kind master to direct our desires and urge our movements toward the prescribed goal. Notions of negative liberty, bordering on the parodic, also treat humans as if we were animals, allowed freedom only within a fenced pasture of free

will. Either caricatured conception of liberty is inadequate. A feminist theory of liberty needs both negative and positive elements, which in specific social contexts combine to illuminate guiding principles, useful only insofar as they are applied contingently.

The theoretical considerations explored in the previous chapter aide us in our pursuit of principles of liberty but they do not dictate those guiding precepts. It is my contention that a complete set of principles of liberty cannot be firmly determined. Rather than thinking of liberty as a finite and fixed set of rules and conditions, it is better to presume that a feminist theory of liberty could contain countless axioms. I do not want (and do not believe it would be possible) to articulate a delineated and determined feminist theory of liberty that would solely comprise a closed set of liberty principles. Such a proposal would necessarily be incomplete; it would likely overlook liberty concerns central to women in social and political situations foreign to me, and it would have to take an unacceptable suprahistorical form. Declared commitments to contextual understanding, participatory interpretation, and contingent application make an overstructured definition of liberty impossible. Rather, a feminist theory of liberty should consist of an open set of principles: to be understood and generated within the context of lived experience, and to be deployed contingently. Herein, I examine only three political issues, and propose only one liberty principle for each. Obviously, support could be marshaled for other principles arising from the same situations. My focus does not preclude such theorizing. The three principles I introduce are examples of one way to think about liberty. There are, of course, others.

PRINCIPLES OF LIBERTY IN THEORY

The reconciliation of different kinds of liberty—negative and positive; republican, liberal, and idealist—is possible if we understand that types of liberty are not necessarily antagonistic or mutually exclusive. Many theories of liberty, including those of Locke and Mill, include aspects of both negative liberty's restraint and positive liberty's attention to conscience. David Miller's descriptions of three traditions of liberty, republican, liberal, and idealist, can be combined within a coherent whole. Miller's formulation emphasized three areas in which human liberty is important: (1) as it relates to self-government and participation; (2) as it determines a realm free of state

interference; and (3) as it depends on a commitment to diversity of the inertias and actions of human agency.[1] The principles of liberty I propose and discuss are each related to one of Miller's three areas. I transpose Miller's emphasis on self-government to controversy surrounding self-definition in a legalistic context. I explore the boundaries and implications of a private (procreative) realm free from government constraint. And I question the extent to which we are able to allow individuals to determine their own, diverse, actions and inactions. Each of these projects generates and considers a (nonexclusive) principle of a feminist theory of liberty.

Three Principles of Liberty

The republican tradition of thinking about liberty teaches us that participation in the construction of social and political institutions and relations is vital for freedom. We can be free only if we are participants in and citizens of a free society. Although Miller does not discuss this issue, it is implicit in our understanding that such freedom also requires self-government and participation in the construction of individual social and political identities. If we are to be free to actively contribute to political and social arrangements, we must also be free to actively shape (to don, shed, and transform) the social and political labels attached to us. That means that categories and assignment of identities must arise from self-definition and participation, not from top-down institutional imposition. An articulation of this value, necessary to a feminist theory of liberty, is The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning.

1. Note that Miller's three areas roughly (and imperfectly) correspond to John Stuart Mill's three regions of human liberty. The second relates to Miller's third (idealist) element, the third to Miller's second (liberal).

> [F]irst, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects. . . . Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others. (John Stuart Mill, *On Liberty,* ed. Currin V. Shields [New York: Macmillan, 1985], 16)

Miller's contribution from the liberal tradition is this: liberty requires a realm of activity free of governmental constraint. But what are the limits of that realm? And what justifications would allow the state to interfere in ethically contentious situations? This is a particularly thorny question for feminists, who are well aware of the dangers that can accompany those (like women, historically) who reside in a realm governed by private individuals rather than the state. It is generally accepted by feminist scholars that the ideology which limited government involvement in the private affairs of individuals also worked to deprive women of legal protection from the abuses we suffered at the hands of our (nongovernmental) rulers. For example, common law tradition that barred the state from regulating relationships between husbands and wives also prevented the state from stopping spousal abuse. The practices that allowed (male) individuals freedom to conduct their nonpublic lives without government interference also kept women out of the public sphere. Feminists have worked hard to dismantle those boundaries inasmuch as the restrictions limit women's ability to participate actively in social and political institutions.

There is a danger that any discussion of a realm of activity outside the clutches of the state, for men or for women, will threaten to reinscribe the public-private distinction into this new feminist theory of liberty. I do not believe that is a realistic threat. Unless women are to be controlled entirely by the state as well as by their male "protectors," there must be some sphere of activity in which we can pursue our own goals by our own means, without the meddling of our government or our neighbors. This arena is certainly not without institutional barriers to freedom and equality, as presently constructed. But it does hold political promise.[2] It is this realm with which I am concerned. And its legal borders and ethical foundations are the focus of the genesis and discussion of The Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity.

The third aspect of liberty, for Miller and for me, harnesses the useful and nontyrannical attributes of the idealist tradition. This aspect requires the

2. Communitarian critics are unlikely to endorse this project at this point. They may claim that I minimize the threats of liberalism in my attempt to hold on to some sphere for private activity and conscience. Perhaps I do. But my goal is to rehabilitate liberal ideas for feminist ends, so such a project seems quite appropriate to me.

participation of individual conscience and judgment in politics. In Miller's terms, it means that an individual must determine, for herself, her approach to and method of life, and must not mistake others' ideas for her own. This value leads to an emphasis on diversity—on the varied (and sometimes conflicting though often complementary) ways individuals believe and behave. This facet of liberty can only arise in a society that values pluralism. Miller's emphasis on individual generation of ideas, and the avoidance of borrowing ideas from other people, is important but leaves unspoken another great threat to liberty. We must not annex the ideas of other people, but we must also not have other ideas thrust upon us, even if they are believed to be good for society or good for us individually. Like John Stuart Mill, I believe that liberty is threatened as much by social forces as by legal. From that concern, I suggest The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process.

These three principles—of identity, privacy, and agency—are presented in Chapters 4, 5, and 6. The articulation of each principle arises in a specific social and political context; the application thereof is examined in the same situation. The case studies provide contexts in which to understand the uses and abuses of liberty.

MEANS AND METHODS

In each of the next three chapters, one of the three principles of liberty is presented. Each principle is explored in the context of a case study—a detailed examination of a legal conflict that raises questions regarding the extent or character of liberty. In each case study, I pay particular attention to the details of the ways individuals talk about liberty. In the first case study, I examine the language used to describe the role and character of identity. In the second case study, I focus on the ethical dilemmas surrounding privacy claims. And in the third case study, I explore the language used by political actors and external commentators to describe the realm of human agency. In all three, my focus is on close readings of the language used by both legal subjects (those who are entitled to speak for the law, whose words enforce the law, whose speech becomes the law) and legal objects (those who are

silent, silenced, muted, or spoken for). The perspectives of participants and close observers can yield understandings that would not be possible were we to rely only on the view of a "transcendent" critic. Rather than depend on the god's eye view of bad theory, the case studies present the situated perspective, the contextual interpretation.

My method is informed by the work of recent sociolegal studies, including those that examine the use of narrative (personal and historical) to illuminate the workings of the law.[3] Such work is valuable because it illustrates the real force of law in everyday lives. It allows those who suffer the force of law to have a voice—a voice that reminds us (and many of us need reminding) that legal conflicts involve people, and that decisions of law have real consequences beyond the resolution of academic questions. It contextualizes legal disputes, and allows the reader to better understand which complications are relevant and which differences of fact matter.

The narrative method does, however, have a flaw. When done poorly, it results in particularly shoddy scholarship, making legal conflicts even less comprehensible than if they had been treated in the old-fashioned law-review way. Kathryn Abrams, in her important article "Hearing the Call of Stories," lists several potential errors of narrative scholarship.[4] Abrams notes that narrative scholarship is often prey to charges: (1) that it lacks normative legal content, (2) that it does not have a standard by which truth can be demonstrated, (3) that its "typicality" is suspect, and (4) that it is (ironically) incontestable. The case studies I use are carefully crafted to avoid those pitfalls.

Although only one contextual study employs an actual narrative,[5] the interpretive stance of the other two could open them to criticism. I have emphasized and re-emphasized the importance of context in scholarship. Because of this, my attention in the case studies is focused on particular

3. Excellent examples of such scholarship include Gary Bellow and Martha Minow, eds., *Law Stories* (Ann Arbor: University of Michigan Press, 1996); Susan Estrich, *Real Rape* (Cambridge, Mass.: Harvard University Press, 1987); Kathleen B. Jones, "The Politics of Responsibility and Perspectives on Violence Against Women," in Jodi Dean, ed., *Feminism and the New Democracy: Re-Siting the Political* (London: Sage Publications, 1997), 13–28; Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* (New York: Doubleday, 1996); Lucie White, "Ordering Voice: Rhetoric and Democracy in Project Head Start," in Austin Sarat and Thomas R. Kearns, eds., *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1994), 185–223.

4. Kathryn Abrams, "Hearing the Call of Stories," *California Law Review* 79, no. 4 (July 1991): 971–1052.

5. See Chapter 6.

conflicts in specific situations. The attention to grounded detail (rather than a [theoretically impossible and practically undesirable] "universal perspective") is an important reason why I have tried to anticipate and address concerns like Abrams's. The first two objections she raises could be made to any second-rate scholarship. I am, therefore, most concerned with the latter two comments.

Any academically noteworthy individual legal case is both typical and not—it is planted into a line of doctrinal development that makes it unsurprising in a retrospective way but it also challenges the doctrine (if it did not, we would not pay it any attention). In that sense, any case rich enough to sustain close reading is likely to be a "hard case"—sufficiently unusual to challenge and aide theoretical development. The legal cases examined in the contextual studies of liberty principles are not typical but they are not hopelessly idiosyncratic either. The way I combat this intrinsic difficulty is to constantly and consistently emphasize the context of the case—the context in which it arose, the context in which it was decided, the context in which it was studied, and the context in which the reader's analysis of my conclusions occurs. Thus, the examined cases may not be typical, but they are grounded in specific and detailed contexts. This means that any conclusions reached are applicable most directly to that specific situation—any inferences for other cases must be provisional and contingent. As long as we do not attempt to draw universal, transcendent (that is, ahistorical, apolitical, suprasocial) conclusions from individual cases, their typicality (or lack) need not be a problem.

The question of whether conclusions can be contestable is also manageable. By "contestable" Abrams means: Does the narrative (or the conclusions it generates) further or stop discussion? Can a reader criticize the narrative, can she contest the conclusions without being shut down? Must the reader have experiences identical to the narrative voice in order to participate in the debate? I think it clear in these case studies that similar personal experience is not a criterion for judgment. I have no personal history of involvement in the legal conflicts I describe and discuss. My conclusions are contingent and, most important, contestable. I do not claim to have issued the final word on any of these disputes and their relation to liberty. I have justified my interpretations and explained my arguments, and I am happy to grant that other interpretations may also be plausible. The conclusions reached are not the final words on the subject but are my attempt to reframe and redirect the debate. If they are contested, I have succeeded.

In addition to the field of sociolegal studies, and acknowledgment of the cautions raised by Abrams, my method of close reading is informed by the work of two other scholars: James Boyd White and Clifford Geertz. White's work is thoughtful and reasoned. He is particularly helpful to me because of his emphasis on reading—as a rich approach to interpretation as well as on the value of the actual fact of reading.[6] White's work underscores the inescapable presence of social context. He writes, in *Justice as Translation*, that

> [t]here is no position outside of culture from which the original [text] can be experienced or described. It is read by one of us, translated by one of us speaking to the rest of us. The meaning and identity of the original are defined in the differences we perceive in it, in what makes it strange to us. To another it will present a different set of differences, and thus be a different text, with a different meaning.[7]

I agree that there is no interpretation outside culture. Judgments are not made by inhuman individuals who gaze down at social conflicts from the philosopher's point of view. We each bring our own perspectives, values, and concerns to a project of interpretation or translation. But one should not push White's contentions to illogical extremes. Our conclusions about the meaning of a text are not (and should not be) a jumble of divergent opinions of unrecognizable origin. Acknowledging the importance of individual interpretations does not open the door to a critical melee; it does not result in an amoral, uncritical relativism. White understood that interpretation and translation are similar practices, intended

> to elaborate the meaning of one text by composing another, of his or her own making. In each case fidelity to the prior text is the central

6. White unabashedly celebrates books. The texts he examines range wildly from Mark Twain to Plato. He is remarkably (and happily) literate. Not discussed herein but worth a look are his *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: University of Chicago Press, 1994); *The Legal Imagination: Studies in the Nature of Legal Thought and Expression,* abridged ed. (Chicago: University of Chicago Press, 1985); and *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984).

7. James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 252.

> ethical imperative, yet in none can that faithfulness be defined as mindless literalism—which would be no fidelity at all—nor can the duty of fidelity be discharged in any other merely mechanical or technical way. There is in fact no one right way to discharge it; it requires a response of the individual mind and imagination, the kind of self-assertion implied in the making of any real text.[8]

There may not be one (and only one) correct interpretation, but there can certainly be incorrect interpretations, including "mindless literalism." White's method is useful because it is thoughtful and reasoned without being predetermined. His approach encourages creativity without abandoning standards for judgment. He grants that

> what you say to me is never wholly understood by me and is not reproducible in my terms; nonetheless I can, indeed I should and must, create texts in response to yours about which I claim that they bear a relationship of fidelity to what you say and in this sense do them justice. My hope is not that they imitate or replicate your text but that they speak to it faithfully. The central truths of translation are the central truths of human interaction.[9]

Translation/interpretation is an ethical enterprise, conducted by socially situated individuals trying to do the best job we can. A respect for liberty is part of that process.

The work of Clifford Geertz was also influential as I constructed the case studies, though in a less explicit way.[10] Geertz's scholarship is informative and enriching; his approach is both broad and deep; his contributions are startlingly sensible—they seem almost self-evident, even as the reader wonders why they are not articulated elsewhere. His comments on "the microscopic nature of ethnography" are applicable to the close scrutiny involved in the legal case study method. Both raise questions of generalizability—can an

8. White, *Justice as Translation*, 243.

9. Ibid., 257–58.

10. See his *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973); and *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983). Both are valuable resources, offering epistemological food for thought as they educate and challenge assumptions about why and how we theorize about politics.

ethnographic study or close examination of a legal case tell us about anything other than the case itself?

> The methodological problem . . . is both real and critical. But it is not to be resolved by regarding a remote locality as the world in a teacup or as the sociological equivalent of a cloud chamber. It is to be resolved—or, anyway, decently kept at bay—by realizing that social actions are comments on more than themselves; that where an interpretation comes from does not determine where it can be impelled to go. Small facts speak to large issues, winks to epistemology, or sheep raids to revolution, *because they are made to*.[11]

Interpretations (or translations, in White's terms) can expand beyond the situation in which they were generated. What must be remembered, however, is that those interpretations cannot be severed from the contexts in which they arose, even as their implications are applied contingently to other conceptualizations. The result will not be a definitive, final answer to the studied problem. Like interpretive anthropology, sociolegal analysis "is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other."[12] Geertz's approach shares with White's an emphasis on contingency and process. While engaging in interpretation we pay attention to ethics as we try to refine our understanding of politics, of people. For both White and Geertz, as well as for me, the goal is not a final, concrete solution. Rather, the hope is that close readings and analysis of case studies will enrich understanding and sharpen analyses, to better describe and discuss the stakes of legal conflicts.

It is important to emphasize again that the articulation of principles of liberty and the exploration of case studies overlap. The principles of liberty I present—The Identity Principle, The Privacy Principle, and The Agency Principle—were all generated within the context of each case study. I did not begin the case studies with a principle to explore; the principles emerged as I grappled with the issues raised within each case study. The principles need to be understood and examined within the specific context of each legal

11. Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in his *The Interpretation of Cultures,* 23, emphasis added.

12. Geertz, "Thick Description," 29.

dispute. But they are also broader and their implications more expansive than the specifics of each case. The "small facts" of the case studies do "speak to larger issues"—particularly, of the elements of a feminist theory of liberty.

PRINCIPLES OF LIBERTY IN PRACTICE

One principle of liberty is explored in a contextual study of a legal conflict in each of the following three chapters. I focus on legal conflicts because the law offers a useful milieu in which to examine facets of liberty. American constitutionalism both enshrines and ignores liberty, as its conceptions of freedom vacillate between the positive and the negative poles. The liberal notion of liberty is often evident, although elements from the republican and idealist traditions are present as well (though not as obviously represented). Law is formidable because of its power to shape social interaction and enforce sociolegislative mores. No other aspect of society has as significant a capability to stop individuals from doing what they want, nor the same potential to encourage the development of moral character. Because I want to demonstrate the depth and breadth of the law's influence, each case study focuses on a different stratum of legal action.

The first case study, from which The Identity Principle emerges in Chapter 4, considers a civil rights case decided by the United States Supreme Court. The law at issue was compared with the precepts of the Federal Constitution and found lacking. The issues it raised called into question the scope and utility of self-government, and they emphasized the importance to liberty of self-definition. This case study is the most methodologically traditional—my analysis centers on close readings of the Supreme Court decision, with references to legal doctrine and lawyers' briefs. The "texts" examined are familiar, though the conclusions may not be.

The second case study, from which The Privacy Principle emerges in Chapter 5, examines the way state statutes are generated and interpreted, and informed at both levels by political activity and assumptions of shared morality. Two cases are examined in depth; both arose in state courts, both were decided with reference to state constitutions. The judicial analyses are more fact-centered than at the Supreme Court level. This case study also depends on close readings of the language used by both participants in and representatives of the legal system, as I try to expose the underlying (and often unexpressed) ethical values and political concerns.

And the third case study, from which The Agency Principle emerges in Chapter 6, relates a legal conflict that occurred beyond the blinders of the law. This chapter is an example of narrative scholarship. I present a personal narrative, of a woman victim of intimate violence, that shows the power and the faults of the law. That story shows the power of law that can be imposed through its infantry—local police, civil lawyers, and conventional impressions of common law rules—even though the question of battering was never the subject of explicit legal argument. The text examined is the narrative account of this woman's experience. Again, a technique of close reading is used to illuminate the speech and the silences that accompany one woman's encounter with the law.

Although chapters 4, 5, and 6 each focus on one facet of liberty—identity, privacy, or agency—do not be misled. It is useful to think primarily of one part of freedom, but that does not imply that the notion of freedom can be fragmented and compartmentalized. The chapter on identity contains threads of privacy and agency, the chapter on privacy relates to issues of identity and agency, the chapter on agency is imbued with concerns of identity and privacy. Formal focus allows us to tease out the details of each principle, but it must be underscored that these principles, overlapping and intertwined, contribute to a feminist theory of liberty. Each of these case studies illustrates the possibilities of that theory, as well as the promise for sociolegal studies of this method of close reading and attention to context. The detailed analyses of these three principles of freedom show the potential of a principled feminist theory of liberty, grounded in context and applied contingently. The following three chapters demonstrate the functions and implications of liberty as it relates to The Identity Principle, The Privacy Principle, and The Agency Principle.

4

BUT IT MATTERS TO ME

Liberty and Identity in the Shadow of *Romer v Evans*

A few years ago, David Drake staged a one-man show off-Broadway called "The Night Larry Kramer Kissed Me." In the show, Drake told the story of the day he came out to his mother. Though he had been filled with trepidation to tell her he was gay, his mother had what many would consider to be a textbook example of a great response. While embracing him, she kept saying how much she loved him, how she would always love him, how the news he was gay didn't change anything. "I love you," she said to her son; "None of the other stuff matters." Drake replied, "But it matters to me."

This anecdote illustrates one of the central concerns of moral and political theorists: the way in which hegemonic classifications of identity operate. In the spirit of David Drake, we need to ask ourselves: Which differences matter? When do they matter? In what contexts? And what does it mean for differences to *matter*?

History is replete with examples of official classifications (of race, gender, ethnicity, religion, or the like) used to subjugate a populace. Whether of native or alien in ancient Greece, of Catholic or Protestant, Moor or Jew in early modern England and Spain, or of the one-drop rule in the American racial scheme, categories of identity have historically been used to separate political actors from the acted-upon. Traditionally, such categories have been exercised by the powerful, who have used them to justify the rationing of rights and obligations. Those categories were seen to be natural, and the consequences attached to them inevitable. Identity was destiny.

In recent decades, with the American civil rights movement and the women's liberation movement, such categories of identity were challenged. African American men and white women questioned the bases for the categories of exclusion, and argued that using these categories to determine the distribution of justice was inequitable.[1] This argument was the basis of pleas for a color-blind, or gender-blind society. Identity, such activists argued, was not destiny but rather a single (largely politically irrelevant) personal characteristic. Treat us all as if we were white men; any differences among us are irrelevant, and we're all entitled to the same treatment. Typical of this approach is historian Kenneth Stampp's view of the irrelevance of race: "I have assumed that the slaves were merely ordinary human beings, that innately Negroes *are*, after all, only white men with black skins, nothing more, nothing less."[2] That is, we're all (the moral, political equivalent of) white men, we just happen to have brown, female, old, or Hindu skins. But some in the activist ranks were dissatisfied. We're not the same as white men, they cried—our experiences as Latinos, lesbians, welfare children, or Asian immigrants make us different from them and from each other. Our lived

1. See, for example, Martin Luther King's "I Have a Dream" speech, included in Clayborne Carson and Kris Shephard, eds., *A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr.* (New York: Warner Books, 2001).

2. Kenneth Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York: Knopf, 1956), vii–viii; quoted in Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988), 12. White liberals seemed particularly prone to this effacing move.

experience as members of [identity category *X*] makes us what we are, and justice demands that our organic identity be noted and considered in any decision-making.

Identity is political: (1) it situates us in a particular context, (2) it informs the way we see from here, and (3) it cannot be ignored when it comes time to do justice. In each of the three conceptions of identity described above, there are different relationships between identity and questions of difference. In the first conception—traditional understanding of identity—classifications signify inherent difference (from the unstated norm) and are used to justify inequality. In the second—the equal-rights position—categories of identity are seen as markers of irrelevant differences (compared to the norm), and no means for determining different/unequal treatment. And in the third—labeled "identity politics"—boundaries of identity are seen as firm and integral to just decision-making. Group identities are perceived to be determinate, and differences are observed between categories of identity, although the political goal is to level the playing field beneath the various groups.

What all of these perspectives miss, however, are the differences within groups. Individual identities do not exist in a single dimension. Indeed, the differences within groups are sometimes greater than the disparities between groups. Each of us experiences and claims a number of different identities; few of us would be comfortable choosing a single category of identity with which to align ourselves in perpetuity. *DeGraffenreid v General Motors* provides a stark example of this point.[3] In that 1976 case, a group of black women who had been laid off from their jobs with General Motors argued that the company's "last hired, first fired" policy discriminated against them as black women. After the lay-off of 1974, none of the black women who had worked in production had jobs. They argued that the Civil Rights Act of 1964 protected them from such discrimination. The U.S. District Court disagreed. The justices found that the Civil Rights Act did indeed protect workers from discrimination on the basis of race and on the basis of sex, but that no new classification, "black women," was intended by the legislators. Further, the court found that General Motors was not necessarily responsible for racial discrimination, because black male employees had kept their jobs

3. No. 75-487 C (3), 413 F. Supp 142 (1976), later reversed and remanded in part, and affirmed in part in No. 76-1599, 558 F.2d 480 (1977).

after the lay-off.[4] And no evidence existed of sex discrimination, the court pronounced, because General Motors had hired a number of "female employees." The fact that they were white women was deemed legally irrelevant.

DeGraffenreid illustrates that identity in fact operates in a number of different dimensions. A closer look at the classification "women," for example, demonstrates that the members of the category are quite diverse, having different ethnicities, religions, classes, sexualities, nationalities, languages, and so on. Individuals do not experience identity in only one aspect, and observers must be certain to remember that categorization in only one plane is simplistic and unrepresentative.[5] I accept that individuals have a "positionality"[6] vis-à-vis identity—that we occupy a specific, contextual cultural position that both informs who we are and, simultaneously, is given meaning by our actions and interpretations.[7] Individual and group identities, then, are complex creations, understanding of which depends on careful attention to nuance and context. And, often, individual experiences of identity bear little relationship to hegemonic group definition, or vice versa.

This complex tangle of meaning and implication little resembles the

4. However, the Court of Appeals did recommend that *DeGraffenreid* be consolidated with another case involving racial discrimination at General Motors.

5. Actor Stephen Fry wrote of his experiences preparing to play Oscar Wilde in a film. When word of casting got out, Fry was deluged with letters offering advice on how he might portray Wilde. Among them:

> Dear Mr. Fry, I hope you will not be forgetting that the key, the only key, to Oscar is that he was and is, first and foremost, *Irish*. . . .
>
> Dear Mr. Fry, Wilde's works whinny and shiver with Victorian gay underground codes. Do not shirk the force of his sexual identity. . . .
>
> Dear Mr. Fry, Wilde's love of his wife and family is consistently overlooked by biographers. I trust you will not fall into the same error. . . .
>
> Dear Mr. Fry, Wilde's lifetime yearnings toward Roman Catholicism are central to any understanding of. . . .
>
> Dear Mr. Fry, I draw your attention toward Wilde's "Soul of Man Under Socialism." Oscar's unique brand of libertarianism is scandalously overlooked by contemporary. . . .
>
> Dear Mr. Fry, Oscar Wilde was in reality a woman. . . .

This amusing example illustrates how absurd single-facet identity construction can be. If Oscar Wilde (or any of us) were *only* a poet or a dramatist or an Irishman, he would be very dull indeed. Stephen Fry, "Playing Oscar," *The New Yorker* 73 (June 16, 1997): 82.

6. This term is from Linda Alcoff, "Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory," *Signs* 13, no. 3 (spring 1988): 405–36.

7. See Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," in Dan Danielsen and Karen Engle, eds., *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995), 332–54.

simplistic treatment of identity in typical legal decision making. In practice, it is often assumed by judges that categories of identity are given—that doing justice is simply a matter of determining the "correct" categorization of a petitioner, and then enforcing the appropriate remedy. In some circumstances, such as the implementation of the "one-drop rule" to determine racial authenticity, rules for classification are explicit. In others, such as determination of sex or gender, categorization is often assumed to follow biological truths. But what about a category, such as homosexuality, assumed to be (by some) biological and (by others) culturally constructed? A category that depends on perceptions of both status and conduct? What about a category, homosexuality, for which the rules of membership are unclear?

American legal history is unclear as to how, precisely, homosexuality is to be defined in the eyes of the law. As one scholar wrote in frustration: "The definition of a homosexual person is a person so labeled by the courts."[8] But if the courts have been uncertain of what characteristics constitute being homosexual, they have been quite sure of what being homosexual *means*. In the few cases involving the rights of homosexual persons that have been heard by the courts, three basic lines of interpretation have emerged. Homosexual persons have been considered threats to the social order, serially "afflicted with psychopathic personality," national security risks, and *per se* criminals. Each of these three interpretations illustrates the extent to which official determination of identity, in this case sexuality, matters.

In the first interpretation, homosexual persons have been considered "afflicted with psychopathic personality" and thereby undesirable potential citizens. These cases—especially *Boutilier v Immigration Service* (1967) and *Rosenberg v Fleuti* (1963)—involved the threat of deportation to resident aliens who were presumed to be homosexual.[9] In *Boutilier*, the presumption of homosexuality is elaborated quietly, although the strong arm of the law is quite apparent. Boutilier applied for citizenship in 1963 and disclosed that he had been charged with sodomy and arrested four years before, although the charge was subsequently reduced to assault and dismissed. He was convicted of no crime. But the court record reveals that "in 1964, petitioner, at the

8. Rhonda R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States," *Hastings Law Journal* 30 (1979): 799, 802; quoted in Kenneth L. Karst, "Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation," *UCLA Law Review* 45, no. 2 (December 1995): 277.

9. *Rosenberg v Fleuti*, 374 U.S. 449 (1963); *Boutilier v Immigration Service*, 387 U.S. 118 (1967).

request of the Government, submitted another affidavit which revealed the full history of his sexual [*sic*] deviate behavior."[10] That affidavit provided the basis for the deportation efforts. Fleuti's charge was based on a previous conviction for a crime involving "moral turpitude," and deportation was sought despite Fleuti's four years' residence in the United States. In both these cases, the government was more interested in getting rid of the "deviates" than in seeing them punished in the United States. This was in keeping with the agreed-upon intent of the Immigration and Nationality Act of 1952 and its exclusion of those "afflicted with psychopathic personality"—the law was designed to prevent homosexuals from becoming naturalized citizens.[11] Once a person is categorized homosexual, deportation is pursued if possible.

The second realm of interpretive consequences is the assumption of equating being homosexual with being a risk to national security. In such cases—*Padula v Webster* (1987), *Webster v Doe* (1988), and *Carlucci v Doe* (1988),[12] among many others—government employees were dismissed from their jobs once their homosexuality was made public. The reason given was that their sexuality made them vulnerable to blackmail, and thus they were threats to national security. The government often needed no actual proof of sexual involvement with foreign agents; neither did it matter whether the employee was closeted. In *Doe v Casey* (as *Webster v Doe* was known in the D.C. Circuit Court), the employee had voluntarily disclosed his homosexuality to his employers. The issue for the court was whether Doe was stigmatized by being fired from the CIA. The Circuit Court found that Doe's dismissal would not be a stigma, because he was openly gay. The court found that the "real stigma imposed by [the government employer's] action . . . is the charge of homosexuality . . . [however] . . . Doe himself does not view homosexuality as stigmatizing—and indeed, admits that he is a homosexual."[13] Although it has been argued that a publicly gay person would be

10. *Boutilier* at 119, emphasis mine.

11. This was explicitly stated in the court opinions in both *Boutilier* and *Fleuti*.

12. *Padula v Webster*, 261 U.S. App D.C. 365 (1987); *Webster v Doe*, 486 U.S. 592 (1988); *Carlucci v Doe*, 488 U.S. 93 (1988). There are, of course, countless other instances in which military personnel were discharged from their service because of revelations or accusations about their sexual identities. In most cases, these dismissals were never challenged in court.

13. *Doe v Casey*, 796 F.2d at 1523, quoted in Janey E. Halley, "The Politics of the Closet: Legal Articulation of Sexual Orientation Identity," in Danielsen and Engle, eds., *After Identity*, 33. Halley writes: "The court purports to view the problem of stigma from Doe's point of view: if he disclosed his homosexuality, he clearly sees nothing scandalous in it; and if he sees nothing scandalous in his homosexuality, he has no liberty interest in evading its legal consequences" (33).

unlikely to capitulate to threats of exposure, the court in this case paid no attention. To be homosexual is to be a security risk. Period.

The third area involves the most straight-forward treatment of what it means to be homosexual in the eyes of the law—homosexuality is coincident with criminality. *Bowers v Hardwick* (1986), *Padula v Webster* (1987), and *Shahar v Bowers* (1997) are all examples of cases in which homosexual identity has been necessarily and definitively conflated with criminal status.[14] In *Bowers v Hardwick*, the U.S. Supreme Court upheld Georgia's sodomy statute and found that there was no "fundamental right to engage in homosexual sodomy" protected by the U.S. Constitution.[15] The opinion cited a long litany of historical evidence showing that sodomy had been prohibited by common law for generations. In *Padula*, the Appeals Court found that Margaret Padula's constitutional rights were not compromised by the FBI's unwillingness to hire her after she disclosed her sexual orientation. Indeed, the opinion found it hard to conceive how legislation impinging on the rights of homosexuals might be viewed as suspect, given that homosexual status is "defined by conduct that states may constitutionally criminalize."[16] In other words, to be homosexual is to be criminal in many states.

In *Shahar v Bowers*, the 11th Circuit Court of Appeals upheld a district court decision that Robin Shahar's rights were not violated when she was released from her job with the Georgia Attorney General's Office.[17] In September 1990, Shahar accepted an offer to begin working as a staff attorney after law school graduation, and was scheduled to begin the following year. She was also making plans for her "wedding,"[18] and discussed arrangements openly. The religious ceremony, described as a "Jewish, lesbian-feminist, outdoor wedding," took place at the end of June 1991. Shortly thereafter, some of Shahar's senior colleagues learned that she was marrying a woman. They shared their concerns with Attorney General Michael Bowers. In July 1991, he rescinded the job offer, writing to Shahar:

14. *Bowers v Hardwick*, 478 U.S. 186 (1986); *Padula v Webster*, 261 U.S. App D.C. 365 (1987); *Shahar v Bowers*, No. 93-9345, Slip Op (11th Cir., May 30, 1997).

15. Although Georgia's antisodomy statute made no mention of sexuality—and indeed the challenge was brought on behalf of both Michael Hardwick, a gay man, and a heterosexual couple, the Does—the issue discussed by the Supreme Court was that of the right to engage in *homosexual* sodomy. This is a good example of how bias in framing judicial questions can shape judicial outcomes.

16. *Padula* at 103.

17. All details of the circumstances come from the circuit court opinion.

18. I use quotation marks around the word *wedding* to reflect the usage in the majority opinion, as well as to underscore that the definition of the word is central to the case.

> [It] has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.[19]

Subsequent depositions revealed that Bowers and his office also decided that Shahar's participation in a lesbian "marriage" ceremony would

> create the appearance of conflicting interpretations of Georgia law; . . . interfere with the Department's ability to handle controversial matters; interfere with the Department's ability to enforce Georgia's sodomy law. . . . Also, following her decision to participate in a controversial same-sex "wedding," the Attorney General and his staff had serious doubts about the quality of Shahar's judgment in general.[20]

The leap from the fact of the lesbian wedding to the presumption of legal guilt makes the simple status of identity criminal. Unlike Michael Hardwick, Robin Shahar was not surprised in her bedroom and observed in the act of sodomy.[21] Rather, her religious marriage to a woman was seen as proof that she was violating Georgia's sodomy law and, therefore, unable to enforce other laws. In addition, Shahar never represented her intimate relationship as a civil or legal marriage. She did not claim any special privileges as a married person; she simply was honest about her participation in a personally significant religious ritual. Yet two courts found that Bowers and the State of Georgia did not act improperly in revoking her job from her. *Shahar* is a striking example of how legal imposition of homosexual identity can obscure complicated reality.

Examination of cases such as these provides little hope for those concerned with the legal treatment of homosexual persons. The doctrinal history shows that homosexual identity has mattered greatly to those enforcing the

19. *Shahar v Bowers*.

20. Ironically, Michael Bowers ran for office in Georgia in 1997, and subsequently confessed that he had been committing adultery (illegal in Georgia) for many years (*Shahar v Bowers,* No. 93-9345, Slip Op [11th Cir., August 1, 1997]).

21. Hardwick was observed in his own bedroom in the act of consensual sex. For further details that were not mentioned in court opinions, see Peter Irons, *The Courage of Their Convictions* (New York: Penguin, 1988), 392–403.

laws, and the implications of that attention have had harmful repercussions. Many critics would argue that attention to identity has proved harmful to homosexual men and women. Focus on homosexual status and homosexual conduct has essentialized gay identity even as it has legitimized violence against gay men and lesbians but offered an official imprimatur to unequal treatment of sexual minorities.[22] When *Romer v Evans* was decided in 1996, many commentators believed that the judicial tide was turning for gay rights. For the first time, the U.S. Supreme Court found it constitutionally impermissible to enact a statute designed to deprive gays, lesbians, and bisexuals of their constitutional rights. Finding Colorado's antigay Amendment 2 unconstitutional deprivation of equal protection, the Court said, in effect, that sexual identity doesn't matter.

In this case study, I examine the Supreme Court decision in *Romer v Evans* in order to show that the concept of identity must be reconceived. As long as identity is seen as unidimensional, and the attribute of groups rather than complex individual persons, such classifications promise no justice. Removing a category of identity, in this case sexuality, from differences that matter before the law is a mistake. Rather than claiming that identity doesn't matter in the law's purview, we need to reconsider what it *means* for identity to matter. Below, I argue that the lens of a feminist theory of liberty allows us a clearer view of a nuanced, complex conception of identity, grounded in a commitment to naming one's self, and one that is necessary for people seeking equal justice under the law. I call this aspect of liberty The Identity Principle—it states that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning. The genesis and contingent application of this principle are explored and discussed below.

ROMER V EVANS

After years of judicial decisions that constrained the rights of homosexual women and men, people concerned with equal justice waited with trepida-

22. For further elaboration on status, conduct, and gay identity, see Dan Danielsen, "Representing Identities: Legal Treatment of Pregnancy and Homosexuality," *New England Law Review* 26, no. 4 (summer 1992): 1453–1508. For a fascinating discussion of the ways in which law legitimizes violence against nonheterosexuals, see Kendall Thomas, "Beyond the Privacy Principle," in Danielsen and Engle, eds., *After Identity,* 277–93. Thomas argues that antisodomy laws function to make gay men and lesbians outlaws.

tion for the U.S. Supreme Court to render its decision in *Romer v Evans*. The cheers on May 20, 1996, could be heard far from the U.S. Supreme Court building in Washington. Gay rights activists, civil libertarians, left-leaning political groups, a great many Coloradans, and sympathizers everywhere gathered around the country to celebrate the Supreme Court's decision in *Romer v Evans*. This decision struck down Colorado's Amendment 2, which was designed to roll back the piecemeal progress supporters of civil rights for gay men, lesbians, and bisexuals had achieved in parts of Colorado. Surprisingly, a majority of the Supreme Court justices (who had long been perceived to be unwilling to consider questions of justice for homosexuals) seemed to do the "right thing," finding that Colorado's amendment denied homosexuals, lesbians, and bisexuals their Fourteenth Amendment rights to equal protection of the laws. More astonishingly, the Court overturned Amendment 2 using the lowest level of judicial scrutiny—the rational relations test, which in the past has virtually guaranteed that the disputed legislation would be upheld. The decision was greeted with great jubilation and relief. But, now that the applause has died down, I wonder: Is the decision in *Romer v Evans* really such a victory? Is it to be celebrated? Are there any laurels on which to rest? And is there any rest for people committed to equal justice under the law?

In this section, I will argue that there are three possible scenarios that could result from this decision. The first is somewhat optimistic: perhaps the Court has signaled a new willingness to consider cases involving "gay rights." It may be that *Romer* broke ground for a new area of judicial decision-making. Perhaps cases involving civil rights for nonheterosexuals will become more prominent in the next decade. The second scenario is down-right rosy: maybe future claims of discrimination will be subject to a test of simple contextual reason rather than the tortured labyrinthine reasonings the Court has previously called "rationality"[23] or the extended accounts of historical dogmas that have been used to perpetuate discriminatory legislation.[24] It is possible that, in the future, justices will apply realistic, politically aware tests to disputed legislation.

The third possibility, the one that will receive most of my attention herein, is complicated and ultimately pessimistic: perhaps what the Court really said is that sexual identity, in the eyes of the law, simply doesn't matter.

23. See *McDonald v Board of Election*, 394 U.S. 802 (1969).
24. See *Bowers v Hardwick*, 478 U.S. 186 (1986).

This possible reading, I argue, would be dangerous for gays, lesbians, ambisexuals, and all members of (quasi-)suspect classes. To say that identity is irrelevant (or at least outside the scope of judicial concern) is to completely disregard the importance of liberty interests as well as the importance of context in politics. Using equal protection doctrine, critical legal studies, and feminist theory, I argue that the Court's decision in *Romer* is laudable in practical terms (it did, after all, get rid of the amendment), but that it carries with it the seeds of theoretical disaster. In other words, this one firm step forward may prove, on closer examination, to be a giant step back.

History

In 1992, Colorado residents were given the opportunity to vote on an amendment to the state constitution. The amendment was written in response to a perceived increase in political power by gay rights groups in the state. A number of laws had been passed in previous years that were designed to guarantee homosexuals basic civil rights: a statute prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodation in Aspen, Boulder, and Denver; a state insurance regulation prohibiting the denial of health or life insurance to men who lived in certain neighborhoods, practiced specific professions, or designated unrelated beneficiaries for their insurance policies; anti-discrimination policies at public universities; and an executive order by the governor (Roy Romer) forbidding discrimination in state employment.[25] A group calling itself Colorado for Family Values, campaigning on the platform of "no special rights," proposed Amendment 2, which read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts,[26] shall enact, adopt or enforce any statute, regu-

25. For more background, see *Romer v Evans*, Brief for the Respondents, in the Supreme Court of the United States, 1994, No. 94-1039.

26. "branches or departments": That is, executive, legislative, *or* judicial. A state court would by definition be unable to even consider a case in which discrimination on the basis of homosexual, lesbian, or bisexual identity was alleged.

"agencies": No police department antidiscrimination policies.

"political subdivisions": No county ordinances.

"municipalities": Repealing the Aspen, Boulder, and Denver ordinances.

> lation, ordinance or policy[27] whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships[28] shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[29] This Section of the Constitution shall be in all respects self-executing.

Colorado voters approved the amendment by a margin of 54 percent to 46 percent in November 1992. Shortly thereafter, the plaintiffs requested an injunction in Denver District Court.

The plaintiffs in this case represented two groups: individual lesbians and gay men who had worked to ensure the passage of the protective legislation eradicated by Amendment 2,[30] and governmental bodies, includ-

27. "enforce any statute": This word "any" is what makes the Amendment 2 so thoroughly reprehensible. It effectively forecloses *any* possibility of maneuvering in the margins. Victims of discrimination on the basis of (non-hetero)sexual orientation do not have *any* opportunities for justice.

"ordinance or policy": Is there anything that could possibly be exempted from this? Perhaps a citizen-sponsored state constitutional amendment to overturn Amendment 2.

28. "bisexual": Presumably the bisexual status is only relevant when not implicated in heterosexual orientation, conduct, practices, or relationships. A passing comment: Why were transsexual, transgendered, or transvestite Coloradans not specifically included in the wording of the amendment?

"orientation": Orientation was generally agreed to be broader than "conduct," but no conclusions were reached on what the parameters might be. Note, too, that the laws targeted by Colorado for Family Values did not protect people from discrimination on the basis of "homosexual orientation" but on the basis of "sexual orientation." Presumably Amendment 2 would allow governmental intervention on behalf of Coloradans discriminated against on the basis of their heterosexuality.

"practices": What does "practices" mean? In the case of Angela Romero, a plaintiff and member of the Denver police department, "practices" might refer to making a purchase at a lesbian bookstore (for which she was taken off the streets and assigned to public school duty—no other officer wanted to provide backup for her).

"relationships": Sexual? Familial? Friendship? Friendship between people of the same gender? Friendship between people with similarly directed erotic desires? Residence in certain neighborhoods? Business relationships?

29. "quota preferences": This was presumably inserted for rhetorical purposes, since there seem to be no incidences of "homosexual quotas".

"claim of discrimination": This denial of any possibility to claim relief from discrimination was the main focus of those who challenged the amendment, as well as of the judges who heard the case in its various incarnations.

30. "Richard G. Evans, an administrator for the City and County of Denver, Angela Romero, a Denver police officer, John Miller, a professor and chair of the University of Colorado's faculty council, Paul Brown, an employee of the Colorado Department of Natural Resources, Priscilla Inkpen, a Boulder minister, and Linda Fowler, who chaired the Denver mayor's

ing the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen. Both groups claimed that Amendment 2 was an unconstitutional violation of a right to equal protection of the laws (and, on the part of the governments, the ability to guarantee individuals' rights to equal protection). The Denver District Court granted the preliminary injunction on January 15, 1993, which the Colorado Supreme Court affirmed,[31] holding that the amendment was subject to strict judicial scrutiny because it burdened the plaintiffs' fundamental right to participate in the political process, and remanded the case to give the state the chance to prove that the amendment served a compelling interest. When the District Court reexamined the amendment, it was found not to serve any compelling state interest, and a permanent injunction was entered. On appeal, the Colorado Supreme Court again affirmed.[32] The State of Colorado appealed to the U.S. Supreme Court.[33]

Legal Arguments

The plaintiffs, represented by Jean Dubofsky, argued that Amendment 2 infringed upon their Fourteenth Amendment rights to equal protection of the laws. They argued that the amendment was impermissible because it singled out one group of citizens on the basis of a single characteristic and deprived them of access to political channels to counter discrimination in nearly all levels of government. The plaintiffs did not argue that homosexuals, lesbians, and bisexuals are a suspect class, requiring any legislative classification of them to be subject to strict judicial scrutiny. Instead, they argued that the state, through Amendment 2, was responsible for an even more basic *per se* violation of their rights to equal protection. In addition to repealing existing laws and prohibiting new protective legislation from being passed, the amendment effectively foreclosed any possibility of judicial remedy. As Justice Kennedy stated in the U.S. Supreme Court opinion:

> It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection

task force on gay and lesbian issues" (*Romer v Evans*, Brief for Respondents, 1–2 n. 1). It is notable that no self-professed bisexuals were included among the plaintiffs.

31. *Evans v Romer*, 854 P.2d 1270 (Colo. 1993) [Evans I].

32. *Evans v Romer*, 882 P.2d 1335 (Colo. 1994) [Evans II].

33. All details from the *Romer v Evans*, Brief for the Respondents, 2–3.

> of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. . . . At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.[34]

The amendment set up a system in which even to question the breadth of the law was to defy it. That sort of sweeping denial of equal protection as far as a whole category of the laws was concerned is, the plaintiffs argued, the most basic denial of their rights. A most cursory reading of the language of the amendment (as the Colorado court did) would show that it was clearly not the least restrictive means of attaining any compelling state interest.

The proponents of Amendment 2, represented by the State of Colorado and Colorado Solicitor General Tim Tymkovich,[35] suggested that there was no need for the courts to scrutinize the amendment so carefully. It was, they argued, a simple and rational response by a majority of the citizens of the state to remedy an injustice—namely, the granting of "special rights" to homosexuals above and beyond those available to "everybody else." The proponents asserted that a rational relationship test should be used because no suspect class was involved. The rationales offered included a desire for statewide uniformity in the laws, the avoidance of preferential treatment, and the promotion of "a zone of autonomy . . . [advancing] religious liberty interests . . . [and] associational liberties."[36] Any of these, the state claimed, would suffice.

U.S. Supreme Court Decision

Majority Opinion

On May 20, 1996, Justice Anthony Kennedy, writing for the six-person majority, delivered the verdict: Amendment 2 was found to be an unconsti-

34. *Romer v Evans*, 116 S.Ct. 1620; 1996 U.S. LEXIS 3245, pp. 16–17.

35. Ironically, the defense of Amendment 2 was in the name of Governor Roy Romer, who had actively opposed it as a ballot initiative.

36. United States Supreme Court Official Transcript, *Romer v Evans* oral arguments, October 10, 1995, Washington, D.C., 23.

tutional deprivation of equal protection, though on different grounds than those used by the Colorado Supreme Court. Rather than subjecting the amendment to strict scrutiny, the U.S. Supreme Court found that less drastic measures were satisfactory.

> Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.[37]

In other words, for the first time in many years, a legislative classification had been found unconstitutional on equal protection grounds using the rational relations test. The Court said that animus was not a rational reason to classify citizens.

The primary rationale advanced by the State of Colorado was the protection of rights of free association of its nongay citizens, especially the rights of employers and landlords who object on the grounds of personal religious beliefs. But Kennedy argued that there was no rational relationship between the classification and legitimate state interests. Instead, Amendment 2 "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[38] As for Colorado's arguments that Amendment 2 was a rational response by a majority of its citizens to stem the tides of special rights for homosexuals and others of questionable morality, Kennedy cut through those as well. Rather than depriving gays and lesbians of special rights, Kennedy argued:

> [t]o the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . We find nothing special in the protections Amendment 2 withholds. These are protec-

37. *Romer v Evans*, LEXIS, 20.
38. Ibid., 26.

> tions taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[39]

It is interesting, however, that for most of his opinion Kennedy refrained from discussing homosexuals as much as possible.[40] He instead referred repeatedly to the "class of persons" or "the named class, a class we shall refer to as homosexual persons or gays and lesbians."[41] As his opinion outlined the Court's decision that Amendment 2 was a *per se* violation of the Equal Protection Clause, a reader might forget that the classification was not merely aimed at "a class of persons" but gay, lesbian, and bisexual men and women.

To a certain extent, the fact that the Court downplayed the homosexuality is not a bad thing. As students of the Court know, in recent years the justices seem to have gone out of their way to avoid granting certiorari to cases with any sort of gay theme. Repeatedly, the Court has refused to hear cases involving gays and lesbians dismissed from the military, subjected to sexual harassment at work, abused in prisons, or denied custody of their children. And focusing on results, it is probably a good idea that the Court didn't actively support the argument that Amendment 2 impinged on the fundamental right of nonheterosexuals to engage in the political process. Who knows if there would have been enough votes?

The Tribe Brief

The denial of issues of identity in any but the most basic terms shows how heavily the majority opinion relied on the reasoning of an amicus curiae brief filed on behalf of the plaintiffs by five nationally known legal scholars: Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan.[42] Tribe and his colleagues argued that the Supreme

39. Ibid., 18–19.

40. And he didn't mention bisexuals at all, except when quoting from the language of the amendment.

41. *Romer v Evans*, LEXIS, 7.

42. The Tribe brief was a masterful and successful attempt to provide the Supreme Court with a way to strike down Amendment 2 without appearing to be involved in legislative struggles over civil rights for gays, lesbians, and bisexuals. It is reasonable to assume that Tribe was particularly well-suited for this task because he had argued Michael Hardwick's case before the

Court did not need to engage difficult and politically touchy issues in order to reach the right decision. Tribe and company suggested that the Court not even consider questions such as: whether strict scrutiny was required; how compelling state interests might be; if homosexuals, lesbians, and bisexuals are a suspect class; or if there is a fundamental right not to be fenced out from the political process (a right asserted without support by the Colorado court). Rather, they argued that

> Colorado's Amendment 2 constitutes a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." That command is violated when a state's constitution renders some persons ineligible for 'the . . . protection of the laws' from an entire category of mistreatment—here, the mistreatment of discrimination.[43]

This amicus brief was very carefully crafted. Tribe and his colleagues seem to have studied well the decision-making styles of the justices, and they knew which buttons to push; appeals were made to specific justices.[44] Arguments were made in the most general way possible, without reference to homosexuality if it could be avoided. And Tribe gave the justices the rationale they needed to leave questions of identities and politics outside the courtroom door.

> All the Court needs to decide in order to affirm the judgement below is that a state's constitution *by definition* denies equal protection of the laws when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons

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Supreme Court in 1986. That defeat (*Bowers v Hardwick*) undoubtedly made Tribe wary when proposing arguments about homosexuality to the U.S. Supreme Court.

43. *Romer v Evans*, Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amicus Curiae in Support of Respondents, in the Supreme Court of the United States, 1994, No. 94-1039, 1.

44. Although sometimes the reader wonders how serious those appeals might be. For example, Tribe quotes Scalia's concurrence in *Cruzan v Director, Missouri Dept of Health*, 497 U.S. 261, 300 (1990): "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." (*Romer v Evans*, Brief of Laurence Tribe et al., 5) As we shall see in the discussion of Scalia's dissenting opinion in *Romer*, that gauntlet was left lying on the ground.

> from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.[45]

This general language was emphasized throughout Tribe's argument. He took advantage of every opportunity to underscore the point that sexual identity was extraneous to his argument. He repeatedly referred to the people subject to Amendment 2's classification as being distinguished on the basis of "a personal characteristic that they share" or "some identifying feature or characteristic of a person or group."[46]

When Tribe did address the personal characteristic at issue, his attempts to be general and inclusive were almost offensive. In a footnote, he wrote: "Amendment 2 on its face thus makes homosexuals *worse off* than heterosexuals—and worse off than hot dog vendors, optometrists, left-handed people, and every other group that remains free to claim discrimination, and even to seek preferential treatment, under state law."[47] In effect, he argued again that the fact that homosexuals, lesbians, and bisexuals were targeted by this Amendment was really beside the point. It would be just as reprehensible if southpaws were the subject. But they weren't. I'm reminded of people who claim disingenuously: "It doesn't matter to me if my friends are black or white, or green or purple." Refusing to see difference is no less harmful than making difference the basis of unequal treatment. Claiming that we are all really alike beneath our skins does not recognize the great disparity of interests and the entrenched inequality of power and access to political participation. The unfairness still exists—and must be countered—despite our similarities.

Dissenting Opinion

Justice Scalia, on the other hand, showed in his dissent that he was (at times painfully) aware of the identity issues at hand. In contrast to Kennedy and Tribe, Scalia took advantage of every opportunity to use the term "homo-

45. *Romer v Evans*, Brief of Laurence Tribe et al., 3, all emphasis in original.

46. Ibid., 3.

47. Ibid., 6, note 2. Obviously, Tribe's examples weren't chosen randomly: hot dog vendors refers to *New Orleans v Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976); optometrists refers to *Williamson v Lee Optical*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Still, in the context of the *Romer* case, it is a strikingly flip comment.

sexual"—especially in concert with such phrases as "elite class" and "piecemeal deterioration of sexual morality." In Scalia's version, Amendment 2 was "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws."[48] In addition, the class created by the amendment was, in Scalia's terms, rationally related to a legitimate government interest: the desire, indicated through democratic means, of a majority of Coloradans to counter the special rights homosexuals had secured. Scalia depended on *Bowers* for back-up. He wrote:

> If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. . . . And a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. . . . [Even] assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, Bowers still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.[49]

To bolster his argument that constitutionally permissible criminalization of homosexual sodomy requires that Amendment 2's classifications be upheld, Scalia turned to polygamy for an analogy. In a rather dramatic suggestion, Scalia observed that

> [p]olygamists, and those who have a polygamous "orientation," have been "singled out" by [the constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah] for much more severe treatment than merely the denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The

48. *Romer v Evans*, LEXIS, 27. Indeed, Scalia's argument was bolstered by his reminder that Colorado's antisodomy laws were repealed years ago.

49. *Romer v Evans*, LEXIS, 35, 37.

> Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.[50]

Generally, this sort of misleading aspersion would not be dignified with a response. But to advance their own political goals, a number of conservative commentators have seized on this as further evidence of the dangerous decision in *Romer*. This is a mistake. Scalia was (deliberately?) misrepresenting the issues of the case. The *Romer* decision would in no way require states to permit polygamy, as it in no way requires states or localities to enact specific provisions protecting people from discrimination on the basis of sexual orientation. What *Romer* would not allow is the institution of laws depriving polygamists of the right to seek protection from discrimination.[51] That is the issue in this case—the denial of remedy for the evils of discrimination, not any affirmative requirement to institute positive laws.

Responses to the Decision

Many left-leaning commentators greeted the *Romer* decision with applause. An article in *Lesbian/Gay Law Notes*, an electronic journal, crowed: "The decision was the first to attain a majority of the court in support of gay rights since *Manuel Enterprises, Inc. v Day*."[52] But some were critical. It was often noted that, unlike the dissent, Kennedy's opinion didn't refer to *Bowers v Hardwick*, which is often cited in appellate court decisions in justification of discriminatory treatment of homosexuals—particularly in the military or other government service requiring security clearance.[53] Perhaps the omission was made because Kennedy had accepted the arguments of the plaintiffs in the case, who explicitly argued that they were not seeking the reversal of the

50. *Romer v Evans*, LEXIS, 47.

51. A comment. Polygamy is a legal category. Without an institutionally recognized imprimatur, there can be no polygamy—merely a number of unrelated people living in a house together (if indeed that). There are probably a number of rational reasons why a state might choose to continue its refusal to recognize marriages among more than two adults. And the case is probably more easily made than that in favor of the criminalization of sodomy.

52. "Amendment 2 Held Unconstitutional," in *Lesbian/Gay Law Notes*, June 1996.

53. See *Padula v Webster*.

Bowers decision. Instead, they distinguished *Bowers* from *Romer* as a question of substantive due process rather than equal protection. Jean Dubofsky argued:

> Bowers is not an equal protection case and our arguments are under equal protection. Bowers was a due process case and it was talking about fundamental rights to privacy. That's a distinction that is very important in this case. . . . Bowers addressed conduct, one specific type of conduct—sodomy. It did not address a broader sexual orientation and, as our briefs set out in some detail, sexual orientation encompasses much, much more than the conduct that was at issue in the sodomy statutes in Bowers.[54]

Even a cursory reading of *Bowers* will bear that out—although both cases involved homosexuals, the constitutional issues are quite different. I am not troubled by Kennedy's move to leave *Bowers* out of the decision.

Another criticism addressed the legitimacy of the decision. Kennedy didn't really explain why the state's reasons for classification were not rationally related to some legitimate interest. He just asserted that animus is by no means rational. But this sort of sloppiness seems to fly in the face of an opinion Kennedy wrote in 1993 in *Heller v Doe*. In that case, some citizens were challenging Kentucky regulations that provided different standards for institutionalization of the mentally retarded and the mentally ill. Kennedy offered one means of explaining why the Court would use the rational relations test to examine that particular equal protection question.

> We many times have said, and but weeks ago repeated, that rational basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." . . . Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run

54. Transcript of oral arguments, *Evans v Romer* [Evans I], Colorado Supreme Court, May 24, 1993.

> afoul of the equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . [A] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[55]

It is certainly hard to reconcile the restrained Kennedy of *Heller* with the Kennedy of *Romer*. And when reading *Romer* in that context, the decision seems a bit illegitimate. Although we may like the result, the reasoning (or lack thereof) is disappointing. Kennedy should have taken the time to justify the majority decision. Had he provided clear evidence in support of his stand, the decision would have more legitimacy.

It is easy to be critical of the reasoning when you like the decision. But *Romer* was notable for the vitriolic responses it evinced from the reactionary right, including two writers associated with the conservative Family Research Council, who spent much of their time asserting that civil rights for homosexuals are almost by definition "special rights."

> This decision may result in the death of the traditional family and the institution of marriage—the very core of our society. . . . The *Romer v Evans* decision is a severe blow to America's moral heritage and will be used by homosexual rights activists to further separate the family from its traditional Judeo-Christian roots. They will use this ruling to force religiously motivated people to subsidize and promote behavior that they find morally bankrupt and against their most deeply held beliefs.[56]

Other alarmist scenarios mentioned included the possibility that traditional American values would soon face a similar sort of challenge from pedophiles seeking special rights. Other, more restrained, critics wondered what implications *Romer* held for debates about the counter-majoritarian dilemma. How might a Supreme Court decision to overturn a popularly supported state constitutional amendment influence mainstream views about the role of the courts in participatory government? It is important to emphasize here

55. *Heller v Doe*, 509 U.S. 312 (1993), citations omitted.

56. Robert L. Maginnis and Robert H. Knight, "Judicial Terrorism: A Moral Crisis," *Family Research Council Perspective*, May 24, 1996.

that reactions to the decision were not overly determined by approval for the outcome. Opponents of the amendment did not lack reservations about the decision. And proponents of Amendment 2 were not hopeless—there were certainly spaces in the reasoning from which to create new legislation.

Doctrinal Results

Doctrinally, the decision in *Romer* was not the gay rights bonanza many had hoped for. No affirmative rights were advanced by the decision; simply put, Colorado may not fence out one class of citizens from the protection of an entire category of its laws (those pertaining to discrimination). That is all. The Supreme Court moved no closer to recognizing the need for stricter scrutiny of classifications of nonheterosexuals in equal protection cases. Justice Kennedy's opinion offered no encouragement for those who want to see sexual orientation included among protected characteristics. Indeed, the decision seemed to have been reached on grounds distinct from any consideration of homosexual identity. It is no stretch to posit that if similar legislation were to be passed in other states, though carefully tailored to avoid specific faults the majority found, the resulting laws would still be frightening to many. It is entirely possible, for example, that State X might pass legislation rescinding local statutory protections for gays, lesbians, and bisexuals. If there were no mention of "claims of discrimination" as in Amendment 2, and if the hypothetical law simply went to conduct, it would likely be upheld by the Court. There are no indications that the Court is eager to revisit the issues of *Bowers* and consider any rights adult homosexuals and bisexuals may have to engage in private consensual sexual activity. As far as rights for military personnel are concerned, the Court has shown little interest in the many cases challenging the "don't ask, don't tell" policy.[57]

Implications

Despite all the problems with *Romer*, however, the Court merits some praise for the political acuity shown. It managed to decide a case involving homo-

57. On October 21, 1996, the U.S. Supreme Court denied *certiorari* in the case of Navy Lieutenant Paul G. Thomasson. Two years later, a three-judge panel from the Second Circuit Court of Appeals upheld the constitutionality of the military's "Don't ask; don't tell" policy. Requests for further reconsideration were denied (*Able v USA,* No. 97-6205 [2d Cir., September 23, 1998]).

sexuals in a way that walked the tightrope between protecting basic civil rights for gays, lesbians, and bisexuals, and not appearing to give any remotely preferential treatment. Perhaps (in the first, most optimistic, scenario) the decision gave the justices an opportunity to get their feet wet—maybe they'll be less likely to shy away from cases involving nonheterosexuals in the future. Cases involving discrimination on the basis of sexual orientation could be the next forum for extending civil rights protections.

A second scenario for the result of this decision is a potential change in doctrinal approach for the Supreme Court. Maybe the decision in *Romer* indicates that the Court is willing to sharpen the rational relations test—to make it actually useful. Perhaps the standard of "mere rationality" has been supplanted with more contextual reasoning. A well-known example of the former tortuous reasonings in which the justices engaged in the name of rationality was *McDonald v Board of Election*. In that 1969 case, Justice Warren wrote:

> Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause *only* if based on reasons *totally unrelated* to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside *only if no grounds can be conceived to justify them*.[58]

The justices were almost required to do intellectual acrobatics in order to "conceive" of any possible reason to uphold the disputed legislation. Maybe in the future a "rational relationship" will mean just that—a rational, contextual relationship, not a flight of judicial fancy; not a series of whimsical "what ifs?" tied up in the guise of rationality. Maybe, too, the "new" rational relations test will rely on reason, not on extended accounts of historical prejudices. It is certainly true that legislative reasons cannot be separated

58. *McDonald v Board of Election* at 808–9, emphasis mine.

from the historical context in which they arise; yet is it necessary to revisit ancient history in order to validate those legislative purposes? In his concurrence in *Bowers*, Chief Justice Burger cited the facts that homosexual sodomy was punishable by death in the Roman Republic, and that sodomy was criminalized under Henry VIII.[59] Interesting, certainly; relevant, not at all.

As I mentioned previously, this rosy scenario is only partially supported by the decision in *Romer*. The majority did show its unwillingness to engage in intellectual contortions in order to articulate any possible (however improbable) reason to uphold the classification. Instead, they looked at the big picture—near absolute deprivation for nonheterosexuals versus tenuously related rights for the majority. In addition, Kennedy's opinion avoided justifying discriminatory legislation through making laundry lists of cant. But it is still difficult to determine how irrational the relationship between the classification and the amendment was. If only Kennedy had more fully justified his decision.

LIBERTY AND IDENTITY

The Court in *Romer v Evans* said that, for all legal intents and purposes, identity doesn't matter. The act of classifying identity was the issue—less important or relevant was the actual classification used. As Tribe reminded us in his brief, left-handed people and optometrists similarly treated would likewise be the subjects of a *per se* violation of equal protection. The Equal Protection Clause, therefore, means little if not that (1) similarly situated people will be treated similarly, and (2) dissimilarly situated people will not be treated similarly. In other words, equal treatment (in these terms) requires similar status; and differences justify inequality.

What the Court did in *Romer* was to declare that, as far as equal protection of the laws is concerned, sexuality is not a relevant difference. That means that differing sexual desires can't justify different levels of protection from discrimination. But that also means that, in determining equal treatment before the law, non-mainstream sexualities are irrelevant. Although I heartily applaud the result of the decision in *Romer*, this is a problem. The solution to problems of inequality based on identity is not to say that

59. *Bowers v Hardwick* at 196–97.

identity doesn't matter. Rather, we need to rethink what it means for identity to *matter*.[60]

As Martha Minow has argued in *Making All the Difference,* it is no better to ignore differences and treat everybody identically than it is to justify unequal treatment on the basis of perceived differences. Problems arise, in what Minow calls the *dilemma of difference*, as soon as we ask: "When does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?"[61] Minow argues that differences, per se, are not the problem; the inequality that results from stratifying those differences is what must be addressed. We forget that differences are socially constructed and relational; differences instead seem to inhere in the person who is different. We need to remind ourselves that categories of difference are created in relationships—they don't just exist naturally and neutrally. Differences aren't intrinsic—they are the products of comparison, and we must expose the standard used. Differences are perceived from a situated perspective—they cannot be separated from the context in which they are created.[62] When differences are articulated, normative qualities adhere. You are not just different from me, you are inferior. The differences described become the "problem" of the person who is "different." And the power behind the distribution of markers of identity is obscured.

We forget, too, that the act of ascribing identity is twofold. Categories of identity often come into being as individuals are assigned membership. And individual identities are gleaned from participation in categories of identity. An example: a category of identity doesn't exist without membership. Take the category "lipstick lesbians." The category was created as a way to group a number of women who claimed to be lesbians but didn't behave "how lesbians are supposed to act." They had hair styles, they wore makeup, maybe they shaved their legs. (Never mind that lots of lesbians have been doing those things for years.) The conflict with small-minded stereotypes required a new classification. And once membership in the category is

60. Another book that grapples with this question is Martha Minow's *Not Only for Myself: Identity, Politics & the Law* (New York: The New Press, 1997).

61. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990), 20.

62. See Minow, *Making All the Difference*, 49–78, for more discussion of these unstated assumptions.

ascribed to an individual, the person's own identity also is transformed. She is no longer just a lesbian, she's a "lipstick lesbian." Does the cultural (nonbiological) origin of this category of identity change anything? Acknowledging that categories of identity are socially constructed doesn't minimize the power those classifications wield. Although their geneses are unnatural (that is, not biologically determined), the repercussions of inequalities assigned to categories of identity are very real.

We must not delude ourselves into thinking that because differences are mythical they are best made extraneous.[63] But we are grappling here not with the Truth of the myth but the consequences of the truth of the existence/perpetuation of the myth. As Kenneth Karst puts it, "To say that any racial identity is a myth is not to say that race is a useless idea in talking about American society or responding to social needs. Our myths of race are real enough as forces in our lives."[64] It is easy, on occasion, to buy into the myths of social contract theory—to hold on to the belief that, with civilized progress, society has moved from status to contract; or to assert that the act of contracting demonstrates our inherent equal footing. This is what the Supreme Court did in *Romer*—ignore status, as if simply *saying* sexuality doesn't matter dismisses issue of the inferior status ascribed to nonheterosexual people. But as Carole Pateman elegantly argues in *The Sexual Contract,* the contractual bases of our society have not transcended the problems of status—rather, status was simply dragged along into "civil society" and "legitimated" by contract. Pateman writes:

> To argue that patriarchy is best confronted by endeavoring to render sexual difference politically irrelevant is to accept the view that the civil (public) realm and the "individual" are uncontaminated by patriarchal subordination. Patriarchy is then seen as a private familial problem that can be overcome if public laws and policies treat women as if they were exactly the same as men.[65]

63. I think it unnecessary, for these purposes, to re-hash familiar explanations of how categories such as "race" and "gender," not to mention such egregious examples as "African-American" or "Hispanic," are constructed. For a discussion of the creation of the category "homosexual," see Michel Foucault, *The History of Sexuality,* vol. 1 (New York: Random House, 1978).

64. Karst, "Myths of Identity," 307.

65. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 17.

Although Pateman doesn't make this meaning explicit, if we understand the term "patriarchy" in this passage to include "homophobia" and what Adrienne Rich calls "compulsory heterosexuality," the results become clear. Is the view Pateman describes not what the *Romer* opinion attempted to enact? The decision suggests that if we just ignore the differences of homosexuality and bisexuality, and treat nonheterosexuals "as if they were exactly the same as [straight] men," we can just sit back and wait for "neutral" laws to overcome those old prejudices about homosexuality. Obviously, that approach is doomed to disappoint.

The result of *Romer* does not challenge patriarchy or sexual hegemony; it is mere appeasement. It does nothing to challenge the relationships of domination and subordination that masquerade as contractual equality in Anglo-American jurisprudence. This modern (heterosexist) contract is, according to Pateman, "a permanent exchange between the two parties, the exchange of obedience for protection. . . . The peculiarity of this is that one party to the contract, who provides protection, has the right to determine how the other party will act to fulfill their side of the exchange."[66] And that is precisely why identity is important post-*Romer*. Remember that recognizing the existence of status is not the same as endorsing the injustices it entails. Rather than changing the descriptors of identity to eliminate those that refer to sexuality, we need to change the way identity functions to mark inequality. As Janet Halley writes of *Casey v Doe*, the case of the government employee dismissed from his job after he disclosed his homosexuality, the power behind the repercussions of identity labels is often masked.

> The court construes men and women who choose not to remain closeted to have made a simultaneous choice to wear whatever badge the majority determines is appropriate for them. Even as the court monopolizes the power to define and control the subjective experience of stigma, it simultaneously establishes the legal fiction that those harmed by government discrimination have chosen their injury.[67]

66. Pateman, *The Sexual Contract*, 58–59. In the context of *Romer*, it is difficult to avoid the suggestion that the protective party might require obedience to take the form of self-abnegation or denial. For nonheterosexuals to receive (equal) protection (of the laws), it is necessary for those differences of sexuality and desire to be made irrelevant. Is it a stretch to wonder: if sexuality were a pertinent characteristic, would equal protection be granted contractually?

67. Halley, "The Politics of the Closet," 34.

Saying sexual identity is irrelevant does nothing to change the ways identities (claimed and imposed) matter.

Reconceiving how identity matters begins with an examination of the routes by which unequal status is assigned and the ways identities are ascribed, whether imposed or proclaimed. There is no legal difference, once sexuality is deemed irrelevant, between being labeled gay and declaring yourself gay. But the moral and political implications are vast. The role of the interpreter, the one who determines appropriate categorization, is enormously powerful. When it is up to other people to decide who is (to be labeled) "gay," homosexual performances (orientation, conduct, practices, or relationships) are determinate. In so doing, the authority to define broad categories of people is used in such a way as to necessarily connect nonheterosexuality with moral, political, and legal approbation.[68] Ascriptions of identity (and the concomitant normative judgments) are based on stereotype, inequality, and group definitions. Differences within groups are minimized.

One example of the ascription of identity is the case of *Gay Inmates of Shelby County Jail v Barksdale*.[69] Jailers enforced a policy (upheld by the 6th Circuit Court) of separating homosexual prisoners from the rest of the population. Decisions were based on "a purely subjective judgment," including enforcing guidelines calling for the separation of prisoners who appear "weak, small, or effeminate."[70] No thought was given to problems of overinclusion or underinclusion. Undoubtedly there were homosexual inmates who were large and full of machismo; surely there were heterosexual inmates who were slight and delicate. But none of that mattered to the jailers (or the court). The appearance became the reality. In part, this is because the imposition of classifications of identity requires a conceptual shift from adjectives to nouns. Once an individual is seen to have "homosexual orientation" or "bisexual relationships," she is moved from being described as homosexual or bisexual to being "a homosexual" or "a bisexual." At that

68. Oddly, identity seems to matter most to the proponents of Amendment 2. In oral arguments before the U.S. Supreme Court, Colorado attorney Tim Tymkovich was asked, "What is the special preference at stake here? What is the special preference that a homosexual gets?" Tymkovich replied, "I think it creates a cause of action on the basis of the characteristic that's not available to the general population at large" (*Romer v Evans*, U.S. Supreme Court Official Transcript, October 10, 1995, Washington, D.C., 25). Imagine the implications of that logic for *any* claim of discrimination.

69. No. 84-5666, 1987 WL 37-565 (6th Cir. June 1, 1987), cited in Halley, "The Politics of the Closet," 25.

70. *Gay Inmates of Shelby County Jail v Barksdale*, at 3–4.

point, personal identity and individual voice are lost. Once she moves from having a homosexual quality to being a homosexual, individual identity is erased and generalized prejudices and stereotypes are more easily imposed. As James Baldwin said in an interview:

> There's nothing in me that is not in everybody else, and nothing in everybody else that is not in me. We're trapped in language, of course. But homosexual is not a noun. At least not in my book. . . . [My life] had nothing to do with these labels [of sexual orientation]. Of course, the world has all kinds of words for us. But that's the world's problem.[71]

Baldwin asserts the importance of naming himself rather than relying on other people's interpretations of what his life means. His statement illustrates that the problems of status are not caused by the existence of difference but by the imposition of definitions by others. Imposed, collective identity homogenizes. Imposed identity sees only broad categories, not complicated specificity. Those broad, monolithic categories threaten to crush the individuals on which they are imposed. As Urvashi Vaid, former director of the National Gay and Lesbian Task Force, has said of outing, "[It] is using homophobia to your own advantage. It is the fault-line that separates those who prize the collective over the individual and those who insist on personal freedom of choice."[72] Imposing collectivizing categories of identity on other people denies them the right to define themselves, for themselves.

The freedom to define oneself, and to do it again and again in various and shifting permutations, is a radical act of liberty. If one cannot name one's self or selves, one is not free. The difficulty of this process (and the beauty) comes when one is forced to negotiate the dynamic boundaries of identity between individual and community. Can one be homosexual without being *a* homosexual? What does it mean to claim the adjective and refuse the noun? How much can one deviate from the stereotypes? Can identity be separated from the vision of the eye of the beholder?[73] Do

71. Richard Goldstein, "'Go the Way Your Blood Beats': An Interview With James Baldwin," in William B. Rubenstein, ed., *Lesbians, Gay Men, and the Law* (New Press, 1993), 40, 44, cited in Karst, "Myths of Identity," 304, 305.

72. Karst, "Myths of Identity," 264.

73. Think, for example, of bisexuality. Many people argue that bisexuality is impossible, that people are either homosexual or heterosexual, that failing to choose is a sign of laziness. Others

individuals have a responsibility to claim and proclaim all applicable racial, ethnic, gendered, sexual, class, etc. identities?[74] What happens when these two (or more) identities collide? Why are reactions so forceful when individuals refuse to shape their identities (or is it their behavior?) to meet stereotypes or communal definitions?[75] What are the implications of calling ourselves something in a gesture of pride that others once called us as an expression of hate?[76] Although all these questions have answers, responses are both contingent and contextual. They depend on our refusal of a strict procedure for determining and imposing other people's identities. They require a commitment to the values of liberty: the rights of individuals to define themselves; the rights of individuals to define themselves differently in different situations, at different times.

The freedom of individuals to proclaim their own identities is a legal concern. The law is greatly implicated in the creation of the consequences of identity claims.[77] In the case of identity claims after *Romer*, legal scholars must acknowledge that homosexuality is not a purely extralegal category. Part of what it means to be homosexual in the United States of America is to be a second-class citizen (even after Amendment 2 has been struck down). It

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believe that all people are inherently bisexual, and that only social forces limit the expression of those desires. For others, bisexuality is seen as a crutch that gay people use to avoid the stigma of homosexuality. Regardless of which (if any) of these theories you believe, note that all depend on the imposition of identity—the assumption that an outsider can see individual identity more clearly than the individual herself.

74. Think, for example, of golfer Tiger Woods. His refusal to call himself African American has many people up in arms. They see his denial of that label as an affront to all the others who have embraced it. Woods, on the other hand, has stated that African-American identification is only part of himself; that to call himself African American is to deny the ancestry of his Thai mother. Does Woods have an obligation to the African-American community? Do people's perceptions of him as black trump his own naming?

75. Remember the Log Cabin group of gay Republicans, who find themselves sometimes shunned by both homosexual Democrats and heterosexual Republicans.

76. The absorption of the term "queer" by the lesbian, gay, bisexual community is one example. Francisco Valdes, a legal theorist who favors the term, writes:

> Queer . . . speaks as part of a new vocabulary that invokes a self-made vision of a better future. . . . [T]his term also increasingly connotes the advances secured by sexual minorities socially and culturally in recent years; even though it can still evoke the terrors of a not too distant past, . . . Queer increasingly signifies self-empowerment.

Francisco Valdes, "Coming Out and Stepping Up: Queer Legal Theory and Connectivity," *National Journal of Sexual Orientation Law* 1, no. 1 (1993): 6.

77. See Minow, *Making All the Difference,* for many and varied examples.

means that criminalized sexual conduct has been defined in such a way as to penalize homosexuals and not heterosexuals.[78] It means that workplace harassment has been circumscribed in many cases to refer only to heterosexual harassment.[79] It means that parenthood has been defined by many courts to include a heterosexuality requirement.[80] It means that the military's new, improved "don't ask, don't tell" policy has resulted in even more dismissals (21 percent more) than the previous flat-out ban.[81] The law cannot escape considering the consequences and implications of identity formation.

But some critics might argue that paying this much attention to individual identity in specific context is akin to opening Pandora's box. What will happen if we allow individuals to name themselves, to describe and create their own identities? What will come next? Special laws for everybody? Chaos and confusion? The Balkanization of doing justice? If identity matters, how can anything ever be decided? Imagine a charge of employment discrimination, in which John is suing over the loss of his job. Can he claim special rights because he's half-white? Gay? Bald? Rides a bicycle? Where does it stop? Which of these characteristics matter? What does it *mean* for these characteristics to matter?

In response, I assert that there is no requirement of simplicity for justice to be done. Circumstances aren't required to be flat and detail-less for judges to make decisions. Legal decisions are made in particular contexts of facts and rules and issues. It would be foolish to attempt to delineate a closed set of circumstances in which identity could be considered properly related, and another set of situations in which identity truly doesn't matter. Karst notes that "even an expanded list of categories [of identity] would leave many individuals' senses of self in the "spaces" between categories; furthermore,

78. See the denial of standing for the Does—the heterosexual couple who also challenged the sodomy statute—in *Bowers v Hardwick*. Note, however, that this applies primarily to married heterosexuals. Prostitutes, for example, bear the brunt of statutes criminalizing sexual activity. See Mary Joe Frug, "A Postmodern Feminist Legal Manifesto," in her *Postmodern Legal Feminism* (New York: Routledge, 1992), 125–53.

79. An exception is *Oncale v Sundowner*, 523 U.S. 75, 118 S.Ct. 998 (1998), which found that it was possible for federal sexual discrimination law to apply to same-sex sexual harassment. Any person can have a cause of action, regardless of the sex of the harasser, if he or she is subjected to "discrimination . . . because of . . . sex."

80. See, for example, *Bottoms v Bottoms*, 249 Va. 410 (1995), a Virginia case in which Sharon Bottoms's custody of her son was challenged by her own mother, who believed that Sharon's lesbianism rendered her unfit to parent. Sharon's mother was awarded custody.

81. Harper's Index, *Harper's Magazine*, November 1996, 17; the source for the statistic is the Servicemembers Legal Defense Network (Washington, D.C.).

at least some individuals can and do move from one category (or "space") to another."[82] The degree of importance assigned to identity cannot be predetermined—instead, a case-by-case critical, contextual, and contingent examination of questions of power and authority and liberty must be undertaken. The underlying principle should be a commitment to the liberty of subjects to name themselves, both as individuals and as members of various groups. This is not an easy process, but it is vital if we wish to avoid the pitfalls of relying on stereotypes and short-hand sketches of reality.

The complications arise when we consider this proposition from the other side. If we say, as I do, that individual self-definition is basic to a feminist concept of liberty, what might be the limits of such an assertion? What part does "truth" play in determining who or what I am "allowed" to call myself? Should I, for example, be able to call myself male in order to seek admission to a men's military school? Certainly, although there will always be consequences to such a declaration.[83] Although in this case my claim would be false, the ethical issue it raises is not of my veracity but of the propriety of the men-only rule in the first place. Let's shift the burden from me (having to prove I'm male) to the school (having to justify its policy of exclusion, based on biased assumptions about the fitness of only men for military school). Let's be honest about what interests are served by limiting applicants to a single sex. The school is not pursuing this policy out of a desire to save the costs of installing women's restrooms. Other motives are involved, and those must be challenged.

Another example: Should an author be able to write a Holocaust memoir even if, as some critics claim, he was never detained in a concentration camp?[84] I would say, yes. But note that the requirement that individuals be able to claim their own identities does not mean that we are required to endorse them. The meanings of identities are shaped within the interplay of persons. Although I may be perfectly free to declare myself a Native American (or to insist that "purple" is the product of blue and yellow), you are free to disagree. If I make this claim simply for sport, it matters little (although it may well offend). But if I leverage the claim to accumulate resources, or to

82. Karst, "Myths of Identity," 309.

83. Self-conception and self-definition are always related, in part, to the acknowledgments of others. None of this takes place in a vacuum.

84. See the controversy surrounding Binjamin Wilkomirski's book *Fragments: Memories of a Wartime Childhood,* trans. Carol Brown Janeway (New York: Random House, 1996). I thank Susan Brison for reminding me of this example.

deny someone else what is theirs, then you would be justified to challenge me. Meanings—indeed, all language—are reached through relationships. I may coin a new word, or assign a new meaning to a word already in use, but neither will amount to anything unless recognized by someone else (and preferably by many others).

A third example: Should a male-to-female transsexual be able to claim female legal status?[85] When a Kansas man died without a will, his wife petitioned for half his estate. His son challenged the motion (and asked for the entire estate), claiming that his father's marriage was not valid because his new wife, a male-to-female transsexual, was really a man. Although the widow, J'Noel Gardiner, was armed with a Wisconsin birth certificate issued after the surgery that identified her as female, the court claimed that under Kansas law she remained a man, that Kansas law prohibited same-sex marriage, and that she was therefore excluded from inheritance. (Of course, had her late husband, 86-year-old Marshall Gardiner executed a will, J'Noel could have legally inherited the entire estate.)[86] This is a case in which identity—particularly gender identity—matters enormously. The question of what we call ourselves—and as what we are recognized—determines the distribution of power and goods (for better and for worse). Decisions about identity claims have important consequences. But what sets the Gardiner case apart from mere name-calling is that J'Noel's identity was declared by a state institution. I argue that she should be able to undergo sex-reassignment surgery, that her decision to live life as a woman should be respected, and the Wisconsin state action endorsing her status should be recognized by Kansas. J'Noel provides a good example of identities that are not permanent. Laws should recognize the mutability of identity as Wisconsin did. One task of a feminist theory of liberty is to provide a justification for courts, such as those in Kansas, which cling to narrowly defined categories of identity that ignore the reality that, in Simone de Beauvoir's words, one can, in fact, become a woman.

It is galling to think that, in the eyes of the law, identity doesn't matter. It matters to individuals because it colors the way we see ourselves in the world, it matters in political contexts because it often determines the distribution of power and goods (for better and for worse), and so it matters importantly.

85. A related issue: should a male-to-female transsexual be allowed to participate in lesbian-only events?

86. John T. Dauner, "Wealth and a Sex Change are Highlights of Kansas Estate Litigation," *Kansas City Star*, June 24, 2000, A1.

Old notions of liberty did not allow identities to matter in these ways. In pursuing fixed categories of identity (reinforcing the walls of the category woman, for example), there was often insufficient emphasis on differences within categories. I suggest herein that the distinction between conduct and status—between who I am and what I do—serves only to limit my freedom. Such a distinction assumes the existence of a standard by which to determine the truth of my identity claims, and the use of such a disembodied norm continues to be dangerous for those of us whose bodies differ from male heterosexual whiteness. In fact, who I am influences what I do, and what you do, and who you are, and so on. This dynamic approach is far more respectful of contextuality and of feminist values. It does not doom us to ethical relativism. It simply (or, rather, not-so-simply) reminds us that meanings are created in context, and that the subjects of identity labels should be allowed a role in naming ourselves. The Identity Principle can be roughly correlated with David Miller's third prong of liberty (that "to be genuinely free, a person must live under social and political arrangements that he has helped to make").[87] Self-government rooted in declaring one's own identity (and helping to determine what those labels mean) is central to freedom.

In the end, sexual identity (indeed, all identity) matters greatly. And to say that it is only important for homosexuals, lesbians, or bisexuals, would be analogous to saying gender is only relevant for women. Sexuality, however it is directed, is integral to the identities of us all. It would be a horrible mistake for the courts to say that, in the eyes of the law, it doesn't matter. The important point to remember is that the extent to which identity matters depends on the particular context in which the dispute occurs. Certainly in many situations identity *shouldn't* matter—911 calls should not be left unanswered because the phone operators are homophobic. But there is a great divide between saying that it shouldn't matter in certain situations and that it doesn't matter absolutely. What we must focus on, instead, is our effort to change what it *means* for identity to matter. I suggest that the freedom to define one's self is the first crucial step. The contingent application of The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning—is a necessary adjunct for those of us committed to pursuing the goals of a feminist theory of liberty. In the mean time, as far as identity is concerned, people committed to liberty must respond decisively: "But it matters to me."

87. Miller, "Introduction," 19–20.

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LOCHNER REDUX

Surrogate Mothers, Sperm Providers, and the Limits of Liberty

Reproductive freedom is rarely a point of contention among feminist theorists. Most feminists assume without question that women's rights to control our bodies and the products thereof are absolute and foundational. Received wisdom tells us that women's interests in bodily integrity should trump any competing claims—whether of potential fathers, of concerned family members, or of the state itself. Women's reproductive freedoms are argued to be expansive. Our experience as women determines the scope of our liberty.[1] However, in nonrepro-

1. Important feminist scholarship has explored this claim, particularly as it relates to the ethics of care. See, for example, Sara Ruddick,

ductive contexts it has long been a tenet of liberal feminism that legal treatment of women *as women* is inherently suspect. Whether subject to heightened regulation of working hours[2] and conditions,[3] or excluded from certain legal roles,[4] women have historically been treated differently compared with men. Women's "differences" have been used to justify inequality. Rightly, many feminists are suspicious when legislation or judicial opinion provides for dissimilar treatment of women and men. Any official recognition of gender difference is seen as the first step toward injustice.

Ironically, in an era of anti–affirmative action sentiment and suspicions of "reverse discrimination,"[5] feminists are not the only ones worried about gender-specific treatment. The men's movement has focused on reforming what it sees as unfair legislation that makes it difficult for men to receive custody of their children, or employment regulations that hold male candidates to a higher standard than women applicants. These concerns are perennially emphasized in debates surrounding reproductive rights and freedoms. Liberty and privacy are always discussed when considering issues such as abortion, eugenics, contraception, custody, and child welfare. Men and

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Maternal Thinking: Toward a New Politics of Peace, with a New Introduction (Boston: Beacon Press, 1995; Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982); and Robin West, *Caring for Justice* (New York: New York University Press, 1997).

Although I appreciate these contributions, the emphasis on women's caring seems, to me, to be a bit dangerous. I worry that prolonged focus on women's caregiving roles can too easily blind us to less nurturing aspects of our experiences and policy goals. The attention to care—to interpersonal obligations—challenges some notions of individual entitlements, which I believe are required for a sustained theoretical and practical commitment to freedom.

2. See *Muller v Oregon*, 208 U.S. 412 (1908), which upheld maximum hours legislation for women but not men. Justice Brewer opined: "The two sexes differ in structure of body, . . . in the amount of physical strength, . . . [in] the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

3. See *West Coast Hotel v Parrish*, 300 U.S. 379 (1937), in which the Supreme Court (in its "switch in time") upheld a minimum-wage law for women, justified in part by a reliance on *Muller*-type reasoning. For further discussion, see the section on freedom of contract.

4. See, for example, *Reed v Reed*, 404 U.S. 71 (1971), which struck down an Idaho law restricting women from serving as an executor of an estate; *Stanton v Stanton*, 421 U.S. 7 (1975), which overturned legislation requiring child support for boys until the age of twenty-one and girls until the age of age eighteen; *Frontiero v Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), which overturned an Air Force regulation denying benefits to the spouse of a servicewoman but not a serviceman.

5. Debates on this subject are beyond the scope of this chapter. Refer to the arguments and results of the University of California and University of Texas attempts to end affirmative action.

women, *as men* and *as women*, are often pitted against each other as privacy rights counter privacy rights, as reproductive freedoms counter other reproductive freedoms. These conflicts involve the most basic and complex balancing of liberties. And even more vexing, perhaps, are the problems that arise when competing liberties collide.

When one liberty is counterpoised to another liberty in a legal conflict, one freedom is going to prevail. Deciding which party or which right will win-out often involves questions of equality and equal protection of the laws. And when sex/gender differences color the dispute, as is usually the case in reproductive rights, the questions of equality become even more pointed. If, in a dispute between a man and a woman, one must succeed and the other must fail, the implications of the decision are vast. If the man wins, is it because he is a man and women have fewer legal protections? Or is it because the system is correcting itself for having provided women too many advantages in the past? If the woman wins, is it because she is a woman, and if so, does that mean she is unequal to the man? Is she being given a biological trump? And will that trump come back to haunt her?

In this chapter, I shall demonstrate that differential treatment of men and women can be not only just but also necessary for and consistent with a commitment to liberty. The widest range of reproductive freedom demands that the individuals concerned be as free as possible—that is, we cannot have reproductive freedoms if we are not free people. But freedom does not require a complete absence of restriction. I argue that The Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity—is the logical result of such a commitment to liberty.

In *Planned Parenthood of Southeastern Pennsylvania v Casey*, the reproductive rights of men and women were balanced in the process of judicial decision making. Although the case addressed many aspects of Pennsylvania's abortion regulations, including provisions that teenagers must seek parental approval and the institution of a 24-hour waiting period, much was made of the Pennsylvania law requiring most married women to notify their husbands before an abortion could be performed. Proponents of the spousal notification measure argued that fathers are entitled to be involved in making decisions regarding reproduction. As Chief Justice Rehnquist stated in the dissenting opinion in *Casey*:

> [A] husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. . . . The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him.[6]

Opponents of spousal notification, however, were more concerned with the threats to women that could arise from this provision. Citing statistics about intimate violence, those opposed argued that the required notification was likely to give the husband veto power over the woman's abortion decision. As Justice O'Connor wrote, in her opinion for the majority:

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. . . . Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.[7]

As the Court previously stated in *Eisenstadt v Baird*: "If the right of 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."[8] But what happens when the government is invited into a dispute, involving those rights, between two individuals, both with a connection to the child? In abortion cases, the court has repeatedly ruled that, when reproductive rights come into conflict, rulings are presumed in favor of the woman. In *Casey*, O'Connor wrote:

6. *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992) at 974.
7. *Casey* at 898.
8. *Eisenstadt v Baird*, 405 U.S. 438 (1972) at 453, emphasis in the original.

> If this case concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude, as a general matter, that the father's interest in the welfare of the child and the mother's interest are equal.
>
> Before birth, however, the issue takes on a very different cast. *It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's*. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman.[9]

O'Connor went on to quote from *Planned Parenthood of Missouri v Danforth*: "[W]hen the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[10]

What this decision said was, in effect, that for men the sex act is an implicit contract. Contemporary public policy dictates that if a pregnancy results from a sexual relationship, the male partner bears legal and financial responsibility for the resulting child (whether or not he explicitly wanted the pregnancy terminated). Even if he would have chosen to postpone reproduction, he can be held responsible for child support. The same is not true for a woman. She is considered, by the law, to be the final arbiter of procreation decisions (at least in the first trimester). How can this disparate treatment be reconciled with contemporary understandings of equality and reproductive freedom? If these responsibilities apply to nonmarital relationships, can they be dismissed if the prospective mother and father are involved only in a contractual relationship (that is, no emotional, affectional ties), entered into before the birth? How are duties divided when the child has been born and decisions regarding the child's welfare must be made? What are the definitions of parental responsibility when the terms "father" and "mother" are themselves called into question?

9. *Casey* at 897, emphasis added.
10. *Planned Parenthood of Missouri v Danforth*, 428 U.S. 52 (1976) at 71.

These questions appear in stark relief in disputes between "surrogate mothers" and "contractual fathers".[11] New Jersey's "Baby M" case first brought these issues national attention.[12] In that dispute, William Stern had contracted with Mary Beth Whitehead to produce a child. Whitehead was artificially inseminated with Stern's sperm, and was contractually obliged to forfeit her parental rights upon the birth of the child. The fee for these services was $10,000. Stern sought this arrangement because his wife, Elizabeth, had multiple sclerosis and wanted to avoid health hazards potentially associated with pregnancy. Shortly after the birth of "Baby M," Whitehead refused to honor the terms of the contract, and tried to keep custody of the infant. The Sterns took her to court and were rewarded with temporary custody of the child. At trial, Whitehead's parental rights were terminated, the surrogacy contract was upheld, custody was granted to the Sterns, and the adoption initiated by Elizabeth Stern was allowed to proceed.[13] The trial court decision was premised, in part, on the image of mother-as-loving-caregiver (an image reflected in some feminist writings on the ethics of care). Because Mary Beth Whitehead had at one time entered into a contract to relinquish her parental rights, she was found at any time (at all times) to be a suspect mother. These stereotypes of nurturing woman supported the denial of Whitehead's parental rights, and of her freedom.

When the decision was appealed, the New Jersey Supreme Court overruled much of the previous decision but continued the custody arrangement. Chief Justice Wilentz's opinion for the court stated:

11. A note on terminology: I occasionally use the term "surrogate mother" to denote a woman who has engaged in any contractual relationship (other than marriage) with a man for the purposes of conceiving and giving birth to a child. By using the term, I do not intend to imply that a "surrogate mother" is not a "real" or "natural" mother, nor that she is a maternal understudy. When circumstances permit, I prefer to use the terms "gestational mother" and "genetic mother." As my argument will demonstrate, I refute the term "natural mother."

12. For further details of the case and discussion, see the Publication of the New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, *After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy* (Trenton: State of New Jersey, September 1992); Phyllis Chesler, "Mothers on Trial: Custody and the 'Baby M' Case," in Doreen Leidholdt and Janice G. Raymond, eds., *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon, 1990), 95–102; Katha Pollitt, "Contracts and Apple Pie: The Strange Case of Baby M," in Pollitt, *Reasonable Creatures: Essays on Women and Feminism* (New York: Vintage, 1994), 63–80; Bonnie Steinbock, "Surrogate Motherhood as Prenatal Adoption," in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1988), 123–35.

13. The trial court's decision in this case sparked passionate responses, particularly because many felt that Mary Beth Whitehead was unfairly victimized by the proceedings. See Pollitt, "Contracts and Apple Pie," for further details.

> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of this child.[14]

In New Jersey, surrogacy contracts are illegal and therefore unenforceable. But various permutations of this issue continue to arise in other states. Although the proprietors of many commercial surrogacy companies insist that most surrogacy arrangements are successful (that is, they do not result in legal conflicts), some cases of contractual-reproduction-gone-wrong still arise.

In 1995, a surrogacy arrangement brokered by Noel Keane, who was responsible for the Whitehead-Stern contract, resulted in tragedy near Philadelphia. James Alan Austin, a single 26-year-old Pennsylvanian, and Phyllis Ann Huddleston, a 29-year-old Indiana resident and mother of one, contracted to produce a baby, who would be raised solely by Austin. Huddleston received about $10,000 of the $30,000 fee Austin paid. Five weeks after the birth of Jonathan, James Austin was charged with homicide after the baby died of injuries inflicted by his father. After pleading guilty, Austin received the maximum sentence.[15] The case caused an uproar in the Philadelphia area, and brought the ethics of surrogacy back into the spotlight. Although the tragedy really had little to do with contractual reproduction (unfortunately, babies are killed all too frequently), it focused public attention on the morality and legality of surrogacy. Art Caplan, of the University of Pennsylvania Center for Bioethics, editorialized:

14. New Jersey Supreme Court, "Excerpts From the Decision of the New Jersey Supreme Court *In the Case of Baby M*," in Gostin, ed., *Surrogate Motherhood,* Appendix I, 253.

15. Details from Mark Bowden, Fawn Vrazo, and Susan FitzGerald, "The 2 Who Created Life That Was Taken," *The Philadelphia Inquirer*, January 22, 1995, A1; idem, "Man Gets Maximum in Death of Baby Carried by Surrogate," *The Philadelphia Inquirer*, September 29, 1995, B4. In an interesting twist, Huddleston sued the surrogacy broker, Keane's Infertility Center of America, for "failing to provide adequate parental training" (*The Philadelphia Inquirer*, August 2, 1995, B3).

> In every state in this country it is illegal to sell a child for money. In every state it is illegal for a woman to bear a child and go out into the street and auction that child to the highest bidder. But in almost every state it is entirely legal for someone to hire a woman, pay for her eggs and her uterus and buy the baby that she produces as a hired surrogate. If the likes of James Alan Austin can simply wake up one day and decide to buy a baby, and if women such as Phyllis Ann Huddleston can think of no better way to make a buck than to sell him one, then the government ought to get involved.[16]

Caplan's tone indicates how strongly opinions of surrogacy are held, and with what contempt the opposition is treated. For many critics of surrogacy, as well as the proponents, the answers are clear, although they always seem to implicate other issues of reproductive freedom.

Critics of commercial/contractual surrogacy argue that it is inherently exploitative of the women and children involved. A policy that results in and depends on the commodification of infants is unacceptable. Gestating a fetus for pay is never ethical. So how do we handle egg donors ("genetic mothers")?[17] Is it acceptable to sell one's harvested eggs to a commercial baby broker? More commonly, proponents of commercial surrogacy point to the example of sperm donors. Sperm donors, they argue, are free to choose how to use their bodies and the issue thereof. If men can contribute toward their business school tuition by selling a few deposits, why can't women rent their uteruses if they choose? Does allowing commerce in sperm and prohibiting gestational surrogacy, as some states do, open the legal system to charges of injustice? Why is what's acceptable for men not appropriate for women? Does the prohibition of commercial surrogacy unfairly limit women's liberties to control their own bodies? And are the limits on surrogacy simply the first step toward the erosion of reproductive rights for women? If women are not free to decide when and how to gestate a fetus, how can they justify their right to choose when and how to abort a pregnancy? And, if we do allow gestational/genetic mothers (who are not married to the genetic fathers) to have custody claims, how do we treat sperm providers who seek parental

16. Art Caplan, "Remember the Baby Who Was Born to be Beaten to Death (editorial)," *The Philadelphia Inquirer*, January 28, 1995, A9.

17. Since the mid-1990s there have been several campus newspaper advertisements seeking to purchase eggs from Ivy League women of substantial height, athleticism, talent, and test scores. One well-publicized ad offered $50,000.

rights? If the courts conclude that there is something special about a genetic connection, something that trumps a nine-month gestational relationship, then what is to stop sperm donors from gaining custody of "their" children. Conversely, what is to stop sperm donors from being responsible for college tuition costs of their genetic relations? Can the disparate treatment of gestational mothers and sperm donors be reconciled? And if not, is consistency necessary for equal justice?

In the following case study, I examine these issues in the context of two legal cases, *Johnson v Calvert* and *Thomas S. v Robin Y*. The *Johnson* case involves a custody dispute in California state court following the birth of a child who was the subject of a commercial surrogacy contract. *Thomas S*., a New York case, concerns the attempts of a sperm donor to gain recognition of parental status many years after the birth of a daughter. In both cases, privacy claims of reproductive freedom and parental autonomy are waved on both sides of each debate. The rights to control one's own body and to raise one's children without undue interference are marshaled on both sides of each dispute. Resolutions of the conflicts depend on the consideration of both privacy and equality. Decisions must address the question of what (if any) limits to liberty are acceptable. Must the limits be identical for all persons, regardless of gender? If the limits do vary, does the value of equality demand that liberty by reduced to the least common denominator?

VALUES AT ODDS IN SURROGACY AND INSEMINATION DISPUTES

In each of these disputes, between proponents and opponents of parental rights for surrogate mothers and sperm donors, four fundamental issues emerge: (1) privacy, (2) freedom of contract, (3) commodification, and (4) human dignity. Before turning to the specific examples of *Johnson v Calvert* and *Thomas S. v Robin Y.*, I review and discuss these four issues.

Privacy

Modern privacy doctrine centers on one very basic question: What are the boundaries that state intervention must not cross? What realm is nonpublic, that is, not open to debate or regulation without a compelling government interest? In recent years, the privacy doctrine has focused on issues of marriage, child rearing, reproduction, and sexual expression. The Supreme

Court had held that the Constitution protects unenumerated privacy rights such as the right to teach one's children a foreign language,[18] the right to send one's children to private school,[19] and the right to procreate.[20]

Contemporary discussions of privacy rights must always contain mention of *Griswold v Connecticut*, the 1965 case in which the Supreme Court first considered a private realm of sexual expression. *Griswold* addressed a Connecticut statute that outlawed contraception. Mrs. Griswold, the executive director of Planned Parenthood, had been convicted of violating the law by advising married couples on pregnancy prevention. In a 7-2 decision, the U.S. Supreme Court found the law unconstitutionally violated the right to privacy of married couples. Justice Douglas, in his opinion for the majority, wrote that the marital relationship demanded heightened privacy protections: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[21] That privacy, however fundamental, was derived from a nebulous constitutional framework. Although a right to contraception in a marital relationship was not enumerated by the founders, Douglas found it in "penumbras" and "emanations" of the Bill of Rights. In the most explicit statement of the constitutional foundations of a modern right to privacy, Douglas wrote:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amend-

18. See *Meyer v Nebraska*, 262 U.S. 390 (1923), which found in the Fourteenth Amendment the right "to contract, to engage in . . . common occupations, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy privileges, essential to the orderly pursuit of happiness by free men."

19. See *Pierce v Society of Sisters*, 268 U.S. 510 (1925), which determined that states could compel school attendance, could mandate that certain subjects be taught, but could not prevent parents from exercising their constitutional right to decide whether to send their own children to public or private school.

20. See *Skinner v Oklahoma*, 316 U.S. 535 (1942), which examined the Oklahoma Criminal Sterilization Act, which required the sterilization of "habitual criminals." The Court found that the right to procreate was fundamental, and that any laws addressing such a fundamental right must be subject to strict judicial scrutiny.

21. *Griswold v Connecticut*, 381 U.S. 479 (1965) at 485–85.

> ment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[22]

This "zone of privacy," although limited to the marital relationship in *Griswold*, was soon expanded.

In 1972, the Court decided the case of *Eisenstadt v Baird*, which challenged a Massachusetts ban on contraceptive distribution to unmarried persons. In expanding the right to contraception to single people, Justice Brennan wrote (in an often-quoted passage): "If the right of 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."[23] One year later, the decision in *Roe v Wade* proved to be the most-often challenged articulation of a right to privacy. In the controversial case, the Court found severe restrictions on abortion violated a woman's right to privacy found in the Due Process Clause of the Fourteenth Amendment. The Court rejected the argument that a right to bodily integrity or autonomy was involved; instead, the decision focused on the ability of women to make decisions about abortion. Justice Blackmun argued that

> [t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. . . . We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is

22. *Griswold* at 484, citations omitted.
23. *Eisenstadt* at 453, emphasis in the original.

> not unqualified and must be considered against important state interests in regulation.[24]

The articulation of a privacy standard in *Roe* simultaneously sets a firm standard and opens the boundaries of privacy to erosion. The "important state interests in regulation" are many, and opponents of abortion, homosexuality,[25] and noncoital forms of reproduction have appealed to many of those interests to counter what they perceive as overexpansive privacy rights.

Freedom of Contract

In 1873 the Supreme Court decided the *Slaughterhouse Cases*, with dissenting Justice Stephen Field first articulating the notion of an unenumerated constitutional right to labor. Field argued that the Fourteenth Amendment Due Process Clause sheltered inalienable rights.

> Clearly among these must be placed *the right to pursue a lawful employment in a lawful manner*, without other restraint than such as equally affects all persons. . . . The equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the while country, is the distinguishing privilege of citizens of the United States.[26]

Field's laissez-faire ideology was a factor in the Court's subsequent substantive due process doctrine.

The "freedom of contract" that emerged after the *Slaughterhouse Cases* was again (and most famously) embraced in the 1905 case, *Lochner v New York*. *Lochner* involved a challenge to New York's maximum hours legislation applied to bakers, which was ostensibly impinging a freedom to contract. In the majority opinion, Justice Peckham reasoned:

> The statute necessarily interferes with the right of contract between the employer and employes concerning the number of hours in which the latter may labor in the bakery of the employer. The

24. *Roe v Wade*, 410 U.S. 113 (1973) at 153, 154.
25. See *Bowers v Hardwick*, 478 U.S. 186 (1986).
26. *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873) at 97, 109–10, emphasis added.

> general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right. . . . Those [police] powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. . . .
>
> The State therefore has the power to prevent the individual from making certain kinds of contracts, and, in regard to them, the Federal Constitution offers no protection. . . . Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution as coming under the liberty of person or of free contract.[27]

Thus, only in specific circumstances involving public safety, health, morals, or general welfare, could a Fourteenth Amendment freedom to contract be restricted.

Justice Holmes observed, in his dissenting opinion, that *Lochner* was "decided upon an economic theory [laissez-faire] which a large part of the country doesn't entertain."[28] That is, Holmes claimed, the doctrine of free market economics became the basis of Supreme Court jurisprudence. Holmes's interpretation of the *Lochner* decision as an example of illegitimate judicial activism has influenced generations of legal scholars. More recently, his view has been challenged by Howard Gillman, who argues that *Lochner* was not an activist opinion advancing a particular economic theory but instead an attempt by the court to (properly) avoid promoting divisive "class legislation"—laws intended to advance the interests of one class of people at the expense of others.[29]

For the purposes of this argument, however, I am less concerned with the doctrinal reasoning in *Lochner* than I am troubled by the Court's ignorance

27. *Lochner v New York*, 198 U.S. 45 (1906) at 53–54.

28. *Lochner* at 69.

29. See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner-Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993). I thank Susan Lawrence for bringing this point to my attention.

of the facts and specific context of the case. The problem with *Lochner* is not that the decision sidestepped neutral principles, or that the Court read a substantive "liberty of contract" into the Constitution. Rather, the decision in *Lochner* demonstrated what H. N. Hirsch calls "the most willful blindness" to important social facts.[30] It ignored the social fact that bakery workers and bakery employers were unlikely to be similarly situated, nor was it likely that employment negotiations would be conducted from equal bargaining positions. The bakery workers may have been able to assert a constitutionally protected right to make employment contracts freely, but that was unlikely to be manifested in a more generous wage or shorter working hours. In response to arguments that maximum hours legislation for bakers was justified by the occupational hazards to bakers' health (especially white lung disease, due to constant inhalation of flour particles), Justice Peckham dismissed the police powers reasoning.

> Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. . . . Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.[31]

Remarkably, the checks on a freedom to contract were impotent in this case.

Lochner exemplifies a decision that flew in the face of common sense. Its blindness to social facts is problematic because such oversight "leads to the drawing of arbitrary lines, and arbitrary lines deny due process because they restrict liberty."[32] As Hirsch observes, *Lochner* is a bad decision "not because the majority of the Court gave substantive content to 'liberty' but rather because the majority stubbornly refused to take seriously the social and scientific facts supporting New York's exercise of its police powers."[33] Justice Holmes, dissenting, lamented: "I think that the word liberty in the Four-

30. See H. N. Hirsch, *A Theory of Liberty: The Constitution and Minorities* (New York: Routledge, 1992), esp. chap. 4. Hirsch gets this phrase from Justice Blackmun's dissent in *Bowers v Hardwick*.

31. *Lochner* at 57.

32. Hirsch, *A Theory of Liberty*, 143.

33. Ibid., 85.

teenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[34]

The doctrine of freedom to contract reached its pinnacle in 1923 in the decision of *Adkins v Children's Hospital*. In that case, the Supreme Court struck down a District of Columbia law that set a minimum wage for women workers. Writing for the majority, Justice Sutherland asserted that "freedom of contract is . . . the general rule and restraint the exception."[35] Further, because of the recent ratification of the Nineteenth Amendment, women's freedom of contract could not be more limited than men's. Thirteen years later, the *Adkins* reasoning was used to reach the spectacularly unpopular decision of *Morehead v New York ex rel. Tipaldo*.[36] In that case, a New York state law setting a minimum wage for women and children was struck down as an impermissible infraction of the freedom to contract protected by the Fourteenth Amendment Due Process Clause. The decision was widely vilified.[37]

But everything changed the following year, with the "switch in time" 5-4 decision in *West Coast Hotel v Parrish*. In that case, which effectively ended the reign of the "freedom of contract" by overturning the *Morehead* decision and dismissing the *Adkins* reasoning, the Court upheld a Washington state law that imposed a minimum wage for women workers. Writing for the majority, Justice Hughes declared: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty."[38] Hughes dismissed the unenumerated freedom of contract, and asserted that the value of equality must be considered when laissez-faire

34. *Lochner* at 76.

35. *Adkins v Children's Hospital*, 261 U.S. 525 (1923) at 546.

36. *Morehead v New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

37. It is reported that "all but 10 of the newspaper editorials written in response to the *Morehead* decision attacked it." Such a negative response is generally assumed to have affected the outcome of the following year's *West Coast Hotel v Parrish* (Kermit L. Hall, ed. *The Oxford Companion to the Supreme Court of the United States* [New York: Oxford University Press, 1992], 562).

38. *West Coast Hotel* at 391.

economics are examined. Those concerns of social justice may mitigate a devotion to a particular economic theory.

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.[39]

The four dissenters, led by Justice Sutherland who wrote the majority opinion in *Adkins*, passionately defended the freedom to contract for both men and women. In terms familiar to liberal feminism, Sutherland argued that the demands of equal liberty required women and men to be treated identically.

> The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect to their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. . . . [S]ince the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does.[40]

Sutherland's pleas fell on deaf ears. *West Coast Hotel* was the end of the "freedom of contract" branch of substantive due process.

Commodification and Human Dignity

Arguments about commodification and human dignity are most often deployed by opponents of surrogacy contracts, although they are occasionally

39. Ibid.
40. Ibid.

brandished in discussions of the ethics of sperm provision. The approaches to each of these disputes are often bifurcated—some are concerned with the commodification of women's (and, though rarely, men's) bodies, others with the commodification of children—but the underlying issue of human dignity is always present. In a 1985 speech at Georgetown University, Justice Brennan stated that the guidepost for constitutional interpretation must be a commitment to human dignity.

> If we are to be a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. . . . As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution.[41]

Brennan's assertion, that what is fundamentally protected by the U.S. Constitution is personal dignity (rather than, say, private property), is inspiring. The icon of human dignity is powerful, with its themes of liberty and justice for all, even as its specific meaning is imprecise. Most people would agree that human dignity involves Kant's categorical imperative: that human beings be treated as ends in themselves, as creatures of intrinsic (rather than utilitarian) value.[42] But, inevitably, debate continues over what those intrinsic values are. In disputes over the propriety of granting parental rights to participants in noncoital reproduction, the concept of human dignity is used as the launching pad for charges of commodification.

Critics of surrogacy argue that the effect of such a contract is to commodify women's bodies. Rather than being seen as human beings, women involved in surrogacy contracts are perceived as objects, as means of gestation.[43] In Aeschylus's Greek trilogy, *The Oresteia,* the god Apollo relates the ancient view of reproduction.

41. William Brennan, "The Constitution of The United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University, October 12, 1985.

42. Immanuel Kant, *Kant: Political Writings,* ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1970).

43. Women's bodies—in their gestating role—have been the subject of many arguments. For an interesting approach, see Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996).

> Here is the truth, I tell you—see how right I am. The woman you call the mother of the child is not the parent, just a nurse to the seed, the new-sown seed that grows and swells inside her. The man is the source of life—the one who mounts. She, like a stranger for a stranger, keeps the shoot alive unless god hurts the roots.[44]

In Apollo's formulation, the woman's role in reproduction is akin to a flower pot. She is planted, fertilized, and her connection to the fetus is merely that of a protective vessel. In modern terms, according to its critics, surrogacy makes women into flower pots of a particularly fragile or malevolent kind. Not only is she "not the parent" but she also requires supervision and sanction to ensure that the gestational environment she provides is not hostile.[45] As feminist author Janice Raymond argues, commodification of women's bodies is integral to surrogacy.

> It is a fundamental postulate of international law that human rights must be based on human dignity. A surrogate arrangement offers no dignity to women and therefore cannot be called a real right. It violates the core of human dignity *to hire a woman's body* for the breeding of a child so that someone else's genes can be perpetuated.[46]

But does surrogacy necessitate hiring a woman's body? Or is it merely hiring a woman to perform a particular service—that of a prenatal nanny?

The debate over commodification of adult bodies depends on a determination of whether gestational surrogacy (and, to a lesser extent, contributions of genetic material) demands selling a service or selling a body. Parallel to familiar arguments in favor of legalizing prostitution, proponents of the "service" model assert that exchanging gestational service for money is less damaging to human dignity than giving it away for free. They may ask rhetorically: "Is not a contract in which money is exchanged for services

44. Aeschylus, "The Eumenides," in *The Oresteia,* trans. Robert Fagles (New York: Penguin, 1966), 260, ll. 665–71.

45. Examples of such rules would be prohibitions against smoking and drinking, required amniocentesis, psychological examinations, character inquiries.

46. Janice Raymond, Testimony on House Bill Number 4753 before the House Judiciary Committee, State of Michigan, Lansing, October 1987; cited in Gena Corea, Testimony before California Assembly Judiciary Committee, April 5, 1988, in Gostin, ed., *Surrogate Motherhood,* 326.

more honest about the position of the woman involved than marriage or informal surrogacy?"[47]

Another response to the charge of commodification of women's bodies tries to do an end-run around issues of human dignity. In a presumably serious suggestion, Australian bioethicist Paul Gerber proposes that brain-dead women continue on life support so they could serve as gestational vessels. "I can't see anything wrong with it and at least the dead would be doing some good. It's a wonderful solution to the problems posed by surrogacy and a magnificent use of a corpse."[48] Gerber's "solution" can turn surrogacy into a "service" only because the bodies in question are dead. Though it might provide a way for poor women's survivors to pay funeral costs, it does emphasize the conceptual slippage between selling the service of a body and the body itself.

Even granting that a surrogacy contract involves leasing a woman's uterus, different positions—all based on a commitment to human dignity—can be held. Katha Pollitt asserts that allowing the sale of gestational labor is bad for women in part because it offers them another unsatisfying economic choice. "Do women need another incredibly low-paying service job that could damage their health and possibly even kill them"?[49] But the opposing argument also worries about threats to human dignity. "Men in power shouldn't tell us what to sell or what not to sell. Whatever is morally difficult in baby selling should be up to women to deal with as a matter of our own moral deliberation and choice. I'll sell what I want to sell, thank you, and if there is a moral problem with it, I'll figure it out along with my sisters."[50] Attorney Lori Andrews cautions that antisurrogacy arguments can threaten feminist concerns.

> Some feminists have criticized surrogacy as turning participating women, albeit with their consent, into reproductive vessels. I see the danger of the anti-surrogacy arguments as potentially turning *all* women into reproductive vessels, without their consent, by providing

47. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 211.

48. United Press International, "Use Brain-Dead Women as Surrogate Moms, Scientist Says," *Detroit News*, June 25, 1988, cited in Corea, Testimony Before California Assembly Judiciary Committee, in Gostin, ed., *Surrogate Motherhood,* 331.

49. Pollitt, "Contracts and Apple Pie," 76.

50. Margaret Jane Radin, "What, if Anything, Is Wrong With Baby Selling?" *Pacific Law Journal* 26, no. 2 (January 1995): 141.

> government oversight for women's decisions and creating a disparate legal category for gestation. Moreover, by breathing life into arguments that feminists have put to rest in other contexts, the current rationales opposing surrogacy could undermine a larger feminist agenda.[51]

Arguments grounded in a concern for human dignity can be deployed both in favor and against women being free to make their reproductive capacity the subject of contractual exchange. But can a woman who sells her reproductive services still be a free person? Or does an other-owned uterus inherently make the woman herself a slave?

Ethical objections to charges of commodification of women's bodies often look to antislavery arguments for support. As law professor Anita L. Allen observes:

> [A]s a result of the American slave laws, all black mothers were de facto surrogates. Children born to slaves were owned by Master X or Mistress Y and could be sold at any time to another owner. Slave women gave birth to children with the understanding that those children would be owned by others.[52]

The anticommodification argument goes farther. Not only is it unethical to own women's bodies wholesale but it is also unacceptable for a woman to sell her right to bodily integrity. Definitionally, "bodily integrity" cannot be separated from the (in this case, female) body in which it resides. In the way that exercising the right to choose an abortion cannot be commodified[53] neither can parental rights be sold before birth. The prohibition of such commerce is predicated on a commitment to human dignity. Carole Pateman writes:

51. Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminists," in Gostin, ed., *Surrogate Motherhood,* 179.

52. Anita L. Allen, "Surrogacy, Slavery, and the Ownership of Life," *Harvard Journal of Law & Public Policy* 13, no. 1 (winter 1990): 144.

53. See the film *Citizen Ruth* for an example of attempts to commodify a woman's right to choose. A poor pregnant woman becomes the pawn of abortion proponents and opponents. Both sides are more concerned with their own agendas then with her interests.

> Here is another variant of the contradiction of slavery. A woman can be a "surrogate" mother only because her womanhood is deemed irrelevant and she is declared an "individual" performing a service. At the same time, she can be a "surrogate" mother only because she is a *woman*.[54]

Pateman's observation underscores the gendered dimension of threats to human dignity—and emphasizes that treating women *as women* can lead to inequality.

Why is it that abstract freedom for women often is emphasized when women's bodies are needed for sale? The argument for a woman's freedom to sell her reproductive capacity often turns on a comparison with men. If a man can sell his sperm, his blood, his hair (though not his kidney), why shouldn't a woman be able to temporarily rent her uterus? Do the demands of equality and human dignity demand equivalent treatment? But, as Pateman observes, comparing the status of women and men in a surrogacy contract, vis-à-vis bodily integrity and commodification, illuminates a significant difference. "Unlike labour power, sexual parts, the uterus, or any other property that is contracted out for use by another," sperm can be separated from the body. Sperm donation is usually considered exempt from the commodification charge because of this distinction. It is separable from the man's body, and the transaction is completed months, if not years, before a resulting child is born. The same is true of egg harvest, although the process is much more complex. Still, neither "sperm donors" nor "egg donors" are really giving anything away. Like big-ticket charity donations, there is a price. The market in genetic material usually involves a payment per donation. The "donor" is selling the nonhuman product of his/her body.

This argument is echoed in claims that commercial noncoital means of reproduction do not result in the commodification of children. Advocates of surrogacy contracts assert that as long as payments are not exchanged for the gestational/genetic mother's waiver of parental rights, babies are not commodified. If the fee does not depend on surrendered parental rights but is instead consideration for services rendered—pregnancy-related expenses and the like—then babies are not being sold. Proponents of such an approach argue that it does not merely erect a legal distinction.

54. Pateman, *The Sexual Contract*, 217, emphasis in the original.

> If the law does not allow payment in exchange for the child, and if the courts will not enforce any contractual provision in which the woman waives her parental rights, then the distinction between payment for the baby and payment for gestational services is real, and not a pretense. The surrogacy contract would provide no entitlement to the child.[55]

As long as babies don't change hands for money, no commodification is involved, no threats to human dignity exist.

Others see this as a semantic debate. Whether payment is for the gestational mother's time or effort, or for parental rights to the child, Judge Richard Posner wants us to be honest about what is really involved in noncoital forms of reproduction.[56] Radin echoes the prostitution-marriage-surrogacy argument mentioned previously:

> [Posner] says that efficiency is served by free trade, and when people really want things, if some people really want to buy something and other people really want to sell it, it will happen. The only thing is, if the trade is legally prohibited, there will be a black market, and black markets are inefficient. Posner is saying that with all the complicated adoption regulations we have, and people going to foreign countries, and people evading it, and people paying lawyers to evade it and so on, all of this is just a big black market. We would be better off to admit that there is a market in babies and get on with it.[57]

But is honesty really the best policy? One objection to Posner's position is the slippery slope argument. If we're going to have a market in babies, will we also traffic in small children (maybe those who are "difficult to adopt"), teenagers, adults?

When babies are commodified, the way we think about personhood changes. People become things, means rather than ends in themselves. If children are the subject of contracts, they must have some qualities of property. There are important ethical distinctions between selling genetic

55. Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements," in Gostin, ed., *Surrogate Motherhood,* 12.

56. Richard A. Posner, "Adoption and Market Theory: The Regulation of the Market in Adoptions," *Boston University Law Review* 67 (1987): 59.

57. Radin, "What, if Anything, Is Wrong," 139.

material or bodily fluids and selling parental rights to children. If parental rights can be negotiated for a fee or contractually transferred, then the parent is related to the child as an owner is to an object.[58] In a practical sense, children become, like sperm or eggs, parental property—human dignity is compromised. How might this affect the object-child later in life?[59] If a child knows how much her parents paid for her gestation, will it affect her own sense of self-worth? Will she wonder how her price compares to the gestational fees of her friends? Will she wonder if she might still be a commodity, the subject of other contracts? Will she retain her dignity?

A feminist commitment to liberty rests on a notion of human dignity that has at least two prongs. First, this conception of human dignity demands that commodification of persons be avoided—in practical politics and in theoretical construct. We will fight against policies that rest on making the human body the object of commercial exchange (including opposing everything from slavery to coverture, and agitating for a living wage or universal basic health care). Commodification is a threat to liberty everywhere. Second, this notion of human dignity requires that we evaluate the world not only in terms of mere formal equality but also that we demand a commitment to avoid the subjugation of women. We must examine institutions and assumptions for the presence of policies that act (in word and deed) to subordinate women—to deny us bodily integrity or autonomy. Although a feminist notion of human dignity may (and should) encompass other prongs, ranging from Kantian ethics to Rawlsian fairness, for example, these two are necessary for the conception of human dignity I discuss herein.

SURROGACY AND ITS DISCONTENTS

Since the Whitehead-Stern case in the late 1980s, contractual surrogacy has been familiar territory to those concerned with feminism, ethics, and public policy. But since that case, the questions and implications surrounding

58. For a detailed and eloquent discussion of these themes, see Kate Harrison, "Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers," in Martha Albertson Fineman and Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995), 167–201.

59. Radin muses: "My son could say, Am I worth a BMW? How much would you pay for me?" ("What, if Anything, Is Wrong," 145).

surrogacy have grown increasingly complex. In many ways, the Whitehead-Stern case was a simple custody dispute. Mary Beth Whitehead was the gestational and genetic mother and William Stern was the genetic father of Baby M; both happened to be married to other people.[60] Advances in reproductive technology have allowed further divisions of labor (no pun intended), as it is now possible—through the use of egg harvesting, in vitro fertilization, and embryo implantation—to separate the functions of genetic motherhood and gestational motherhood. Like the increasingly complicated American family (think of the many permutations of relationship-specific Hallmark cards), gestating a fetus now may involve multiple players. It would be possible, as one example, to have five individuals enacting "parental" roles—genetic mother, gestational mother, post-birth custodial mother, genetic father, post-birth custodial father[61]—not to mention the various lawyers, doctors, and baby brokers collecting their fees. As the arrangements get more and more complicated, and as disputes arise, the state is often invited in to mediate in court between the parties. And as soon as the state is involved, as in *Johnson v Calvert* and *Belsito v Clark*, constitutional privacy issues and public policy concerns become paramount.

Johnson v Calvert

Mark and Crispina Calvert desperately wanted a child.[62] Crispina had undergone a hysterectomy in 1984, but her ovaries were still functional. In order to have a child genetically related to both parents, the Calverts sought a surrogacy arrangement. In 1989, Anna Johnson, the mother of one daughter, became aware of the Calverts' desire to hire a surrogate, and offered her services. On January 15, 1990, the Calverts and Johnson signed a contract stipulating that Crispina's egg, fertilized by Mark's sperm, would be im-

60. Was the issue really a question of paternity? Common law holds that a child born to a married woman is presumptively the child of her husband. But William Stern's surrogacy agreement stipulated that he was the father of the child in question. What happens if we think of the case as a disagreement between putative fathers?

61. Obviously, this count assumes a heterosexual, two-parent (one female, one male) couple that plans to raise the child. Nothing prevents the substitution of another man or another woman for either custodial parent position.

62. Details of this case are from *Johnson v Calvert*, 5 Cal. 4th 84 (1993), and Brent Smith, "*Anna J. v Mark C.*: Proof of the Imminent Need for Surrogate Motherhood Regulation," *Journal of Family Law* 30, no. 2 (1992): 493–517.

planted in Anna's uterus. The zygote was implanted four days later. When the child was born, he/she would be given to the Calverts "as their child" and Johnson would give up "all parental rights." For her part in the arrangement, Johnson would receive $10,000 (paid in installments, the last of which was due six weeks after the birth) and the Calverts would pay for a $200,000 policy insuring her life. Mark Calvert was white, Crispina was Filipino, Anna was African-American.[63]

The relationship between the Calverts and Johnson was not smooth. The Calverts discovered that Johnson had not told them of previous pregnancies that had ended in stillbirths or miscarriages. Johnson claimed the Calverts were unsupportive during an episode of premature labor and subsequent hospitalizations for pregnancy-related complaints. In July 1990, Johnson wrote to the Calverts and stated that she would refuse to surrender the child unless she immediately received the balance of monies owed her. The Calverts filed a lawsuit seeking to be named the legal parents of the fetus. Johnson countered with a suit asking to be named mother of the fetus. After the birth on September 19, 1990, all agreed to honor a court order giving the Calverts temporary custody and Johnson visitation. In October, the trial court determined that the Calverts were the baby's "genetic, biological and natural" father and mother, that Johnson had no parental rights to the infant, and that the surrogacy contract was legal and enforceable. Johnson appealed the decision.

The issue of the case was the determination of which woman—Anna Johnson, the gestational mother, or Crispina Calvert, the genetic mother—was the "natural mother." The Uniform Parentage Act, passed in California in 1975, was designed to erase the legal distinction between legitimate and illegitimate children. It provided that a "natural mother" may be "established by proof of her having given birth to the child."[64] By that gauge, Anna was the "natural mother." But it also stipulated that, as applicable, criteria defining the father-child relationship could also be used to determine a mother-child relationship. Some instances of presumed paternity include when a child is born into a marriage, when the man represents himself as father of

63. Anita L. Allen, "The Black Surrogate Mother," *Harvard Blackletter Journal* 8 (1991): 17, 18, cited in Erika Hessenthaler, "Gestational Surrogacy: Legal Implications of Reproductive Technology," *North Carolina Central Law Journal* 21, no. 1 (1995): 171.

64. California Civil Code section 7003, subd. (1), cited in *Johnson v Calvert,* 5 Cal. 4th 84 (1993), at 90.

the child, or when blood test results show evidence of a genetic relationship. By the criteria of genes, Crispina was the "natural mother." In a footnote, California Supreme Court Justice Panelli, for the majority, stated that, despite the urging of amicus the American Civil Liberties Union, the court would not declare that the infant had two mothers.

> Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. *To recognize parental rights in a third party with whom the Calvert family as had little contact since shortly after the child's birth would diminish Crispina's role as a mother.*[65]

The task of the court, then, was to determine that the infant had one, and only one, mother. And if the court was to justify its decision that Crispina, not Anna, was the "natural mother," it needed to appeal to both nongenetic and nongestational grounds.

When genetic connections and gestational ties occur in two different mothers, another standard is needed. The "best interests of the child" guideline was eliminated because the court determined that it would confuse issues of parentage and custody, and could cause problems for the genetic mother if custody were to be split between the genetic father and the gestational mother.[66] Instead, the court found its standard in "intentionality."

> [Mark and Crispina Calvert] affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not

65. *Johnson* at 92, footnote 8, emphasis added.

66. This outcome was admittedly unlikely, however, as the opinion revealed: "Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded that the best interests of the child are not with her." *Johnson* at 93, note 10.

> for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.[67]

In so deciding, the court legally assigned the infant one (and no more than one) "natural mother." Intentionality—not genes, gestation, or interests—thus became the standard for determining parentage in such disputes. The dissenting opinion noted, however, that the question of intentionality had a perpetually predetermined answer. Justice Kennard argued that, under the majority's analysis, a dispute between the genetic mother and the gestational mother would always be resolved in favor of the genetic mother. He observed that such an analysis "recognizes no meaningful contribution by a woman who agrees to carry a fetus to term . . . beyond that of mere employment to perform a specific biological function." It also ignores that "carrying a child for nine months and giving birth is . . . an assumption of parental responsibility."[68]

The majority opinion, written by Justice Panelli, also determined that surrogacy contracts were legal and enforceable. The majority reached this conclusion because it was determined that such contracts were not coercive and did not encourage the commodification of children. The logic of these conclusions merits examination. Panelli found that the Johnson-Calvert surrogacy contract was not coercive because it was signed before conception—that is, because Johnson's uterus had not been implanted with the zygote "she was not vulnerable to financial inducements to part with her own expected offspring."[69] With that reasoning, reminiscent of "the most willful blindness"[70] to social facts of *Lochner*-style freedom of contract, individuals could sign away rights all the time and be held to those commitments in changed circumstances. The California Supreme Court argument counters

67. Ibid., at 93.
68. Ibid., at 115.
69. Ibid., at 96.
70. See Hirsch, *A Theory of Liberty*, esp. chap. 4.

the judicial opinion in the Stern-Whitehead case. In that case, Justice Wilentz—finding the surrogacy agreement illegal—observed:

> The point is made that Mrs. Whitehead [like Anna Johnson] *agreed* to the surrogacy arrangement, supposedly fully understanding the consequences. Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.[71]

Wilentz's appeal to values of human dignity is a much more principled argument than the California court's reliance on data. Of the charge that surrogacy presages the commodification of children, Panelli's majority opinion stated: "We are . . . unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it."[72] That one sentence is the extent of the majority's engagement with the issue of commodification.

The dissent, on the other hand, saw the specter of commodification in the reliance on intentionality to determine parental status. The use of intentionality was based, in part, on a notion from intellectual property law: "originators of the concept" reasoning, which allows the creator of an idea to claim property rights. But, as the dissent noted, unlike artistic works, "children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration or made freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property."[73] And that, they argued, is the result of the reliance on "intentionality."

But the majority remained unconvinced. To disallow surrogacy would unfairly limit possibilities for personal expression, they charged. Preventing the making or enforcement of surrogacy contracts "is both to foreclose a personal and economic choice on the part of the surrogate [read: nongenetic] mother, and to deny intending parents what may be their only means of

71. "Excerpts From the Decision of the New Jersey Supreme Court *In the Case of Baby M*," in Gostin, ed., *Surrogate Motherhood,* Appendix I, 257.

72. *Johnson* at 97.

73. Ibid., at 114.

procreating a child of their own genes."[74] Thus California affirmed the legality of surrogacy contracts, created the "intentionality" test to determine parentage, and made sure that infant Johnson/Calvert had a single "natural mother."[75]

Belsito v Clark

A 1994 surrogacy case, *Belsito v Clark*, involved an Ohio couple's attempt to have their names appear on a child's birth certificate as they were the genetic parents and intended to raise the child as their own. The controversy arose because the fetus was gestated by Shelly Belsito's sister, Carol Clark. Unlike the controversy in *Johnson v Calvert*, Anthony and Shelly Belsito and Carol Clark agreed that the Belsitos were the genetic parents and were intended to have custody of the infant after birth. According to Ohio law, however, the woman who delivered the infant was to be listed as "mother" on the birth certificate. In addition, because Clark was not married to the biological father, Anthony Belsito, the baby would be considered illegitimate. Further, the Belsitos would be required to undergo formal adoption proceedings in order to be recognized as the legal parents of the baby. They filed suit, asking to be recognized as having parental status and for the birth certificate to reflect that relationship by naming the Belsitos as parents and indicating the legitimate status of the infant.

The Common Pleas Court agreed with the Belsitos, but reached that conclusion while rejecting the *Johnson* intentionality test. Rather than using the intentionality test to determine parental status, the Ohio court (attempting to resolve two issues at once) stipulated:

> The test to identify the natural parents should be "Who are the genetic parents?" When dealing with a non–genetic-providing surrogate, such a rule minimizes or avoids the question of the surrogate

74. Ibid., at 97.

75. In an interesting development, it appears that there is some movement away from the gene-based intentionality test. In August 2000, a Massachusetts lower court declared that lesbian partners could both be listed as "mother" on their baby's birth certificate. One partner had provided the egg, the other the uterus for gestation. The court found that the genetic bond and the gestational bond certified both women as mothers.

> selling her right to be determined the natural parent. . . . She cannot sell a right she does not have.[76]

The test of genetics thus is primary when it comes to determining natural parental status. But how are "legal parents" (who will raise the child) to be identified? The Ohio court claimed it used both the birth and genetics tests to answer this question, but determination depends on the consent of the genetic parents. "If the genetic parents have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents."[77] Thus, genes trump any other relationship in the determination of parentage in *Belsito v Clark.*

Discussion

The conflict between genetic connections and emotional or environmental relationships[78] as determinants of "natural parentage" is a constant theme in disputes over parental rights for surrogate mothers and sperm providers. Does shared genetic material define a parent-child relationship? Or does a relationship depend on an emotional connection, whether forged during gestation or in the project of child rearing? Many jurists and commentators argue that the genetic connection is primary, and should take precedence over gestational experience. In *Belsito*, the Ohio court expressed a clear preference for recognizing the ties of "blood relations." In addition to the traditionalist reliance on blood lines, modern critics favor genetic mothers over gestational mothers as a way to avoid the ethical problems of surrogacy contracts. One proponent of granting genetic mothers and not gestational mothers parental rights listed the following advantages:

> It avoids the application of contract principles to family relations; it rests motherhood on the single contribution that no other woman can supply for the child; it relies on the most important connection between a mother and child as the determining factor of motherhood; it is the definition of maternity that is the least susceptible to

76. *Belsito v Clark*, 67 Ohio Misc. 2d 54 (1994) at 64–65.

77. *Belsito* at 66.

78. By "environmental relationships" I mean the physical connection of gestational mother and fetus.

> discriminatory results or baby-selling; it advances the best interests of the child; and it best conforms with current social understanding of parenthood.[79]

In addition, resolution in favor of the genetic mother, as many propose, would be much more expedient than waiting for a legal conflict to be resolved. The reasons cited above would result in an efficient and empirical resolution of parental status. But is that what we want? Is efficiency the best justification for denying a gestational mother's interests in the child? The focus on genes threatens to obscure the complicated affectional relationships that color family relationships. It also could dangerously delegitimate parent-child relationships that have no common genetic markers. Many adoptive parents, step-parents, foster parents would argue that "the most important connection" between parent and child is love, not blood.

But that position, familiar as it may be, fails to taken into account the deep-seated desires of some childless women and men to have a child that is genetically related to them. As feminist psychologist Barbara J. Berg points out, those desires are glibly dismissed by people who either have chosen not to procreate or have reproduced easily. "[I]nfertile women who seek assisted reproduction are almost always perceived as mindless automatons who have succumbed to the pronatalist agenda and are therefore excluded [from the debate]. Their collective voice, perspective, and varied experiences have somehow been easy to ignore and dismiss."[80] Berg's observation underscores the finesse with which determinations of "natural parentage" must be handled, and the intrinsic futility of each such decision. Whenever conclusions must be reached about which one woman is the "natural mother," another woman who wants to be involved with the child will be kept at a distance. And definitions of "natural" motherhood will be narrowed and narrowed, becoming more obviously contrived as gestational mothers or genetic mothers are stripped of their maternal status.

Why, as the California court refused to do in *Johnson v Calvert*, is "natural" motherhood a position limited to one woman? And why is it distinguished from (step- or foster- or custodial-) motherhood generally? Law

79. Jeffrey M. Place, "Gestational Surrogacy and the Meaning of 'Mother': *Johnson v Calvert,*" *Harvard Journal of Law & Public Policy* 17, no. 3 (summer 1994): 908.

80. Barbara J. Berg, "Listening to the Voices of the Infertile," in Joan C. Callahan, ed. *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995), 94.

professor Randy Frances Kandel suggests that there is nothing "unnatural" about some infants resulting from noncoital reproduction having two mothers. "Dual motherhood is a fact of nature because it is made possible by technology."[81] Focus on the mechanical or artificial roots of assisted reproduction does not change the fact that the child produced by the new technology *exists*. Thus, the only thing "unnatural" about such determinations of motherhood is the exclusion of one woman from the role. But it is important to remember that "a fact of nature" is not necessarily ethical or legal. And beyond the determination of parentage is the juridical question: should surrogacy contracts be legal and enforceable?

Proponents of surrogacy argue that fundamental rights support the legality of such contracts. First among these is the privacy interest—in this situation, the right to procreate. Drawing on *Skinner v Oklahoma*, which found a fundamental right to procreate, and *Griswold v Connecticut*, which determined that privacy interests prevailed over any state interest in prohibiting contraception, proponents of surrogacy argue that the freedom to procreate extends to the enactment of surrogacy contracts. "If one cannot exercise his or her right to procreate through the act of sexual intercourse, then one should be able to use the medically available alternatives to reproduce otherwise."[82] That is, a right to engage in coital reproduction requires an equivalent right to engage in noncoital, or technologically assisted reproduction.[83] In these arguments, however, the right to procreate is assumed to belong only to the genetic or intending parents. The nongenetic, gestational mother's right to procreate is dismissed as irrelevant because her role is seen to be that of an employee, not a potential parent.

A related privacy interest is drawn from sources such as *Meyer v Nebraska* and *Pierce v Society of Sisters*, which focused on an adult's right to form a family without undue state interference. That interest, proponents of surrogacy argue, underpins a couple's right to decide to pursue noncoital means of gene-centered reproduction rather than being forced to consider (by infertility or by state prohibition of surrogacy) only adoption. That right can

81. Randy Frances Kandel, "Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy," *Rutgers Law Review* 47, no. 1 (fall 1994): 193.

82. Smith, "*Anna J. v Mark C.*," 502.

83. For a detailed explanation of this reasoning, see John A. Robertson, "Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction," in Gostin, ed., *Surrogate Motherhood,* 24–42.

only be countered by compelling state interests. As John Robertson noted, "[M]oral condemnation or speculation about exploitation, commercialism, and slippery slopes alone should not justify interference with fundamental decisions about family formation."[84] But a freedom to procreate without arbitrary state interference does not mean that the state should be required to act affirmatively to facilitate reproduction. The distinction is important.[85]

A second constitutional right often cited by surrogacy-supporters is the resurrected freedom to contract. Although effectively disregarded with the *West Coast Hotel v Parrish* decision (see above), freedom of contract is cherished by those who support the legalization and enforcement of surrogacy contracts. Their concerns focus more on the damages to women were those contracts not to be honored. Why should men be able to enter into contracts involving sperm provision without much approbation, while women's decisions to be gestational hosts are subject to disapproval and disparagement? How much influence should organs or sexual reproduction have on legal arguments? Why should women not be allowed to do with their bodies as they wish, and to earn a wage at the same time?[86] As Brent Smith argues: "An outright prohibition on surrogacy would not only infringe this right [to contract], but also deplete a possible source of income for these women."[87] And why should their contractual obligations be dismissed post-hoc because they had second thoughts? In other situations involving bodily integrity, contractual commitments are binding, even as circumstances and emotions change. Would it be appropriate for the military to discharge all personnel who enlisted in times of peace if, faced later with the immediate prospect of killing or being killed, the recruits decided the decision to enlist had been hasty? Would such a policy result in demeaning the individuals involved?

Opponents of legal and enforceable surrogacy contracts disagree. Forcing gestational mothers to relinquish their children, they argue, is demeaning to those women in particular and humanity in general. Despite the glowing

84. Robertson, "Procreative Liberty and the State's Burden of Proof," 27.

85. But it is also beginning to fade. In 1998 an Illinois policewoman claimed that her employer should pay for infertility treatments because infertility is a disability (protected by the provisions of the Americans with Disabilities Act). The judge agreed. For further discussion, see "The Halt, the Blind, the Dyslexic," *The Economist* 347, no. 8064 (April 18, 1998): 25.

86. Notice that many of the proponents of legal and enforceable surrogacy contracts make arguments reminiscent of those made in favor of legalizing prostitution.

87. Smith, "*Anna J. v Mark C.*," 516.

descriptions of surrogacy as "the gift of a child" and approving biblical stories about Sarah and Abraham and Hagar,[88] modern contractual surrogacy is problematic. One's "right to procreate" is not absolute. It does not involve the right to have access to other people's bodies to facilitate reproduction. It does not recognize a man's right to forcibly impregnate a woman and compel her to carry the fetus to term. It does not require adoption agencies to provide children for all childless couples who want to parent. It does not exempt prospective foster parents from social service investigations to determine their fitness. And it does not require state action to solve the infertility problems of individuals.

The point of modern privacy doctrine is to limit the role government may play in determining people's intimate decisions. Government reversal of a law prohibiting contraceptive distribution to unmarried people (*Eisenstadt v Baird*) does not require the state to provide free condoms to all its citizens. Legal, enforceable contractual surrogacy is not the logical end of reproductive freedom. Rather, as Katha Pollitt observes:

> What's new about contract motherhood lies in the realm of law and social custom. It is a means by which women sign away rights that, until the twentieth century, they rarely had: the right to legal custody of their children, and the right not to be bought, sold, lent, rented or given away.[89]

Contracts involving those rights, as surrogacy agreements do, are not the epitome of free choice in reproductive expression. There is nothing noble about an agreement that compels a woman to gestate a fetus for less than minimum wage and then give it up forever, regardless of her emotional bond or moral resolve. Surrogacy contracts are not the purest expression of women's freedom to be "just like men," because sperm and the function of a woman's uterus are different things. Sperm can be separated from the man's body; the uterus is part of a woman's body. "The supposition that the women in surrogacy are involved in a 'liberating' experience is akin to the

88. Note, of course, that when Sarah encouraged her husband Abraham to impregnate Hagar so they could have the child they wanted, the parties were not equals. Hagar was Sarah's slave. Hagar had no ability to consent or contract. Her body was definitionally commodified.

89. Pollitt, "Contracts and Apple Pie," 67.

supposition that selling one's kidney gives one the freedom to control one's own body."[90]

Most opponents of surrogacy do not argue that women have no right to enter into contracts or that their responsibility for their actions is limited. The issue here is this: should gestational mothers or genetic mothers be compelled to surrender their parental interests because they signed a contract, before fertilization, that said they would? Opponents of legal or enforceable surrogacy argue that the contracts must be prohibited not because they involve women[91] but because they are an implicit threat to human dignity. There are some things, they argue, such as the bodies of women and children, that must not be commodified.

I sympathize in part with both proponents and opponents of contractural surrogacy. Like its proponents, I am willing to grant that gestational surrogacy sometimes results in a win-win situation, particularly in noncommercial cases in which a family member gestates a fetus for the genetic or social parents. I also grant that women should be allowed to control their own bodies, absent a compelling state interest opposed. But, like the opponents of contractual surrogacy, I believe that such arrangements can lead to the exploitation of women and the commodification of human dignity. For those reasons, I think that surrogacy contracts should be legal, but certain provisions made in those contracts should not be enforced because they result in exploitation and commodification.[92] Agreements to pay a gestational mother's incidental expenses (as well as for her labor) and to take custody of the infant if she does not object should be enforced,while trading parental rights for a payment should not. State power should not be used to mandate surrendering custody. Contractual demands that the infant be without defect should not be unenforced. Contracts that provide the gestational mother no possible connection (such as visitation, partial custody, and so on) with the child should not be enforced. The guideline for determining which provi-

90. George J. Annas, "Fairy Tales Surrogate Mothers Tell," in Gostin, ed., *Surrogate Motherhood,* 51.

91. Katha Pollitt made an interesting observation. "Why should mothers be held to a higher standard of self-knowledge than . . . fathers? In a recent California case, a man who provided a woman friend with sperm, no strings attached, changed his mind when the child was born and sued for visitation rights. He won. Curiously, no one has suggested that the decision stigmatized all males as hyperemotional dirty-dealers" ("Contracts and Apple Pie," 74).

92. Mary Lyndon Shanley reaches a similar conclusion (though it is based on different reasoning) in "'Surrogate Mothering' and Women's Freedom: A Critique of Contracts for Human Reproduction," *Signs* 18, no. 3 (spring 1993): 618–38.

sions ought to be enforced is a commitment to human dignity: to the avoidance of the commodification of persons and the subordination of women. Anything else (such as blind devotion to contracts) is indefensible.

THE TRAFFIC IN SPERM

Like the practice of surrogacy, the use of artificial insemination with donor sperm is not a new procedure. Long the solution to male infertility for couples who wanted to conceive, it is increasingly an option for unmarried women who want the benefits of parenthood without a man to play the role of "father." In the past, artificial insemination rarely led to legal conflicts. One reason is that sperm providers were usually not identified to the recipients. Sperm "donation" was a mostly anonymous practice, a way of earning some spending money. Until the late 1980s, sperm banks were unregulated by the government.

Another reason most commercial sperm transactions went smoothly is that laws of parentage often sufficed. Paternity is traditionally presumed to be the province of the man married to the child's mother at the time of conception or birth, or one who represents himself as the father.[93] Or, it could be established by a blood test, unlikely to be feasible with an unknown sperm provider. Because the sperm provider usually had no involvement in the pregnancy and no knowledge of the genetically related child, there were very few opportunities for questions of parental rights and interests to arise. Indeed, the 1973 Uniform Parentage Act specified that "a sperm donor will not be treated as the natural father of the child where a married woman was inseminated under the supervision of a licensed physician with sperm donated by a man other than her husband."[94] However, in recent years, artificial insemination has come into its own. Attorney Kate Harrison has observed:

> The radical potential of insemination lies in the fact that it alters the basic reproductive unit, destroying the certainty of the (hetero)sexed couple, and re-centering the woman. Its enabling capacities equalize

93. For further discussion, see Sheila Reynolds, "Challenging the Presumption of Paternity," *The Journal of the Kansas Bar Association* 65, no. 10 (December 1996): 36–46.

94. Harrison, "Fresh or Frozen," 174.

> women without men—both heterosexual women who are not in relationships with men and lesbian women—in an area that is critical to many women—their reproductive potential and their desire to bear a child.[95]

Harrison is right—insemination changes the requirements for conception, allowing women to exercise possibilities they did not have before. However, its "radical potential" has not yet been fully exercised. Although insemination alters our expectations about conception, it does not concomitantly change our notions of familial relations. A 1993 case demonstrates the political and legal problems raised by insemination.

Thomas S. v Robin Y.

Robin Young and Sandra Russo met in 1979 and continue to share a committed lesbian relationship.[96] Very soon after they began the relationship, they decided to have children and agreed that, because she was older, Russo would attempt to get pregnant first. They were assisted by a friend, Jack K., a gay man who provided the sperm for insemination. A daughter, Cade Russo-Young, was born May 18, 1980. It was agreed that Jack K. would have no parental rights or responsibilities but that he would make himself available to the child if she had any questions about her biological genesis. Soon after Cade was born, Young and Russo decided to have another child, and that Young would give birth. Because they wanted their children to know Young and Russo as co-mothers and primary parents, they decided it was best to find a man other than Jack K. to provide the sperm for the second pregnancy. That would best help them fulfill the concept of family to which they were dedicated: "Two lesbian mothers raising two children, equally, and two children responding to each other as sisters and responding to two mothers, equally, without regard to biological ties."[97] Indeed, the sisters would have no genetic ties to each other. Young and Russo met with Thomas Steel, a gay man who lived in San Francisco, and agreed that he

95. Ibid., 168.

96. Details are from the court opinions, *Thomas S. v Robin Y.*, 599 N.Y.S.2d 377, 157 Misc.2d 858 (N.Y.Fam.Ct. 1993), and 618 N.Y.S.2d 356, 209 A.D.2d 298 (N.Y.A.D. 1 Dept. 1994); as well as Edward A. Adams, "Sperm Donor Seeks Visitation With Child," *New York Law Journal*, February 25, 1994, p. 1, col. 3.

97. *Thomas S.* (N.Y.Fam.Ct. 1993) at 379–80.

would provide sperm for insemination and follow the same guidelines agreed upon with Jack K. The child would be raised by Young and Russo as co-mothers; Steel would have no parental status but would be available to the child if she questioned her biological origins. Both Russo and Steel were attorneys, but they did not formalize the agreement by seeking external legal advice or putting it in writing. Ry Russo-Young was born November 16, 1981, in San Francisco, California. Steel was not named on her birth certificate.

For the first three years of Ry's life, there was no contact with Steel. After Jack K. became less involved in Cade's life because of his drinking problem, Young and Russo requested that Steel treat both girls equally. He agreed, and visited the Russo-Young family at their home in New York many times between 1985 and 1991. He treated Russo and Young as co-mothers, and Cade and Ry as equals. But in late 1990–early 1991, Steel wanted to make a change. He asked for the opportunity to visit with Ry without her mothers (both of whom she called "Mommy") present. The family court record reported:

> [Steel] felt, increasingly, that he was being forced to follow unreasonable instructions in order to visit with his biological daughter, Ry. He also found it difficult to treat Ry, his biological daughter, as Cade's equal. *He was not able to put biology aside*, as Robin Y. and Sandra R. demanded. . . . He wanted to introduce Ry to his biological relatives and was not comfortable including Robin Y. and Sandra R. in the introductions. . . . [H]e requested that both girls visit with him and his biological family without the mothers in California in the summer of 1991.[98]

Young and Russo refused the request. Steel filed suit, seeking a declaration of paternity and an order of visitation. Ry was eleven years old when the Family Court ruling was made.

On April 13, 1993, Family Court Justice Edward Kaufmann dismissed the proceedings, holding that Steel was equitably estopped[99] from receiving a declaration of paternity. As such, visitation was denied. Despite the fact that

98. Ibid., at 379, emphasis added.

99. Equitable estoppel "applies to circumstances where the action or inaction of one party induces reliance by another to his or her detriment . . . or where the failure of one party to assert a right promptly has created circumstances rendering it inequitable to permit exercise of the right after a lapse of time" (*Thomas S.* [N.Y.Fam.Ct. 1993] at 381).

Steel's blood relationship to Ry was not in question, Kaufmann decided that the doctrinal responses to cases involving paternity did not apply to this particular case. Young was unmarried when Ry was conceived and born, so there was no presumptive father. New York State law did not speak to the fact pattern of a lesbian couple taking sole responsibility for their procreative actions. Therefore, in reasoning reminiscent of the "intentionality" test of *Johnson v Calvert*, Kaufmann found that Steel had been initially uninterested in parental rights, and indeed would not have served as the sperm provider had he been so inclined. Over the following ten years, his contact with Ry was episodic and did not resemble a parental relationship. In Kaufmann's view: "When Ry was almost ten years old, he decided, due to changes in his life, to attempt to change the ground rules of her life."[100] He determined that Ry's best interests would not be served by a declaration of paternity for Steel:

> The reality of [Ry's] life is having two mothers . . . working together to raise her and her sister. Ry does not now and has never viewed Thomas S. as a functional third parent. To Ry, a parent is a person who a child depends on to care for her needs. To Ry, Thomas S. has never been a parent since he never took care of her on a daily basis. . . . Thomas S. apparently believes that Ry, as his biological child, must feel fatherly affection for him. He is incorrect, I think. . . . In her family there has been no father.[101]

Untraditional as it may be, Kaufmann found that Steel's genetic connection to Ry did not justify dismantling her stable two-mother family. Steel immediately appealed the decision.

On November 17, 1994, the Supreme Court, Appellate Division reversed and remanded the Family Court ruling. The court held that Steel was entitled to an order of filiation (legal declaration of paternity) but remanded the issue of visitation to Family Court for further hearing. The appellate court premised its decision on the fact, agreed to by all involved, that Steel was Ry's biological father. The court put aside issues of visitation and custody and focused instead on how Steel's procedural due process rights would be

100. Ibid., at 382. The judge speculated, in a footnote, that Steel's 1987 HIV-positive diagnosis might have changed his perspective on parenting.

101. Ibid., at 380.

compromised by the denial of parental rights to a man admittedly genetically related to Ry. In an odd twist of reasoning, the Family Court decision was criticized on equal protection grounds. The appellate opinion stated: "The notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment."[102] This assertion is startling because it misses the issue of the case entirely. Steel did not argue that his parental rights were minimized because of his sexuality. His homosexuality had nothing to do with his ability to exercise his parental status. The issue, noted in the first case, is the definition of parentage.

The appellate court found that parentage depended on biological ties, and that an oral agreement could not erase the paternal role. Family Court Justice Kaufmann found that parentage depended on social relationships and intentions, and that the oral agreement must be honored, particularly because it had been for the first decade of Ry's life. Despite the disparate conclusions reached in the two rulings in *Thomas S. v Robin Y.*, both decisions have positive implications.[103] The Family Court conclusion, that Steel was not entitled to an order of filiation, indicates that genes do not always trump social arrangements. It suggests that shared experiences and emotions can be more potent indicators of family relationships than genetic material. On the other hand, the appellate decision, that Steel was entitled to a declaration of paternity and could not be held to an oral agreement limiting his paternal interests, shows that perhaps there is room for more than two "parents." The appellate opinion did not minimize Russo's role as co-mother, and left open the (little discussed) possibility that parenting need not be limited to one male father role and one female mother role. However, the legal and ethical issues remain: Are parental positions determined by genetic contribution or relationships, and can they be modified by a legally binding contract?

Discussion

The legal and ethical issues are strikingly similar in debates over parental status for surrogate mothers and sperm providers. Both *Johnson v Calvert* and *Thomas S. v Robin Y.* pit a single person against a couple, a contributor to conception/gestation against the "intended" parents, second thoughts against

102. *Thomas S.* (N.Y.A.D. 1 Dept. 1994) at 361.
103. See Harrison, "Fresh or Frozen," 188–94, for further discussion.

a contract. In both cases, parental definitions oppose genetic relationships and social relationships. Both cases turn on the limits of bodily integrity. Both cases question whether parental rights can be forfeited by a contract made before conception. Both cases legitimate specific, limited, traditional definitions of the family. But neither case explicitly addresses the way privacy interests relate to human dignity, or how the threat of commodification of children can point to an alternative conception of the family.

Because men have rarely been perceived to have diminished political-legal standing compared with women, and because freedom of contract doctrine traditionally has used men as the standard for comparison, few critics of contractual noncoital reproduction have focused on the exploitation of men *as men*. Debates over the propriety of parental status for sperm providers have centered on whether (like gestational/genetic mothers or genetic fathers) they can subsequently challenge the terms of the contractual agreements, not whether they ought to be able to make them in the first place. Typical of this approach is Larry Gostin's civil liberties analysis. The distinction turns on the presence of intentions to act as a parent, the active involvement during gestation, and the time necessary to participate in the agreement.

> Once a donor gives his sperm to a bank in return for a fee he has completed his "transaction"; he has no intention to reproduce and has not committed himself to, or prepared for, the responsibilities of parenthood. Moreover, once the man has donated his sperm he knows nothing further of its use. In short, he has not acted like a father and has no grounds for asserting the rights of a father.[104]

Gostin's position is that the anonymous provision of sperm is a temporally and legally limited action. It does not constitute parental involvement. It does not hold implications of any parental status. The only real question, articulated by Christine Overall, "is whether one's gametes remain one's own after one has donated or sold them for use by another person, and particularly after they have been combined with another's gametes to form new embryos."[105] Overall maintains that once gametes have been transferred, the originator no longer has propriety over either the gametes or the embryos

104. Gostin, *Surrogate Motherhood,* 18.

105. Christine Overall, "Frozen Embryos and 'Father's Rights': Parenthood and Decision-Making in the Cryopreservation of Embryos," in Fineman and Karpin, eds., *Mothers in Law,* 183.

formed from them. The embryo, or eventually the fetus, is an entity distinct from the sperm or ovum provided. To grant the sperm provider parental status would involve, in Overall's estimation, "the fetishization of sperm, and an uncritical yet morally problematic equation of ejaculation with fatherhood."[106]

These observations are important, but sidestep a critical facet of the *Thomas S.* case. Steel, Russo, and Young agreed not just that Steel would provide sperm for insemination but that he would be available to Ry if she expressed curiosity about her biological origins. The oral agreement, entered into before conception, provided for a (limited) social relationship among the Russo-Youngs and Steel. Never was Steel intended to play the "father" role, indeed parental positions were limited to the two co-mothers, but he was asked to participate in a relationship more intimate than that involving a family acquaintance. Assuming that Steel's interest in receiving an order of filiation and perhaps visitation was motivated by a desire to have a closer relationship with Ry, and not by a wish to wreak havoc on her family, the relationship of Steel and the Russo-Youngs bears further examination.

The National Center for Lesbian Rights, which filed an amicus brief when the Family Court decision in the *Thomas S.* case was appealed, argued that certain principles of family definition applied to planned gay and lesbian families, including:

> (1) a biological connection is neither a necessary nor a sufficient basis for establishing parenthood; (2) agreements, particularly when coupled with an ongoing course of conduct, establishing the intent of a biological parent either to share parenting with another person or to relinquish parental rights should be upheld; and (3) a child's experience of his or her family, which may include two, less than two, or more than two parents, is critical to any legal analysis.[107]

This definition of family emphasizes that genetic connections are less important than ties of emotion, and that agreements regarding parenting status should be honored. The arguments are strikingly similar to those marshaled by proponents of legal and enforceable surrogacy contracts. They defend the

106. Overall, "Frozen Embryos and 'Father's Rights,'" 195.

107. The National Center for Lesbian Rights, "Amicus Brief, In re Ry R.-Y," *National Journal of Sexual Orientation Law* 2, no. 1 (1996): 165, electronic publication.

absence of "naturalness" (of genes, or of gestation) of the created family, emphasizing instead the role of intention in shaping family roles. They too emphasize the boundaries of the contractually created family, underscoring its cohesion. It may or may not reflect the parental roles of the "traditional nuclear family"—one male father, one female mother—but it still asserts that there are a limited number of clearly defined parental roles—for example, two female co-mothers, no male father. In all, the family definition advanced is quite self-contained and static.

But the principles advanced in the amicus brief take a very important theoretical step, namely, the provision that the child's "experience" of the family be considered. Although the parameters of that "experience" are not elaborated, it requires a conceptual shift from a parent-centered perspective to a child-centered perspective. The former perspective—adopted without question in *Johnson v Calvert*, *Belsito v Clark*, and the appellate ruling in *Thomas S. v Robin Y.*—intrinsically raises the specter of commodification. As Joan Mahoney notes: "If one starts from the point of view of the parents and then tries to determine who has a "right" to the child—to live with the child, make decisions about the child, determine who else gets to associate with the child—then parenthood cannot help looking like ownership."[108] Adopting the parents' point of view is also the only way to imagine the sale of parental status, and the associated charges of baby selling. It is nearly impossible to conceive of the circumstances surrounding the commodification of children from the child's point of view.

If parenthood is not a property right, demonstrated solely by evidence of shared genetic material, then it must be based on a relationship between parent(s) and child. The proper approach to resolving parentage disputes, I believe, would avoid the problems of commodification and exploitation; would respect the variety of possible family arrangements, including various numbers of parents of any sexuality; and would begin from the perspective of the child in question.[109] Any threatened judicial imposition of additional

108. Joan Mahoney, "Adoption as a Feminist Alternative to Reproductive Technology," in Callahan, ed., *Reproduction, Ethics, and the Law,* 43.

109. A thorough analysis of this position and its (political, ethical, legal) implications is beyond the scope of this chapter. This viewpoint must be distinguished from the traditional "best interests of the child" approach, which has often been harmful to the rights and interests of women. That approach takes the perspective of what an adult (often the judge or social service worker, rarely the mother) asserts is in the child's interest. My suggestion is that all deliberations begin from the viewpoint of the child herself.

parental figures must consider the child's perception of her family. As Justice Kaufmann wrote in the Family Court decision:

> To Ry, Thomas S. is an outsider attacking her family, refusing to give it respect, and seeking to force her to spend time with him and his biological relatives, who are all complete strangers to her, for his own selfish reasons. . . . I think that Ry must have sensed Thomas S.'s affection for her. But this does not mean that she ever viewed him as a parental figure. For Ry, such a view would have been disloyal to her family and inconsistent with the reality of her life.[110]

The judicial declaration of paternity would have threatened Ry's vision of her family, and her understanding of what it means to be a parent, a caretaker. For Steel to radically alter Ry's family structure after ten years does not show respect for Ry's experience and the Russo-Youngs' family history. Because of this, I believe that the oral agreement among Steel, Russo, and Young should be respected and enforced. Although the demands of good sense require that Steel's request to play a larger role in Ry's life be heard, it is unacceptable to think that an outside party can effectively hold a veto over her co-mothers' parenting decisions. Steel's genetic contribution to Ry's life does not entitle him to parental status, for that would be akin to a property interest in a child. Instead, the guide for deciding these cases should be the value of human dignity—to treat children not as property but as persons. Similar agreements involving different children may not be enforceable, but such decisions should be made on a case-by-case basis using the guidelines suggested by The National Center for Lesbian Rights.

THE LIMITS OF LIBERTY

In the preceding discussions, the desire to avoid commodification and exploitation and the desire to honor human dignity have combined to convince me of the appropriate ways to resolve parenting disputes in circumstances of noncoital reproduction. I have argued that gestational surrogacy contracts should be legal but largely unenforceable, and that insemination

110. *Thomas S.* (N.Y.Fam.Ct. 1993) at 382, 380.

agreements in which the sperm provider is known should be legal and largely enforceable. The standard for judging individual situations and specific provisions thereof should be a commitment to human dignity, and the concomitant refusal to allow the commodification of women, men, and especially children. It could be claimed that this two-pronged approach to parentage disputes is unfair, as it leads to different results for men and women. In the gestational surrogacy situation, it is quite possible that the gestational mother can renege on her contract without penalty, while the contracting genetic father cannot. Does this mean that men who do not have noncommercial access to a viable uterus will be stymied in their attempts to procreate? (Yes.) Does this mean that women will be held to lesser standards than men when contracts are disputed? (No.)

In contrast, the scenario whereby a sperm provider reconsiders his previous agreement and seeks increased parental status would be resolved in a very different way. The sperm provider would most likely be held to his contractual agreement to remain removed from parental activities. Does this mean that men don't form emotional attachments to their children? (No.) Does it mean that men don't have the same reproductive rights as women? (Yes.) Do the demands of equality and liberty require that men and women are treated similarly in such disputes? No. Is it unfair to release gestational mothers from their contractual obligations? No.

As Andrea Dworkin has observed, "[T]he only time that [equivalency] is considered a value in this society is a situation like this where some extremely degrading transaction is being rationalized."[111] Equality-as-sameness has no place in this debate. Especially when it comes to reproduction, women and men are not similarly situated. When they are, as in the case of an anonymous sperm provider versus an anonymous egg provider, they should be treated identically. But a comparison of the role of gestational mother with the role of sperm provider illuminates obvious and incontrovertible differences. As discussed previously, sperm donation does not involve questions of bodily integrity. It does not threaten the physical well-being of the provider. Sperm donation does not intrinsically involve the formation of an emotional attachment to the idea of a specific fetus. Sperm donation does not involve fundamental privacy rights. It is more like blood donation or plasma sale

111. Cited in Gena Corea, "Surrogate Motherhood: Happy Breeder Woman," in her *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Womb* (New York: Harper & Row, 1985), 227.

than gestational motherhood. Treating sperm as the bodily product it is—a sort of detachable property—does not threaten human dignity. Would we grant company shareholder rights to a woman who knowingly donated blood intended for the benefit of the CEO? Do the heirs of an organ donor deserve part of any award the recipient might win? Sperm, as sperm, does not require the same sort of custodial care provided by a gestational mother. It is separable from the body. It is distinct from the person. Unlike a gestational mother's uterus, it can be the subject of an enforceable contract.[112] A concern for human dignity—that is, antisubordination and anticommodification stances—demand that a person cannot be the object of a contractual agreement.

Critics in the freedom-of-contract vein would object to my assertion that surrogacy contracts should be largely unenforceable. Ruth Macklin argues:

> [W]hat [feminists who oppose surrogacy] are really saying is that those who elect to enter surrogacy arrangements are incompetent to choose and stand in need of protection. . . . [T]he feminist charge that the practice of surrogacy exploits women is paternalistic. . . . [T]he charge of exploitation contradicts the moral stance that women have the ability and the right to control their own bodies.[113]

But opponents of enforceable surrogacy contracts do often believe in women's rights to control their bodies. Their objections are not to the women's actions but to the state enforcement of the contracts. Although I believe surrogacy contracts should be largely unenforceable, I do think they should

112. A word about the ethics of parental claims by egg donors is in order, despite the subject being beyond the focus of this chapter. Although I understand that for many people, there is something special about sperm and eggs—some elusive quality that makes them more significant that "ordinary" cells—I do not endorse that view. In parental rights disputes, egg donors should be treated like sperm donors rather than like gestational mothers. The situation of a *woman* (rather than a man) providing the genetic material does not significantly change the context. To decide otherwise would be to fetishize genetics, giving a bit of DNA veto power over other relationships of affection and caretaking. Egg donation is certainly more invasive, time-consuming, and expensive (emotionally and physically) than sperm provision, but it is not categorically different. (I thank Susan Behuniak and Suzanne Samuels for their comments on this issue.)

113. Ruth Macklin, "Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis," in Gostin, ed., *Surrogate Motherhood,* 136–50, 141, cited in Joan C., Callahan, "Editor's Introduction," in Callahan, ed., *Reproduction, Ethics, and the Law,* 26.

be legal. If women choose to follow the terms of their contractual agreements, the state has no business stopping them. I object, however, to the use of state power to compel women to behave in a way they don't want, which is both exploitable and commodifiable. Enforcing surrogacy contracts has more serious effects than simply requiring women to honor their agreements. As Joan Callahan notes, "[I]t is acceptable to select public policies which attempt to limit the activities of *exploiters*, even if fully competent people might choose to be exploitees."[114]

Although The Privacy Principle fits most closely to liberal conceptions of freedom as the absence of governmental interference, from the anticommodification view, a problem still remains. A woman who chooses to be exploited is depriving herself of human dignity. Some proponents of a positive conception of freedom would say we should force a gestator-for-hire to be free of self-commodification. I disagree. Although I think it important to agitate for a more woman-friendly economy, I cannot abandon the idea that women must be able to determine for ourselves the meaning of our actions. That is why positive liberty alone will not work. And negative freedom alone would only forbid government entanglement with surrogacy contracts. Although nonenforcement would be the rule, there would be no mechanism (in line with the antisubordination consideration) to compel the contracting parties to honor their commitment to the gestating mother.[115] Mere absence of restraint is inadequate here. That is why the feminist theory of liberty I suggest, through The Privacy Principle, contains aspects of both negative and positive conceptions of freedom, circumscribed by an antisubordination standard. By making surrogacy contracts legal but *largely* unenforceable, we protect liberty and dignity.

The value of human dignity demands that liberty be limited by the principle of antisubordination. As Justice O'Connor noted in *Casey*, when reproductive interests of a man and a woman collide, only one can prevail. The social fact that women are not similarly situated vis-à-vis reproduction influences the resolution of the dispute. The state must not compel women

114. Callahan, "Editor's Introduction," 26, emphasis in the original.

115. Some might say I am too dismissive of the concerns of the contracting mother. I have wrestled with this issue. In my scheme, the contracting parties are left with most of the costs and most of the risks. Although I feel for them, I cannot ignore the power differential that gives them an inherent advantage over the gestational mother. And in an impossible situation, it seems to me far worse to be severed from a child you have gestated than from a child you have never known at all.

to act in ways that denigrate human dignity and threaten to result in the commodification of persons. An individual's liberty to control his or her own body does not extend to a right to control another person's body, whether by contract or not. To allow a policy with that effect, such as the total enforcement of gestational surrogacy contracts, would be unconscionable.

6

TWO WRONGS, ANY RIGHTS?

Intimate Violence and the Role of Liberty

Many discussions of freedom for women immediately turn to the issue of battering. How, critics ask, can women be free citizens if they are captives in their own homes, subject to the violent whims of abusers? A March 31, 1997, report in the *New York Times* indicated what many have suspected for years—that the private realm of intimate relationships is a danger zone for women. Researchers investigated the cases of 1,156 women killed in New York City in a five-year period (1990–94). In the 484 cases for which the relationship between the victim and the assailant could be determined, 49 percent of the

women were killed by their "current or former husbands or boyfriends," "one third of the time the women appeared to be trying to end the relationships," and "[m]ore than half the women killed in the city during those years died in private homes, usually their own."[1] Interestingly, these shocking statistics seem to have little effect on the mass response to issues of domestic violence.

The day before the study results appeared, the *Times Magazine* had featured a story on Hedda Nussbaum's attempts to rebuild her life after Joel Steinberg.[2] Nussbaum was a poster girl of sorts for activists struggling to increase awareness of domestic abuse. She was a striking example of the emotional devastation that is evident in battered women,[3] and her behavior sparked debates about the extent to which victims of abuse could be held responsible for their actions. Nearly ten years later, Nussbaum still wears the

1. Pam Belluck, "Women's Killers Very Often Husbands or Boyfriends, Study Finds," *The New York Times*, March 31, 1997, B2.

2. Francine Russo, "The Faces of Hedda Nussbaum," *The New York Times Magazine*, March 30, 1997, 26–29. Nussbaum and Steinberg were thrust in to the spotlight in November 1987, when their seven-year-old daughter Lisa died after years of abuse culminated in a beating. Although Steinberg actually inflicted the blows, Nussbaum was also vilified because she had not called for help as Lisa laid on the floor in a coma for twelve hours. Nussbaum, too, had been subject to horrific abuse for years—the former children's book editor had been beaten, broken, hooked on drugs, forced to endure unspeakable abuse inflicted by the man she had once loved.

3. I use the term "battered women" with the full knowledge that objections may be raised to the gender-specific term. I am certainly aware men have not cornered the market on violence. But despite O. J. Simpson's pleas to the contrary, intimate violence (domestic violence, marital abuse, family violence) is laden with gendered meanings. Many scholars have shown that women are often battered *as women*; that wives and girlfriends are abused *because* they are involved in relationships; that the legal institutions of marriage and the family (and the law's history of ignoring the violence in those institutions, considering them private matters) are built on foundations that implicitly gave men (fathers, husbands) rights of control over their chattel. I think that to pretend that intimate violence sees no gender is to demean the experience of the women who have been abused. Making battering "everybody's problem" runs the risk of minimizing its force in the lives of women.

Sally Engle Merry writes about the dangers of forgetting the social context of intimate violence:

> Feminists insist that wife battering should be considered as seriously as other forms of violence instead of being minimized as it has been in the past because it occurs within a private domain. The demand is, indeed, to consider the violence in its own terms. Ironically, this emphasis on the criminalization of the physical act has distracted attention from the overall relationship of gender power that underlies the violence.

Sally Engle Merry, "Narrating Domestic Violence: Producing the 'Truth' of Violence in 19th- and 20th-Century Hawaiian Courts," *Law and Social Inquiry* 19, no. 4 (fall 1994): 973.

physical and emotional scars of those years of abuse as she tried to make a new life for herself. "[I]n her fragmented state," the *Times* article reported, "she talks with childlike eagerness of her 'fame,' as if she has forgotten what she's famous for. If she connects the pieces of her life, she will confront a picture few of us could look upon."[4] But if Hedda Nussbaum is confused, there are many others who feel very certain of their opinions. It is interesting to see how passionately people respond to her experience.

On April 20, three weeks later, the *Times Magazine* printed two letters to the editor regarding the Nussbaum article. Both were heartfelt. Robin Peress of Niantic, Connecticut, wrote:

> The only thing tragic about Hedda Nussbaum is the choice she made to stay with Joel Steinberg after he threw the first punch—and the fifth and the fiftieth. Hanging on to her victimhood as a battered woman, she drags down those of us who have learned that we played a hefty role of our own in sticking around for hideous treatment.

Joanne Patten of Downers Grove, Illinois, echoed the sentiment:

> It cheapens and demeans the plight of those who truly are victims of domestic violence to compare Hedda Nussbaum to Patty Hearst, who was kidnapped and terrorized by a fanatical group, or to Nicole Simpson, who was by all accounts a loving and attentive mother. Nussbaum was a crack cocaine addict, and getting the drug at all costs was the driving issue in her life. Her excuse that the monstrous Joel Steinberg "demanded" that she smoke cocaine with him after he beat little Lisa is typical. Addicts never accept responsibility for their actions.[5]

These letters demonstrate the fervor with which people respond to battered women. The first letter focuses on Nussbaum's refusal to acknowledge her own agency (by "hanging on to her victimhood"); the second letter minimizes the role battery played in the tragic events that led to Nussbaum's daughter's death (she was primarily an addict, and the abuse was incidental).

4. Russo, "The Faces of Hedda Nussbaum," 29.
5. Letters to the Editor, *The New York Times Magazine*, April 20, 1997, 12, 14.

Patten's letter challenges the first wrong—intimate violence—and Peress's letter addresses the second wrong—the failure of a battered woman to leave.

It is evident to even the most casual observer that discussions of intimate violence always involve attempts to address these two issues. Was the violence "real"? (Or was it just a [wink, wink] "domestic dispute.") And if it was real, then this is the ever-burning question: Why didn't she leave?[6] It is my contention that the two "wrongs" (the abuse, and the failure to leave) combine to leave the woman victim of intimate violence with few rights.[7] If she doesn't leave and is abused again, people say, it is possible that

1. She was in part responsible for the subsequent abuse, or
2. She is unable to make choices, or
3. She is a bad parent, exposing her children to such violence, or
4. She is the victim of "learned helplessness," or
5. She has bad judgement, or
6. She's too trusting, or
7. She isn't trying hard enough to make her partner happy, or
8. More of the same.

Of course, if she does leave, it is "likely" that

1. She will be financially destitute.
2. She will be stalked.
3. She will be killed.
4. She will be homeless.
5. She will be unable to afford a lawyer.
6. She will be threatened with the loss of her children.
7. She will be blamed for the failure of her relationship.
8. She will be accused of being unfaithful, etc.

6. As Martha R. Mahoney noted, "The question 'why didn't she leave' is actually an objectifying statement that asserts that the woman did not leave. Asking this question often makes actual separations disappear" (Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," in D. Kelly Weisberg, ed., *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work, and Reproduction* [Philadelphia: Temple University Press, 1996], 342).

7. There's a semantic problem here. The abuse is certainly wrong. The failure to leave is a perceived wrong, which, I argue, must be respected as a valid option for a battered woman. Although I would prefer that any victim of intimate violence leave the abusive situation, I don't believe that a commitment to liberty can be combined with compelling her to go.

She is, literally, damned if she does leave and damned if she doesn't.

These women are caught between the rock of the law and the hard place of political theory. And it is precisely in this circumstance that a feminist theory of liberty is vitally important. We must see the two wrongs as a two-stage constraint on a woman's liberty. In the first stage, her freedom is limited by the batterer, who uses his fists or his words or his penis to show her that she is subject to his control. In the second stage, her freedom is constrained by the commentators (professional or not) who cacophonously ask the constant question: "Why didn't she leave?" Their judgments and assumptions (that she is complicit in her abuse, that she is incapable of making informed choices, that physically leaving the relationship is the only "real" solution) are the social limits on her liberty.

Imagine the predicament of a battered woman who is deciding how to handle her situation. On the one hand, she confronts her abuser—a man she loved (and maybe still loves) who has engaged in a comprehensive effort to demean her confidence, to belittle her worth, to harm her mind and her body. On the other hand, she sees a group of social service providers (counselors, advocates, attorneys) who repeatedly ask: Why didn't you leave? And, perhaps more discreetly: What's wrong with you? Why did you let this happen? (There must be something wrong with her . . . maybe she got what was coming.) Neither the abuser nor the provider treats the woman as having agency; neither sees her as capable of making informed choices and decisions; neither believes that she is a moral equal. To whom does she turn? What choice does she have?[8]

The two-step denial of liberty adds insult to injury. My focus herein is on the insult—the criticism of the battered woman by those who are supposed to help her. It is difficult to imagine that the act of intimate violence can be stopped by a theoretical argument. But the second-order denigration can. Only once we refuse to ask of the battered woman, "Why didn't she leave," can we begin to revalue a feminist vision of liberty. No men or women will be free as long as liberty is limited to certain "acceptable," predetermined avenues of action. If women have the freedom to leave abusive situations but

8. It is important to note the great advances feminists have made in this area. There are indeed many shelters and social service providers that recognize the structural forces felt by women victims of intimate violence—the economic and political barriers to escape. But those who look beyond psychological explanations are still a small percentage of the whole. Conversations with women victims of battery demonstrate, time and again, that the pejorative institutional treatment of battered women flourishes still.

don't have the freedom to make decisions for themselves (or even to stay), they are fundamentally unfree. The notion that there is one and only one correct solution to situations of battering (that the victim not the perpetrator must physically leave) is dangerously close to caricatures of tyrannical, positive liberty. Isaiah Berlin writes of the use of these kinds of universal standards of judgment:

> This is the argument used by every dictator, inquisitor, and bully who seeks some moral, or even aesthetic, justification for his conduct. I must do for men (or with them) what they cannot do for themselves, and I cannot ask their permission or consent, because they are in no condition to know what is best for them; indeed, what they will permit and accept may mean a life of contemptible mediocrity, or perhaps even their ruin or suicide.[9]

Berlin's observation is correct. Imposition on individual liberty is dangerous, and its character does not change if the bully has good intentions. I argue herein that whether or not a victim of intimate violence has left an abusive relationship is theoretically and ethically irrelevant because a feminist theory of liberty must include, at its core, a nondeterministic, nonperfectionistic notion of agency—the freedom to do what some would call "the wrong thing."

Now, this "wrong thing" is not a limitless category. Some critics might ask: Why should a batterer, then, not be free to abuse? I think the answer is clear. A feminist theory of liberty must not protect the right of the abuser to harm but must protect the right of the woman to decide for herself whether to leave. Common sense and the application of the antisubordination principle are required. Although it will be suggested that a woman who remains in a situation of abuse is perpetuating her own subordination, respect for her personhood demands that we allow her to make her own choices, as we work strenuously to provide her with other affirming and meaningful options. This respect can be articulated by The Agency Principle, which provides that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical

9. Isaiah Berlin, "Two Concepts of Liberty," in David Miller, ed., *Liberty* (New York: Oxford University Press, 1991), 53.

decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process.

In this chapter, I address these concerns, using the experience of a woman, victimized by intimate violence, *who did not immediately leave* her abuser. I am not suggesting that women who are subject to violence should stick around and re-enlist for more abuse. But violent relationships are often much more complicated than distanced (dogmatic) observers may believe. Emotions and obligations exist that can't be explained away under the rubric of false-consciousness. Paula Spencer, the heroine of Roddy Doyle's novel, *The Woman Who Walked Into Doors,* speaks of her abuse: "Every day. I think about it every minute. Why did he do it? No real answers come back, no big Aha. He loved me and he beat me. I loved him and I took it. It's a simple as that, and as stupid and complicated."[10]

Experts have many answers to that eternal question: Why didn't she leave? (Or its less resigned cousin: Why doesn't she leave?) Among them:

1. Battered women are of low intelligence or mentally retarded.[11]
2. Women who charge their husbands with assault are: "castrating," "aggressive," "masculine," "frigid," "indecisive," "passive," "masochistic."[12]
3. The battered woman is a traditionalist, viewing her husband as the head of the family . . . she feels responsible for maintaining the peace at home, and thus accepts the blame for her husband's violence.
4. "Learned helplessness," serious impairment of problem-solving abilities, and clinical depression. . . . Low self-esteem is also common among battered women.
5. She comes to hate herself for being unable to leave . . . her inability to escape makes her feel even more inadequate and helpless.
6. The battered wife is financially dependent on the batterer. The presence of children. . . .
7. Stockholm Syndrome.[13]

10. Roddy Doyle, *The Woman Who Walked Into Doors* (London: Minerva, 1997), 192.

11. Historian Elizabeth Pleck, quoted in Ann Jones, "Why Doesn't She Leave?" *Michigan Bar Journal* 73, no. 9 (September 1994): 900.

12. "The Wifebeater's Wife: A Study of Family Interaction," quoted in Jones, "Why Doesn't She Leave?" 897.

13. These reasons are all quoted in Malinda L. Seymore, "Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence," *Northwestern University Law Review* 90, no. 3 (spring 1996): 1042–43.

But aren't these explanations a bit one-dimensional? They all rely on a tendency to engage in professional categorization of these "problem" women. In these explications, there is a category—"the battered woman"—before there are any individual women in situations of battering. The sweeping summaries overwhelm the details of women's lives. They reinscribe a distinction between "women" and any given woman. Feminist theorists must be careful to avoid such moves. Even experts who take care not to blame the victims of abuse don't avoid the problems of overgeneralization. Feminist scholar Christine Littleton writes:

> Translating women's victimization into a problem *with women* masks the pervasiveness and extent of men's ability to oppress, harm and threaten us. It protects the legal system from having to confront the central problems of battering—male violence, male power and gender hierarchy.[14]

Littleton is right to urge that we focus on social and institutional problems. But that alone doesn't do much for the individual battered woman. Typologies don't work if our goal is to better understand the experience, the perspective, and the needs of women victimized by intimate abuse. We need to pursue both prongs of attack—to combat institutional inequality on behalf of women generally as we simultaneously refuse to rely on stereotypes to characterize individual women.

Although many women who have been abused may share certain experiences and views, only careful attention to the complicated, contextual details of those relationships can help us to further explore what role freedom may play in these women's lives. As a theorist, I believe that abstract commentary bears little relation to the lives women lead, and that denying the importance of details is a serious mistake. Only an actual example of the effects of violence can provide us with a framework within which to discuss liberty. In order to demonstrate the complexity of relationships involving intimate violence, I present a case study. The details of this particular case will ground my subsequent theoretical discussion.

This case study is used for the purpose of giving further emphasis to the

14. Christine A. Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women," in Weisberg, ed., *Applications of Feminist Legal Theory,* 332, emphasis in the original.

complicated and contingent nature of our understanding of battering. Most of what the dominant culture acknowledges generally about battering is from exceptional situations—lurid movie-of-the-week accounts of tempestuous relationships with tragic, dramatic, fiery endings. In many of those cases, the abusive partner is dead and the battered woman is standing trial for murder. But what about more run-of-the-mill situations? What about the not-so-unusual cases that happen in your neighborhood or in your family? These situations might not involve murder, they might not result in tabloid articles, they might not be easily summarized in a "he hit me so I shot him" paragraph. Some people wouldn't even consider them "battering." But those unexceptional stories may be most useful for understanding complicated abusive relationships. They can help us take the focus off the battered woman syndrome (what's wrong with her) and put it on the battered woman's situation, looking at the complexities, the details, the contingencies, and the context of the relationship. The use of such stories (narrative scholarship, if you will) is quite common in sociolegal studies,[15] though less prevalent in feminist work. Narratives provide a useful way to ground theoretical efforts; they remind us that concepts are useful only inasmuch as they reflect and inform understandings of political reality. Concrete contextualism aids our comprehension, and is particularly useful in situations such as battering that are too often oversimplified for tabloid sensibilities.

But first, some notes on procedure. For this case study, I wanted to find a woman who didn't leave an abusive relationship. I wanted someone who lived in the region, who was available for interviews, and who would make any relevant information available to me. I wanted someone who would be open and honest and thoughtful. I quickly discovered that this was a difficult task. Family court records are sealed. Unlike other legal research, searches for domestic violence cases lead nowhere. The only cases that can be accessed are those that are later heard by an appellate court. And, obviously, it is difficult to learn much about the facts and nuances in those records. Rather than look for a case that would lead me to a potential subject, I needed to look for a woman who would lead me to a case.

In December 1996, I contacted Womanspace, a New Jersey organization dedicated to helping women who have been the victims of abuse. Because of

15. See, for example, Gary Bellow and Martha Minow, eds., *Law Stories* (Ann Arbor: University of Michigan Press, 1996); and Susan Estrich, *Real Rape* (Cambridge, Mass.: Harvard University Press, 1987), esp. chap. 1.

concerns about confidentiality, the director suggested that I write a letter detailing my research project and describing the sort of case I was looking for. I tried to be thorough in my description of my research project, and vague in the description of the sort of case I was seeking. That letter was then copied and circulated among Womanspace's counselors and support group facilitators. I began to get some responses in January 1997. Counselors called me and gave me first names of four clients who might be interested. They had given my phone number to the clients, who would follow-through on their own. I waited.

After two weeks, I got a message from a Womanspace client named Linda. We spoke three times by telephone. Her abuse had been horrific and long-lived. She had been married for over fourteen years to a man who beat her, threatened her, controlled her reproductive choices, and subjected her to terrible psychological abuse. They had four children together. Despite her assertion that spousal abuse is "not supposed to happen to people like me"—Ivy-educated, wealthy women—she stayed in the marriage until just last year. Her story was fascinating. And Linda was anxious to participate in this project. She said many times that she had thought of writing a book about her experiences. This would be her opportunity to tell her story.

Then Jane, a fifty-one-year-old, upper-middle-class white woman, called. Her story was interesting, though less dramatic than Linda's. She had not experienced the sort of physical abuse that leaps to mind when we think of "battering." Most of the terror had been psychological, emotional. One year after the abuse had started, Jane left the relationship. But a year later she went back, and did not leave again for another year and a half. As she told me her story over the telephone, she seemed forthcoming. Her story seemed much easier to tell than Linda's (simply in terms of presenting eight years of experience versus fourteen). The abusive relationship produced no children. There weren't as many separate incidents of abuse. But would the lack of serious physical injury to Jane hurt my argument? Would readers be tempted to wonder if she was "really" a victim rather than focusing on the nuances of the case?

But Linda had already committed to participating in the project. And Jane was not yet sure about her interest.[16] At that point, I decided that the

16. I was tempted at first to think of Jane as "not really" a battered woman. (At that time I had no knowledge of the history of marital sexual abuse Jane had endured.) Sure, she called herself the victim of domestic abuse, but how was I to know if that was the truth or if she was

right thing to do (for everyone) was to renege on the agreement I had reached with Linda, even though I did not have a firm commitment from anyone else.[17] But Jane called the next week. She had decided to participate. Her only concern was that we take every precaution to insure that her estranged husband remained unaware of her whereabouts. I agreed. I spoke with Jane several times by telephone. I also conducted interviews with her, in person, on four separate occasions, over a four-week period.[18]

My plan was to present her story as an edited narrative.[19] I would then elaborate on the story to make my argument about freedom, and would connect and contrast it with other writings on intimate violence. Because I continued to be concerned about the specter of parentalism in feminist writings, I gave a copy of this chapter to Jane for review. Her responses are discussed later in this chapter.[20] The incident that spurred me to take this extra step is the memory of reading Lucie White's "Mrs. G" article.[21]

In that description of a welfare mother's attempts to articulate her needs in an institutional framework designed to listen to everyone except the clients, White got off to a good and interesting start. A notable strength of

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just involved in a messy, vindictive divorce? Does Jane's definition of herself as a battered woman make her a battered woman? How did I attempt to subjugate her by presuming to define, for her, intimate violence in a way that minimized the effects of psychological trauma?

This may sound like intellectual insignificance, but it is my contention that *how* we think about freedom has as much importance as what we think about—that the questions we ask are as integral as the answers we suggest. And I needed to consider what responsibilities I had to the women who had offered their stories.

17. I explained to Linda that, on reflection, I was convinced that using her story in the chapter would be good for neither of us—for me, because of practical concerns, for her because of the inability to guarantee the integrity of her story in those confines. Then I waited, prepared to start the process all over.

18. The interviews were conducted on March 5, March 10, March 26, and April 1, 1997. All interviews were taped. The cassette tapes were transcribed by a professional transcription service and reviewed by the author. The transcriptions were then edited to form a cohesive narrative. Because of concerns about security and confidentiality, identifying characteristics (including names of people and places) have been changed. All tapes and transcripts are on file with the author.

19. See Hendrik Hartog, "Abigail Bailey's Coverture: Law in a Married Woman's Consciousness," in Austin Sarat and Thomas R. Kearns, eds., *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993), 63–107, for an example of this technique. Hartog presented a narrative of Bailey's life, drawn from her journals, which then serves as an entry to his discussion of legal consciousness.

20. We met again on May 19, 1997.

21. Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," in Martha Albertson Fineman and Nancy Sweet Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991), chap. 3.

the article is the respect with which she treated her client. She related the bureaucratic snafus that led to her client being accused of receiving an overpayment from the welfare authorities. White described the strategy sessions in which she and her client Mrs. G. determined their strategic legal responses. White's most practical suggestion was that her client play to the biases of the panel by stressing the "life necessities" she spent the money on, including furniture payments, food, Kotex, and shoes for her daughters. In the private meeting, Mrs. G. "explained that the girls' old shoes were pretty much torn up, so bad that the other kids would make fun of them at school."[22] White described how, in the hearing, Mrs. G. departed from the rehearsed script.

> Choosing my words carefully, I asked why she needed to buy the new shoes. She looked at me for a moment with an expression that I couldn't read. Then she stated, quite emphatically, that they were Sunday shoes that she had bought with the money. The girls already had everyday shoes to wear to school, but she had wanted them to have nice shoes for church, too. She said no more than two or three sentences, but her voice sounded different—stronger, more composed—than I had known from her before.[23]

White was surprised to see her client tell a story different from the one rehearsed. The panel ruled against Mrs. G., although she subsequently was allowed to keep her benefits. But White, the lawyer, was still perplexed. "Why," she asked, in a chapter heading, "Did Mrs. G. Depart from her Script at the Hearing?" This is where White's stance of respect began to shake.

> Mrs. G.'s talk about Sunday shoes spoke in several different ways about what she needed to live her life. On the most literal level, she was making a statement about religion, and its importance in her life. For subordinated communities, physical necessities do not meet the minimum requirements for a human life. Rather, subordinated groups must create cultural practices through which they can elaborate an autonomous, oppositional culture and consciousness. . . .

22. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes," 44.
23. Ibid., 45.

> Religion, spirituality, the social institution of the Black Church, has been one such self-affirming cultural practice . . . and remains central to the expression of Black identity and group consciousness today. By naming Sunday shoes as a life necessity, Mrs. G. was speaking to the importance of this cultural practice in her life, a truth that the system's categories did not comprehend.[24]

I wonder how Lucie White knows this. How is she able to so neatly explain Mrs. G.'s surprising actions? The tone of this passage bothers me greatly. There is no indication that White asked Mrs. G. for an explanation of her choice of words. There is no basis for presuming that Mrs. G. spoke to her lawyer about "the importance of this cultural practice in her life." White's substitution of her own interpretations of Mrs. G.'s behavior seems presumptuous and ironic in an article purporting to be about her client's "rhetorical survival skills." I worry that White allowed her authorial perspective to cloud Mrs. G's own descriptions of why she did what she did (or to take the place of actually asking Mrs. G.).

I believe that feminist freedom must rest on the intractable commitment to allow women to speak for themselves. Always. Women who do speak should be given the benefit of the doubt—not dismissed as too hopelessly undereducated or confused or misguided. These procedural concerns are largely responsible for the length of this chapter. Jane's narrative, though edited, is considerably longer than stories of experience used in feminist law review articles. I think that the length of the story is justified for two reasons: (1) the more complete story illustrates, through the use of many examples, how complicated Jane's relationship was; and (2) the extended narrative allows the opportunity for Jane to relate her interpretations of events along with her recollections of the details. I am wary of presenting my own interpretations of her experience as singularly authoritative.[25] Naturally, later in this chapter, I shall draw certain contingent conclusions about the role of freedom in the lives of battered women. But the categorical imperative is a guiding concern. All too often, "experts" issue proclamations on this policy

24. Ibid., 54.

25. Note that the interpretations form an interesting four-layer phenomenon. First, there is Jane's story and her interpretations of the events. Second, her daughter Susan's perspectives on the events as well as her interpretations thereof. Third, my readings and written understandings of Jane's experience. And, fourth, the reader's interpretation/judgement of my telling and re-telling of Jane's story.

issue or that, assuming that they "understand" the issues after having read the summaries. That approach is inadequate.[26] It is vital that scholars *really listen* to the stories people tell of their experiences with the law.[27] Let this narrative be the first step.

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This is a real case of stalking, long-term. When I was nine, Robert, my second husband, lived in the same basic neighborhood, and we attended two different schools. But when I was eleven we met. And we were kind of first girlfriend, first boyfriend. And then at age thirteen we moved to a different area, about ten miles away, when my widowed mother remarried. And he

26. As Doyle's character Paula Spencer described, it is necessary to look beyond what is "obvious":

> I didn't exist. I was a ghost. I walked around in emptiness. People looked away; I wasn't there. . . . I could see all these people but they couldn't see me. They could see the hand that held out the money. . . . They could see the mouth that spoke the words. They could see the hair that was being cut. But they couldn't see me. The woman who wasn't there. The woman who had nothing wrong with her. The woman who was fine. The woman who walked into doors.
>
> They could smell the drink. *Aah*. They could see the bruises. *Aah, now*. They could see the bumps. *Ah now, God love her*. Their noses led them, but their eyes wouldn't. (*The Woman Who Walked Into Doors,* 186–87)

27. Some concern is raised on this point—a worry central to criticisms of narrative scholarship. If we encourage women to speak for themselves, unmediated by voices of authority, are we in danger of promoting an anti-intellectualism threatening to scholarship? Might not academics be usurped by journalists? This is not my personal concern. Indeed, I think here of Patricia Williams's Benetton story, detailed in her *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass.: Harvard University Press, 1991). Williams experiences exclusion from Benetton (a clothing store), enforced by a white (and I assume racially motivated) saleschild. She fights back by creating a big poster detailing the way she was shabbily treated, and mounting it on the store window. She tells her version of the story in her own words.

> Always a major objection is to my having put the poster on Benetton's window. As one law professor put it: "It's one thing to publish this in a law review, where no one can take it personally, but it's another thing altogether to put your own interpretation right out there, just like that, uncontested, I mean, with nothing to counter it. (51)

Why is she obliged to counter her own version of her own experience? I have no concerns about Williams and Jane telling their own stories for themselves. I can always participate in the conversation (real or virtual) and am able to rally my academic skills in support of my project—and so can you. Narrative scholarship is a wonderful way to begin conversations; it need not unilaterally end them.

managed to periodically get a ride or whatever, because he was still too young to drive, and wander around the area that I lived in. I have no idea how frequently he did this because I would only see him every now and then. So when he got his license in high school we dated my senior year.

My stepfather did not like him at all. So he didn't make it very easy for us to date. He had a problem, like any father, with any boy who showed interest, but he really had a problem with Robert. So we didn't date a whole lot. He asked me to his senior prom and I declined because I knew what a hassle it would be with the family, and I went off to college. We must have run into each other the summer between my freshman and sophomore year. We dated a little my sophomore year in college. And then I didn't see him again. But he had in his mind that we would get married. I didn't know this. . . . I was told this later.

Actually I met [my first husband, John] while I was out on a date with someone else from college. He took one look at me and decided that I was the one. So I got married and immediately got pregnant and had my daughter Susan the following summer.[28] And then had my son two years after her. John and I were married nineteen years. Good man, hard worker. He also played hard and really just didn't have any time for his family. So, in 1985, we decided it was time to move on. [John and I] always kept it very civil because we had the two children, and we're both basically two very reasonable people.

So I didn't see Robert for years. And, as I said, in 1985 we ran into each other and started very slowly—coffee, then lunch, and worked our way up to dinner. I hadn't heard from him [in the intervening nineteen years], once he found out I was married. A number of years later, several years after we were married, he told me that he remembers distinctly the night he found out I was married. His mother had run into someone that I knew and the mutual friend had mentioned that I had gotten married, so she went home and told

28. Although my original intention had been to concentrate solely on Jane's story, as we talked it became clear that she was very close to her daughter. Susan was a great comfort to Jane—she provided her with a place to stay when she left the relationship, as well as unconditional support. But Susan's experience is atypical because she is both intimately involved (as the daughter of a battered woman) and still at some emotional distance (because she was grown by the time her mother became involved with Robert). I conducted a personal interview with Susan on March 17, 1997. (The interview was taped and transcribed. Tapes and transcriptions are on file with the author. Again, names and identifying details have been changed.) I found her comments interesting and insightful, and have inserted them in footnotes as they relate to Jane's narrative.

him. And he was dressing to go out that evening and was doing his tie to the suit that he was wearing, and it was like someone had punched him in the stomach and he felt nauseous and was just kind of torn apart. He had never forgotten that. I didn't even know it happened, you know?

Initially [my relationship with Robert] was everything you could ever want. If you were out for the day, an example. . . . We went up to the hot air balloon festival that was held at a winery up there. And it was, you couldn't do enough together, walk hand in hand, table to table. You see, one of the major problems with my first marriage was that John and I had each built our own life and had not built one together. [John's] attitude was: Well, you and the children know where you can find me. So this [with Robert] was totally the opposite. This was: I can't wait to be with you every minute and anything you want to do I'm interested in. We were married in December 1988. It was perfect, absolutely perfect. Things couldn't be more wonderful. The old saying, if it's too good to be true. . . . And he was that way up until about two years after we were married. Everything was still fine in 1989.

[We bought some properties] on what I call the mountain—it was very pretty but very isolated. I ended up not having any time for any of my old friends so that I lost contact with a good portion of them. And it was so isolated that unless you knew your way around, nobody was going to hop in their car and come out to you. It backed up to a farm that was 120 acres. And directly behind us was all forested land that probably is virgin woods. There were deer paths and there was a real nice little glen up there that you could just wander through and sit on this huge granite rock. That was really lovely. But later on that turned into not so great an asset.

[I was happy.] Absolutely. Absolutely. I worked two jobs. We had opened an antique shop, so that on my days off I would work in the shop, or would be out looking for merchandise, or maybe setting up for an antique show. It was not at all uncommon for me to walk in the door at eight o'clock at night and be out the door at 8:05 on a call for antiques, and not back in again until midnight. It was very exhausting.

I worked all the time. He knew where I was the whole time. And if I wasn't at an office, then I was in the shop or with him on a call. He would never go on a call by himself. He would wait until I was there to go with him. The premise was that we were doing it together, we were building the antique business together. So I never thought about it. But as I look back now, that's what I thought was wonderful—that he was so interested in me

and for me. Now that I look back I know it was not true. His was a need. It wasn't out of love. It was because he was insecure because he needed to hold on. He needed to possess.

As I said, I was a district manager, and he must not have liked the fact that he didn't know exactly where I was. So he insisted that I give up being a district manager. I went in and gave my notice and I said to [my boss] that I had a problem, that we were building this business and Robert was unhappy with the fact that I was wandering all over the countryside. So rather than lose me, what she said was: "Why don't we put you in an office." So I said, right up my alley. But, in fact, what it did was it gave him my exact schedule, because now I was on a time clock, not salary. I took a $10,000 hit by doing that, right off the top. So, he wasn't happy with that, but again, at least he knew exactly what my schedule was going to be, and that told him also then exactly what time I should get home, because he knew how much time it took to get from whatever office I was in to the house. So that was a way, I think, for him to keep track of where I was. I couldn't, in his mind, get lost for an hour or two because he knew exactly forty-five minutes later I should be walking through the door.

His parents would mind the shop for us on Wednesday and Thursday. It made perfectly good sense to me because [his parents] knew about antiques, and it was really a logical move. I had no problem with it. What I didn't realize was that he had never done anything in his entire life without them so that he had never grown up, never taken responsibility for anything. Mom and Dad were always there to bail him out of whatever trouble it was, or grab him before he got into any serious trouble and have a talk with him.

And I had neglected to see that when we went places and did things we would go to visit his friends, not mine. I was just so swept up in this whole thing that I didn't realize that I was just being taken away. Later on the isolation became more obvious and then blatant when he refused to allow any of my family on the property.

Then he started to get really strange. I had said to him once, if we have a fire in this house and can't get to the kitchen door, I hope you realize we're going to die. The routine was that the Great Room door and the front door were always locked, chain locked and dead bolted. And it wasn't the type of dead bolt that you could turn with your hand. You had to have the key for it; you had to bring it with you. You couldn't use those doors unless you unlocked everything, so they stayed locked 99 percent of the time. The

storm door was always locked. At night you would close the outside kitchen door, which was the storm door, lock it; close the inside door, lock the knob, put the chain on, dead bolt it. And, we had a security system. When you got upstairs, you turned the alarm on and the whole first floor had motion sensors. He was a little paranoid.

I had a .38 that he insisted that I get after some burglaries in the area had occurred. And he made me go get it. I was like, "well why don't you go get it?" "No, you go get it," [he said.] So we went down and we picked out a gun for me and took all the information, had all the paperwork and took it to the police and they ran me through the FBI and I got my permit for this gun, which I never fired the whole time I was with him. As it turns out, he wanted me to go for the permit because, I found out later, he had been convicted of assault with a deadly weapon. He told me that when he was eighteen, in hunting season, he and a friend had guns in the trunk of the car. And they stopped and some other teenagers gave them a hard time. And he lost control of his temper. And he went to get his loaded shotgun, and he threatened to shoot them. He was convicted of that. But, because of his age, he found out that if he waited so-many years, he could have the conviction expunged from his records. So if I have to go to court, and say this man has been convicted of assault with a deadly weapon with intent to kill, there's no record of it.

His mother had never handled life on her own. And [after Robert's father died,] she needed someone, and the only one she had was her son. So she became more and more possessive of him in 1992. They just were constantly on the phone with each other. And I realized at some point too that he had grown up being abused by this father, and she had been abused by this husband. They had forged an alliance when he was very, very young. And the two of them would be sympathetic towards each other when one of them received the wrath of dad. So they were already joined at the hip, and now this made her more dependent emotionally.

In this [family] it was never anybody['s fault], nobody ever took responsibility for anything. And in my relationship, I always took the responsibility, or I blew it off. Example. We were away for the weekend at a friend's, and I had left a bag out in the car. So I said, "I'm going to go out and get my bag." He said, "No, no, no, I'll go get it." And he went out to the car, got it, and on the way back in he stubbed his toe and broke it. He said it was my fault that he broke his toe. Because if I had not forgotten the bag, he would not have broken his toe. And I would always come to his defense. So

when, in fact, I got tired and stopped defending him, he took great offense at that.[29]

In August 1992, he had a panic attack. He drove himself to the hospital. He called me, told me he was at the hospital, that he had thought he was having a heart attack but they had reassured him he wasn't. And not to panic over it, but that's where he was, to let me know. And then this nurse grabbed the phone and said, "He's not really all right." And I said, "Okay," and I said, "I'll take care of things [at the office], and I'll take care of things at the shop so that his mother doesn't get upset, and then I'll be there." I was the only one in the office, so I closed the office at four like I always would, went back to the shop. It was a Wednesday so it was [his mother] Carol's day there. And I had called and told Carol, "Do me a favor, I'm going to be home in a little while, I'm leaving the office now, wait for me." I wanted to tell her about Robert so that she didn't hear it over the phone and we didn't have two people in the hospital. I had reassured her that I had spoken to him, he was okay, that she could go up and see him. I mean I knew I was healthy, I wasn't going to have a heart attack or a panic attack over this. He was in the ICU for observation, and you could only see him at certain hours, and I said [to Carol], "If you go now, you'll be able to visit him. And then tell him I'll be there later when they allow visitors again." I never heard the end of that. Never, ever. I ran two businesses and got four hours sleep a night and he came home with such an attitude because his mother sat there during the day and told him how, if his wife truly loved him she would be at his side. That she would have run right to the hospital that instant and not worried about things like a shop. So he came home with an incredible chip on his shoulder that summer. And things rapidly deteriorated after that.

In the fall he started to get really strange. And I should preface this by saying we had had quite a blowout and I had just said to him, "Look, if it's not going to work, then why don't we just calmly, logically, and in an adult-like fashion, just sit down and figure out the best way to handle this.

29. Susan said:

> It's not like she brought this guy home and he was a complete whacko from the first day you met him. He was very charming, and couldn't be nicer. He was so sweet. So you thought—hey, this is a really great guy. Congratulations, I'm really happy for you. So maybe for her it was harder because he had this wonderful image, and the mystique was being shattered. She did have this image—maybe it can be good, maybe we can go back to that time.

We'll divide our assets, we'll sell off what we need to so that nobody gets hurt [financially] and go our separate ways."

I was sitting in the shop on one Friday and he showed up at like ten after twelve. I said, "What are you doing here?" "I just wanted to see where you were." I said, "Where else would I be? It's Friday, I'm in the shop." And then he said, "Oh, and I left something at the house and I had to come back for it." So he left. About five or ten minutes later the phone rang and it was an attorney trying to explain to me that if I agreed to a mutual restraining order, that nothing can be removed from the shop or the house, that I won't have to be dragged into court. I said, "What are you talking about?" And she said, "Well, I am your husband's attorney and I have gone to the courts and I have gotten this restraining order so you can't remove anything from the shop." I said, "Why would I remove something from the shop? I don't understand what's going on. What do you mean you're my husband's attorney?" And she said, "I'm your husband's matrimonial attorney." I said, "For what?" She said, "Who is your attorney?" I said, "I don't have an attorney." She said, "Oh, you need to get one." And I started to cry.

And now she's trying to calm me down over the phone. And I said, "I really don't understand what is going on." And she told me that I was going to be served later that day with papers and they would be the divorce papers and that he had filed for divorce. He had her tell me over the phone. Heaven forbid he should do something like that. He comes home like nothing has happened. And then [he] tried to convince me that Friday evening that everything was okay. There was really no big problem. Everything was going to be okay. It was just words that really didn't mean anything.

I didn't know what to do. We had seen a marriage counselor and I didn't know whether to pursue that avenue again. I knew that the minute I left the house I was in trouble. So I stayed. He tapped the phones and probably followed me. I did get an attorney because I had to have representation. And he started to get stranger and stranger in his actions. More paranoid. He lost weight. He got deep circles under his eyes because he was not getting much sleep. He was so paranoid and panic-stricken over everything. He wanted more accountability of where I had been, what I was doing. The isolation increased. Once I realized the phones were tapped, I really couldn't talk to anybody on the phone. The kids [Jane's daughter Susan and her fiancé David] had been around quite a bit and he didn't want them around much any more. And when the kids would say, "Well, we'll stop down," we would be busy and there wouldn't be time for them, so we got more and more isolated. They weren't getting a true picture of what was going on

other than the fact that they were concerned that they didn't know what was going on.[30]

They came to the shop one day and asked about a joint investment that they had made with Robert. And they asked me questions that I couldn't answer. Then David said, "Where's Robert?" And I said, "He's up at the house." And David said, "Well, can I go up to the house and talk to Robert?" I said, "Sure." It was the worst thing I could have done. He [Robert] took it as a personal threat.

David went up to ask him why they only got their original investment back, and Robert screamed, "Don't you come into my house, don't you threaten me," and carried on at him and told him he was going to call the police, to get out of his house. So David came out of the house and down to the shop and he's madder than a wet hen. And he's saying, "Do you believe this," you know.

. . . I looked up toward the house, and I could see Robert coming from the house. And he obviously had a head of steam going also. I said to David and Susan, "You two stay here, I'm going outside." I went outside to stop him so that there wouldn't be an escalation. And he's screaming now and carrying on about [how] David better get off the property—he's going to call the police, he's going to file charges against him for threatening him. I'm out there trying to calm him down. David heard Robert threatening me, screaming at me, threatening me. So he came out to protect me, and now I was between the two of them. I've got Robert on one side, David on the other side. David's going, "Leave her alone." And Robert's screaming, "If you don't get off the property, I'm going to kill you." He threatened to kill David if he ever came on the property again. So Susan is now out of the shop, she was in tears. And Robert went in to the shop. I said, "Please go home. He'll calm down." And now they're worried. And I said, "No, I'll be okay." Well, they were afraid to leave me because it's such an isolated spot and there was no

30. Susan said:

> The process was so slow. It was really, *orchestrated*, so that it didn't seem to be what it ended up being. So that we went from coming down to visit all the time to then they were doing more of the antiques and so less of her time was even available for us to even get together. That seemed kind of strange. I always say that because it was a second marriage my mom really wanted to make it work. So I kind of felt that she was trying twice as hard but for . . . they weren't heading toward the same ends, you know. That's when she started to say, well, you know, he's just tired, or this and that, you know we can't get together because he's so tired. I think it was because she was just really trying to make things *work*. Trying to make the second go-round go.

one else around. So they sat out in their car. I went inside; he's behind the counter and he's screaming at the top of his lungs. [H]e screamed and carried on like a lunatic and threatened to break my neck three times. He screamed at me, "Who am I?" I said, "Robert." "Who am I?" I said it louder. And a third time. "What is my name?" "Robert." "Louder." He has me now yelling his name. "Do you know what I could do to you? I'm going to break your neck." He's screaming at me that he's going to take me out back on the mountain and bury me where no one can ever find me again.

At that point a neighbor's son pulled up into the parking lot and got out. And when he entered the shop, the kids left because they realized [Robert would] have to get himself under control. And, as he came in, Robert screamed at me, "And don't you ever steal anything from me again." Which was just strictly to make me look bad, because nothing had transpired to lead up to that. Nothing had been said at all.

[The neighbor's son] left and Robert went up to the house and told me to close the shop. So I did. I locked the shop up and went up to the house and when I came in he didn't say a word to me. I'm telling Robert how sorry I am, that I had made a mistake. (Not realizing this is what I've been doing for months, I guess, and months. I've been apologizing for everything, I've been taking the blame for everything for years. And will do anything to keep the peace.) So I pick the phone up and I call the kids and tell them how it's all my fault. That I never should have let David go to the house. And please don't be upset with us for this; we'll straighten it all out. And when I hung up, my daughter told me she turned to David and said, "That's not my mother, that's an abused woman." I still hadn't even reached that point [of articulating the abuse].

[T]hat night Robert and I hardly spoke. I got up the next morning, got ready to go to the office, and I was dressed and down in the kitchen puttering around and he came in and he just stood there and he watched me and watched me and watched me. It was just really scary because it's like the straw that broke the camel's back. This is that absolute quiet rage that now somebody has lost control of, and I don't know when he's going to react. He had moved into another bedroom about three weeks prior. And, unbeknownst to me at the time, he had taken the tapes of phone conversations, and he stayed up the entire night and would play these conversations for himself. And he was so mentally wigged out by then that anything, absolutely anything, that was said and was remotely negative he would sit and play over and over and over again. He had put himself right over the edge.

I headed for the door, and as I opened the door he turned to me and in

this very cold voice said, "This is my house and don't you ever forget it, and don't you ever come back again." And as I went out the door, I realized that if I didn't get away, that I was in grave danger because he had three guns in the house [a shotgun, a .22 rifle, and a .38 pistol from which the serial numbers had been filed off]. And out I went. I went to the office and I called my attorney. He said not to go back into that house.

I was lucky enough that the first time I went for a restraining order my attorney went down with me. We spent a lot of time in court that day, or in the building, in the process. Two days after I ran for my life I went back for my clothing and all the locks had been changed. I had to go to court in my daughter's clothes. I did get a permanent restraining order and left. And I had to get an order from the court and take it to the police and have the police go with me to the house so that I could get my belongings.

The domestic violence complaint had to be done with the police, and it is a criminal charge, and he was charged with terroristic threats. And, of course, they listed that he had the three guns in the house. And the thing that concerned them the most was that the one was unregistered, unmarked handgun—that the numbers had been filed off it. So it was basically untraceable and quite possibly had been used in a previous crime. So that really concerned the police. They went out and did not have a search warrant. [They] asked him if there were any guns in the house, and of course he said no. And they asked specifically about those guns. And boy did I get told about that later, about what could have happened to him. I was putting him in danger. I wasn't in danger, he hadn't threatened my life, none of that mattered. The fact that he could have been arrested for owning an illegal gun because I went public on it was totally wrong. I was the bad guy.

Heaven forbid something should go wrong while you were out in public, it made him just wild. It had to be this fairy tale picture that every time you stepped out the door, everything was perfect and everything was wonderful. He was verbally abusive. He isolated me. He was emotionally abusive. And [he] would justify it by saying, "Why did you make me do that?" And "We're in this together." He threw that a lot: that he was devoted to the vows so that any problem was my problem and it was because I wasn't as devoted as he was to the vows that we had taken. So he used guilt a lot. He was physically abusive, but not overtly. He knew that if he had ever punched me, broken my ribs or my nose or whatever, that I would walk out. But he also realized that I did not want to be embarrassed in front of my family, so he found ways that he could be physically abusive to me through abusive sex and bondage. I used to laugh and say, everybody thinks of candles as being

so romantic. And so did I at one time. What he would do was he would burn candles and if he was in one of his abusive modes, would throw me down out of the clear blue, and then tie me to the bed. And he would take the candle wax and pour it on you and burn you. Certainly not what you would go and tell your family about. And then he would say, "This is normal." I said, "I don't like this." And that's when he would say, "A lot of people do this. You mean you led such a sheltered life you don't know about this? What's the matter with you?"

[The police] feel that you're overreacting to a situation when, in truth, if you're dealing with a true abuser, they're very good at covering for themselves, and they're very dangerous. And the police will just blow you right off. Absolutely blow you right off. When I moved to my daughter's and had the permanent restraining order in 1992, I took it to the local police station and a woman took me in, took a copy, and basically patted me on the head and said, have a nice day. Didn't ask whether this man was around. Didn't say is there a pattern so that we can have an officer that just rides through. Nothing. Just shuffled the papers and sent me on my way. That doesn't give you any validation, and you're already confused and pretty isolated.

We had one settlement meeting in December 1992. Well, [his attorney] made the mistake of saying to him that I seemed like a very nice and reasonable person, which was the wrong thing to say to him because, as I had mentioned before, you are either a friend or you are a foe. That just put her in the foe column. So he fired her.

The antique shop had been sporadically opened and closed because if I wasn't there, it didn't get opened. So while I was gone, there was very little business except for January 1993. I called and left a message that I was going to come down and pick up some paperwork for the accountant. I came up the house driveway and wasn't I surprised because the parking lot for the shop was full to overflowing. I walked down to the shop. And here he and his mother and cousin were having a going-out-of-business sale that had been going on for a couple of weeks. So I nailed him on that one.

I had an automobile accident in April 1993 while we were separated. In August 1993 he said that he had letters from the business that I needed to have. I met him to get them and we started to talk and he was in counseling, and he was really sorry for everything. And I just got sucked right back in.[31]

31. Mahoney writes, "Participation by the batterer in a counseling program is a very significant factor in predicting a woman will end a separation, since his participation tends to increase her hope for safe return" ("Legal Images of Battered Women," 343).

When I went back in the fall of 1993, it was with the idea that we were going to jointly go to counseling and work it all out, hopefully—no promises, but hopefully. I dropped the divorce [in 1993] and so did he. My attorney was not happy. And we went to counseling and had been going several months when I turned one day and I said, "Quite honestly my biggest problem is trust. I don't know whether I could ever trust you again because I was so blind-sided the first time, and so shocked to be hit with those divorce papers and a restraining order." And this counselor turned and looked at me with this incredible expression on her face. She had no earthly idea that he had filed the divorce papers and what had originally happened. He had obviously gone to her and stated that I had wanted the divorce, it was all my doing. That we were in the middle of a divorce and he had just been a victim. And I looked at the expression on her face and thought, Oh, my God, what have I done? You know?[32]

By that point he had forced me into switching personal injury attorneys, to which I said, okay. So I made arrangements and I met [the new lawyer] and had him request my records from the other attorney's office and went home and said, "I got a new attorney." "What do you mean you got another attorney?" [Robert said.] He was livid, absolutely livid that I had snuck around behind his back and I had gotten this attorney and he knew nothing about it. And I said, "But I did it because you wanted me to." Well, he wanted to know when the next appointment was and we went together and he insisted that when the suit be filed, that his name be on the suit. This man was not with me when I got hit. He did not pick me up from the hospital. Susan did. Really, his only [interest] was the money.

But Robert was still trying to convince me that everything was going to be okay. So 1993 was basically all right. He was beginning to isolate me again. My mother had been helping me just prior to Christmas because I had just had the surgery, [but she] was not allowed to stay in the house. I guess he didn't want the rest of my family, heaven forbid, to have any

32. Susan said:

> I was really disappointed when she went back. I never said anything to her. But I didn't think that anything would change. I always tried to be, you know, more objective and more of a friend to her about it. Because I knew that she wasn't telling me a lot of the private things that occurred between them, and that she maybe didn't always want to tell me everything. So, you know, when she made the decision to go back I said well, you know is this really what you want to do? And she said, yes, I really think it will go this time. And I said, well, if it doesn't, you know the door is always open.

influence on me or for me to say anything to them. But he allowed my mother and my daughter and her significant other to visit me, to have Christmas dinner with us. Christmas is my birthday, so it's always been a big gathering.

In 1994 we continued with the shop. He started to get more and more distant because things weren't working out for him and he was really aggravated that I needed a second surgery, and after I had it he just couldn't [wait] for me to go back to work. He used that for a lot of pressure—that things were so difficult for him and if I could do my fair share, things wouldn't be like that. I thought he would let up when I went back [to work part time in September], and he didn't. Obviously the income is not going to be what it was when it was full time, [so that was a problem for Robert.] I was [working] full time by the holidays. We were just also taking it a step at a time business-wise, and that did not make him happy. And when anything doesn't make him happy, he becomes more and more distant.[33]

I was never the one that said, "I have a headache, a backache, we did it last night." He would use that. If he got angry at you, he would withhold any affection. So as we became more distant, there was never not just a kind word, but there was never a hug, never a pat on the back. If he got really angry with you, he would take the king-sized pillows and he'd put them down the middle of the bed. You know: a don't-touch-me type thing. Again, more like a punishment.

He had sold some of my jewelry in the shop. And I had let him. He had me so convinced that it was my fault that we were in the financial situation we were, that I agreed to put a portion of my jewelry in the shop for sale. We were definitely working on two different standards here. He would use guilt to the nth degree: "I took those vows and I meant them and they mean

33. Susan said:

> She was always so tired, and, almost, *crazy*. You know, he would say "do A," so she would do A, and he would say "No, I told you to do B," so she'd do B, and he'd say "No, I said it was C." So she could never win. She was just completely confused and dazed and exhausted from trying so hard and working so hard. She was fighting a losing battle. She became a totally different person: someone who was just very confused, and very tired, and almost helpless to a certain point. It was very sad. I was very sad for her. I said, "This just isn't fair. You shouldn't be working day and night when you've just had surgery. That's not right. And it's unfair of him to expect that." And she'd say Oh, yeah. But again I think she was just trying to make it work and not have that stigma of being a failure at your marriage.

nothing to you." And he would say something like that but then he wouldn't follow through. To me it was more important that you're in this together as a partnership and when one of you is injured, down and out, whatever, the other one has to carry the load as best they can until you can get healthy enough to pitch back in. And it was obvious [in retrospect] that I was the one that had to do all the pitching in.

Things [continued] to escalate in 1994. I didn't leave, but you could feel the pressure building. He tapped the phones again. The further apart we got, the stranger he got. And he would become more paranoid. And we went nowhere. Together we saw basically no one. He would sit and brood and wait for me to come home in the evening. And in October 1994 he insisted on wills. And I said, "Okay. If that will make you happy, then we'll go ahead with the wills." So he used a legal group [in a near-by town] and said that he had spoken to them and because we had three parcels, three pieces of property, that the only real way to set things up, to divvy them up, would be to figure out the value of each and come up with comparable values. He took the shop and the unencumbered building lot, put them in his name, and put the house with the huge mortgage in my name. I said, "whatever makes you happy." I was at the point where [I would do] anything to avoid another battle. I think initially you try to explain things and defend things, and then after a while you just get so worn down that you'll do almost anything not to have to have an explosion. And if that was going to make him happy, then fine. So in November we went in and signed the deeds to the three pieces of property, and unbeknownst to me, he stopped paying the real estate taxes on the house, which was now in my name, which meant the tax bills were in my name.

He had [also] added all these things to the deed. He had put a $15,000 payment on the house deed and the shop deed to his mother for a mortgage that he had from years before we were dating. My mother had let us have $5,000 for merchandise when we first were going to open the shop. So he put her $5,000, split that $2,500 on each. He had complained that he had to use one of his credit cards and checks for the credit card while I wasn't working, so he put $3,000 payment to this credit card on each of these deeds. I have not found an attorney yet who said that he had ever seen anything like this before. What he was trying to do was [insure] that if any of the properties were sold, his mother would get $15,000. He figured I would not agree to that unless he put my mother on there, and then he added himself for $3,000. In 1994 we put the house up for sale. So he's

figuring if we sell the house, his mother's locked in for $15,000. He's locked in for $3,000. And then my mother for her $2,500. So he and his mother are going to get money.

In 1994 none of my family was allowed on the property for the holidays. He tried to convince me that we should rent a limousine and have champagne and hors d'oeuvres and truffles, whatever, riding up to New York and back and go to the Russian Tea Room for dinner for my birthday. And I looked at him and said, "I can't do that. We're struggling here financially because of my being out." Well he carried on greatly about [how] I was no fun, I didn't want to do anything any more. And badgered me and badgered me, and I just said, "We can't, we just can't do it," and refused. Looking back on it now, I am so glad I held my ground. I think what he was going to do was go to court and state that I was such a horrible person, look what I forced him to do: here we were absolutely penniless and I forced him to rent a limousine and take me to New York for my birthday. He couldn't do that. He tried, but he couldn't do it.

So it was time for the March [1995] mortgage payment, for the house. And I walked in with my check and I said, "Here, for the mortgage payment." He looked at me and he said, "I don't have any money for you for that." He said, "I've paid all I'm going to pay. You'll just have to find a way to do it." I said, "I can't do it. I don't get a check for two weeks, and the mortgage payment is due now." So I took my check to the bank and gave it to them as a partial payment because it was already late. And they took it. My understanding is that they normally don't, and they didn't take anything later after that—they never got another payment after that. By then I realized there was a problem, and I went to my attorney and I said, "He's getting ready to go over the edge again, and I'm concerned. This is what's going on." He said, "Don't pay another penny." He said, "Because you'll be throwing good money after bad. You're going to have other bills you're going to be obligated to pay. So, sit back and wait."

I really think that Robert figured that I would save the house with the money that I got from my personal injury case. But that money was not going to be available for quite awhile, anyway. He said: "Well, you'd better do something to save the house. The mortgage payments have to be made or they're going to foreclose on the house. Well, what's going to happen to my mother and her money if you don't make these payments?" I said, "Well, I guess she loses her money." And I didn't mean that to be smart or anything. It's just if you lose the house and you don't have money, what happens?

Everybody loses. He flipped out. This is not the way he intended it to go when he set it up. He figured that I had such a huge sense of responsibility, that this money would be coming through, and that one way or another, I would find a way to make it all better. And I would be the one that would lose. So he screamed and carried on at me. And then after that, things got really tense and really hairy.

It was around that time [April 1995] that I found a shotgun in the basement. In 1992 when he threatened my life, it was with a gun. He had done competitive trap shooting before we were married, and that's where the shotgun came from. And I didn't get hysterical when I saw it hidden downstairs because it was in its case, it was not assembled. The stock and the barrel were not together. So I didn't get hysterical, but it put me on the alert that I should start to look around.

In that same time period, my keys to the shop disappeared. And an old set appeared, and that's what was hanging in the kitchen. Well the set of keys that I had didn't have a key to the closet [used to store valuable goods in the antique shop]. I had kind of paid no attention to that. I finally decided after I spotted the gun that I really should start to find out where things stood [with the business] and find a key [to the closet]. Finally I found one that fit the door. And I opened this closet and [merchandise was missing]. So I said, wonderful. My husband is stealing from me.

Before I left, [a co-worker] tried to call me and couldn't reach me. He said, "I think you have a phone problem. You might want to check into it when you get home." So I walked into the house that night and I said, "There must be a problem with the line." And Robert stopped and then he said, "Well no there isn't." He had had the telephone company come out, run a line to the shop only with the old number that had been the shop's for thirty years, and he put a new phone number in the residence under my name and had not told me about it. He must have had an answering service on [the shop line], but there was no way I would get any of the messages, or could even pick them up. And I had no clue this had occurred. None whatsoever. I had no idea what all he was up to. But that was another real big warning sign for me just before I left.

Then the shotgun hidden in the basement had disappeared again. And I said to him when I realized it was not where I had seen it, I said, "Oh, I see you moved the [gun]," and he was just kind of startled and looked at me. I wanted him to realize that I knew that gun was in the house. And that I hadn't made a big fuss over it, but that I had known that it was there. I

decided then that I really should go through the place. So I went through the house. I decided to look in his closet and under the clothing on the top shelf I found about a two-foot, really heavy lead pipe hidden under his clothing. And the next day I started to make phone calls, because I realized that one night I was going to wake up dead. That if that item, if that pipe was there for our protection, *we* . . . *We* would have known about it.

I called my daughter, who had always said, "You know, when you're ready, let me know. There's a room." And I called my attorney and said, "I really need to come in and talk to you." I said, "This is what I found." And he said, "You've got to get out of there." I said, "I know. I'm leaving Sunday." And needless to say, I made all these phone calls from the office. Not from the house. The day that I left it took me two and a half hours to get away. I explained everything that I could to him in as calm a way as possible to keep him calm. And when I got out to my car he asked me to put the window down so he could say something, and then he put his hands and arms in the window so that I couldn't pull away, because he knew that I wouldn't just pull away and hurt anybody. I got out of there around six and to my daughter's at 6:30. He had already called once to speak to me and I don't think I was there ten minutes when the phone rang and I picked it up and it was him. And he said, "The dog told me to tell you this is a really bad idea. That you shouldn't leave." And I thought, how bizarre. And I said, "Well you tell her I'm really sorry, but this is something that I have to do. I don't have any choice." That was the last time I spoke to him. That was Sunday, May 21st, 1995.

I filed for [divorce on the grounds of] mental cruelty and emotional abuse. My attorney, quite honestly, wanted me to get down and dirty. I wasn't prepared to do that. He wanted me to make it a domestic violence issue. And I was not capable, at that time, of taking that on. I just wanted out, and I wanted it over. I was willing to walk away from everything I had invested down there, my $83,000 worth of cash and anything that had been acquired from the time we were married on. The only things that I took with me were my clothing and a couple of personal belongings. Two days after I left the real estate agent was called up to the house and the shop and Robert was in the shop and he went there and he said the place was empty. So he's the one that verified for me what I knew was going to happen, that all the antiques were going to disappear immediately.

The next time I saw him was with his second attorney. In June 1995 this attorney and Robert had a settlement meeting with us at my attorney's

office. Robert threw things at my attorney, and he screamed at everyone. He was so out of hand and out of control that day that his attorney took him out of the meeting room twice and took him out of the building the third time. He had a list of demands, all of which I agreed to, including for the final and last time, jointly filing income taxes. And he said, "That's not good enough." And I turned to him and said, "Frankly, Robert, that's a better deal than anyone else would offer." And his attorney turned to him and said, "It is." He also came in that day with a VCR tape that he was waving around, and he said, "And I have this, and I can use this." Just waving this thing and making threats. And I told him also that quite honestly the only one who had any interest in what was on that video was him, because whatever it was either didn't apply in any way, shape or form, or was totally out of context and had to have been taken through somebody's back windows. It's something that was totally inadmissible in a court of law anyway. And the man didn't file charges of adultery or anything on me, he didn't have them.

After that blew up he was then finished with attorney number two, because the attorney didn't do contested divorces and wouldn't represent him any longer. He then had to go out and find himself a third matrimonial attorney. So we lost part of the summer in trying to catch attorney number three up. So with all the records being copied and sent to the new attorney and what-not, you lose a series of months.

After I left in 1995, there were vehicles parked across the street from the office late at night. There were nights that I would pull up to Susan's house and—that old saying, the hair would stand up on the back of your neck—I would get that incredibly apprehensive feeling. And he must have been around. I could pull up five nights, and I'd be fine. And then I would pull up one night and it would just be really eerie. And then we would get what we called our non-phone calls. And you knew who it was. They came in between 9:30 and quarter after 10 in the morning. Or they would come in the 4:30 to 5:30 area in the evening. You would pick the phone up, somebody would be there, but nobody would say anything. Sometimes you would hear a radio, sometimes you would hear the tires going down the highway. That's how I knew it was a mobile phone because I heard the vehicle moving.

Things got quiet actually the end of 1995, beginning of 1996. And then I decided that I really needed to do something with myself, and [decided to open a business.] I found out that I had to [complete some paperwork near his office]. So I said, okay, he goes in 9:30 in the morning, leaves at 2:30 in

the afternoon, so I'll get there at three. He's always gone by three o'clock in the afternoon. And I'm nervous. And I say to the woman, "I'm sorry, I'm a little nervous. I'm in the process of a divorce, and my husband works [nearby]." She looked at the name and she said, "Oh, yes he does." I said, "Well, I'd just like to get this done as quickly as possible." So as it turns out, [I had to return to complete the paperwork]. Well I just wanted to get out of there. So I asked her what time she opened in the morning and I said, "I'll see you first thing in the morning," and out I went.

Well, of course, to get out of the building as quickly as possible, I went out the nearest side door. Head out, first step down is to a wide step, and then after that you have fifty [to] seventy steps to go down. I step out the door, step on to this wide step and look down the steps and whose head do I see at the bottom of the steps but his. I see the top of his head, his jacket. Oh, my God. So I stepped off to the side because there was like an alcove on the side and I stood with my back against the street side. I thought, maybe he'll just come up the steps and if he has to go in the center door, he won't even see me. No, he came up the nearest steps, he came up that side and stopped on the landing right next to me. I haven't looked at him, I don't see him, but I hear his voice saying, "Hi, how are you?" I thought, oh God, you know, here I was so worried. He's perfectly fine. So I turned, now and faced him. And I said, "Oh, Hi."

Well here somebody else had stepped out the door, and that's who he was addressing. He turned and looked at me and went from a normal expression to one of absolute, pure unadulterated hate. And I realized this and headed down the steps immediately. It's raining now. I pulled the hood up on my jacket, headed down the steps. He had taken a step to open the door and step in when he realized who I was. And then he stepped back out and he started to scream and carry on. "You're nothing but white trash, you're worthless. Do you see that person? Do you see her? You want to see what white trash is? There it goes. That's white trash." He screamed and carried on like this the entire time I was going down these steps until I got to the corner and made the turn and he could no longer see me. Ranting like a lunatic.

I ran across the street, got in my car, and I sat there and sobbed, just sobbed. And then I'm thinking, you've got to get out of here. What if this man comes after you? So I quick got my key, put it in the ignition, and pulled away while I was still half sobbing. The phone calls started again. I was mortified. I had to go back in the next morning. I had already blown it.

He was there at three in the afternoon. But, I also know that he's not that early a riser. And if he's going to be there at three in the afternoon, he probably didn't start real early. So I took my chances. I just, I had to do this. I had to start to make my way. So I went back at 8:30 in the morning. He wasn't there. I was out of there by nine. I didn't want to have to go back in to center city again on the off chance that I might run into him. I just wanted it all over and done with.

He had stayed in the house [after I left] in 1995. Unbeknownst to me, in October he put my name on the utility account and had the bills sent to his post office box so that I was not notified and he ruined my credit with them. The deed was in my name. So I became responsible and liable for that and there was no way I could fight it. I had no idea that I was responsible, but it doesn't matter. There are just certain bills you can't get away from that you're going to be responsible for. He sold the shop and the building lot.

He has managed to put the real estate taxes against me because he stopped paying them right after the deed was transferred. That made me fully responsible for them. I had no idea. He had stopped paying the mortgage payments, but he was on the mortgage, so it hurt both of us. When I found out about the new phone number, I called the telephone company and demanded that they put the telephone bill in his name. I said, "I never called and contracted for this." And they admitted it was he who called and told them to put it in my name. So I had it changed to his name. . . . What else did he do to me? Every bill that he could possibly put in my name. He had oil delivered in February 1996 and had that account sent to my address later after he had been billed a couple of times. And it was now to be in my name. He had landscaping work done and then never paid. And I actually have a copy of the bill, and it had the post-it that Robert sent to [the landscaper] that said that we have moved, please bill us at this address under my name and signed Jane.

I ended up having to file for bankruptcy February 1996 because I had all these outstanding bills that I was now liable for and had no way of paying. The biggest one, of course, being the mortgage. And because I have this really ridiculous sense of honesty and fair play, I put him in the bankruptcy for $3,000. When I got the list of creditors, he's in for a total of $34,500 against my bankruptcy. His mother is in for $33,500.

I have always believed it's a small world. [In April 1996 a friend of a friend] and his wife made arrangements with another real estate agent to have access to the house and they went in. And I really expected to hear

from him within a week or so. Two weeks go by, nothing. So round about the third week I decided I should call him. And I did. Platitudes over and done with, I said, "Did you get a chance to see the house?" He said, "Well, yes, my wife and I and the boys did go through. It was really kind of weird." I said, "What do you mean weird?" He [explained]. . . . So I got off the phone and called my attorney. He said, "I want you to go down there, and I want you to take photos, and get stuff." I was terrified. But my attorney suggested that I take the police with me.

I met the Chief of Police at the Police Station, and we went over. There was a mutilated photo sitting right outside the screen of the fireplace next to an empty Dom Perigon bottle. My side of the photo [taken after we had reconciled] was mutilated and his side of course was pristine. As we wandered through the house, we went upstairs and the master bedroom was totally empty [except] for this shrine that he had built with these large wooden blocks. It was sitting in front of the window so the sunlight streaming in shone on it. And on the top of the shrine was a St. Jude card; my understanding is St. Jude is the Patron Saint of lost causes. So the police chief asked me if I thought Robert was suicidal and I said, "Never a day in his life. The most important thing in Robert's life is Robert." We then went into the third bedroom and there was a dirty mattress on the floor. There was a candle holder with three candles that were burnt way down to like within an inch or two. There was a brand new candle still in the wrapper on the floor. There was an electric alarm clock there that had been unplugged. There were two wine glasses sitting on the windowsill. There was an ashtray. [The friend had said], "I guess he had a woman in there." And I said to [the friend], "do you know any woman who would go in there and use that mattress?" I said, "I don't think he had anyone in there. I think it's strictly for me." I put the pictures in what my attorney and I call the "psycho file."

Then at 12:30 in the afternoon in June [1996], I pulled out of the gas station that I always used. And sitting in front of [a] building facing the highway was Robert's vehicle. And I thought, oh, no. Please don't let it be him. Second was the recognition it absolutely is him. I passed him, he pulled right out behind me, followed me into the center U-turn lane. You could see the vehicles coming up over a rise from there. So I watched the vehicles, saw a tractor trailer coming, and quickly pulled out, which I normally shouldn't and wouldn't have, into the right-hand lane. [I wanted to] have this truck right behind me and then he couldn't pull out and get right behind me. He would then be forced to pass us, was my logic. The tractor trailer had slowed

down, but Robert zipped in and got behind me. So I'm thinking, well we'll both start off slow, he'll pass me, he'll get tired of this game and he'll pass me. He didn't. So I pulled out and passed the two vehicles in front of me. He pulled out and passed. I pulled into the right-hand lane, he pulled into the right-hand lane. He followed me [for at least 10 miles]. I made the left-hand turn and he was literally right behind me. For the first time I got what his license plate number was, because I had never paid any attention before. He had on his Ray-Ban glasses. I mean, this is how clearly I could see him. I could tell you the expression on his face. And I was in a panic, or a half panic anyway. So I turned to the left, and the only thing I could think to do was to go to the local police department. So I made the left and had to stop for traffic because there was a light. I look in the rearview mirror and he's gone. I looked to the right and I looked to the left. I mean, where can you go? There's nowhere to go. I thought to myself, you know, [a friend's] office is there. I said, this whole time you were in a panic when he was really headed to [the friend's office] and you've overreacted. So I went to the light and made a right, and another turn. And I saw him again. Now I was in a total panic. He turned right when I turned left. I pulled over and called my attorney. He said I must get a restraining order immediately.

I went to court the next morning for the temporary restraining order. Robert did not show up for the original scheduled court date, and we were notified of another court date and he and his attorney showed up. [They had also filed a restraining order, accusing Jane of stalking.] Robert made a scene in the courthouse, yelling across the rotunda that he was terrified of me. He screamed, "I'm terrified of that woman! I'm terrified of that woman." And we went into court and my attorney had told me that the best thing for me to do was to agree to mutually dismiss because he was sure that [Robert] would use the restraining order against me. Unless I had someone with me 24 hours a day to prove where I was at any given time, he would have the police here and have me arrested for breaking the restraining order. So, with tears in my eyes, I agreed to dismiss the charges.

That is the first day that I ever saw someone from Womanspace [a battered women's advocacy and social service group]. Womanspace had a court advocate outside the courtrooms so that if a woman is there because of domestic violence, they will help you in any minor way that they can. And a woman by the name of Dorothy asked me if I was going to go through with the restraining order. I said yes, that I intended to do so. And she was very surprised when I came out. She asked me if I had gotten my restraining

order, and she could see I was upset. And I said no, I had dismissed. So she took me into the little side chamber, and she said, "But you said you weren't going to drop it, why did you do that?" And I said, "You don't understand. I had to. We are not dealing with a logical, rational human being here. We are dealing with someone who is not a well man, who is psychotic to some degree; a sociopath. He believes whatever story he wishes to conjure up in his mind. And then can tell it like it's true because he's far enough over edge that he can make himself believe it. So when my attorney advised me to dismiss it because he knows in a couple of weeks I will end up with police at my door, I know he's telling me the truth. I'm just going to have to find another way." So she had given me the Womanspace card and said that they had meetings and had private counseling so to please give them a call.

Now the way that I knew that Womanspace had an advocate there was that HBO had a special on domestic violence and abuse. It was on fairly late at night. I think I was on the phone with their 800-number at 11:30 pm. At that point I had been gone a year or close to it. I thought once I got out I would be fine, and I was working. So I thought I was functioning. I had absolutely no earthly idea I was depressed, and did not realize what a toll the phone calls and the other forms of harassment had taken on me until I saw this program. And then I realized that if I had stayed, I would have been dead. And I really became terrified because he hadn't gone away.

You know, leaving didn't end it. It just doesn't stop this type of person in any way, shape or form. And I called Womanspace because I knew I was heading to court, and I realized I needed more help than I had originally thought. And I was very nervous about going to court because I knew he would be there. And I felt that I was going to need that person to be by my side.

Since that time I have been attending the Womanspace group meetings once a week, and it's been a big help. It took me quite a while of being there and listening before I could honestly say and deal with some of the things that had occurred. And it was because we had kind of formed a subgroup and we were helping each other.

[One day] I was helping another woman pack up and move out. So she and two others of us were there one day and someone said, "Well, my husband did this," and this one said, "My husband did that." For the first time I told that I had been sexually abused. I had never said that to anyone. That's [why the abuse] worked for him—because here I had been gone for over a year, and I still had not been able to verbalize that. And I have not

been sexually abused like a lot of women have. His form of sexual abuse was more for power. It was "I'll rip your blouse open, throw you on the bed." I guess when he was questioning his power was when he would do these things, when he was maybe feeling weaker, that's when he would need something to make him feel powerful. We had a king-sized brass bed that had been mine, and it was the perfect bed for bondage. He would just throw you down there and have something on the side of the bed that you didn't even know was there. And then use bondage. He would cause burns on my body with hot wax. Once he absolutely terrorized me. He taped my mouth and had my hands tied and my feet were tied. And what he did was he threw me down and flipped me over on my stomach so that my face was in a pillow and I couldn't breathe and I thought I was going to die. I really thought I was going to die. And I freaked out after that and he backed off for a while, for a little while. But I could not breathe through my nose and my mouth was taped, and I just had never experienced anything like that before in my life. I felt so powerless it was unbelievable. And I understood exactly how a raped woman feels. And, I think, what made him feel good was the fact that it was a rape scenario. He was the all-powerful male beating his chest and he could take the female and he could do anything he wanted to with her, and there was nothing she could do to stop him.

You're so upset by the occurrence that it is completely disorienting when it's immediately followed up with: you know, a lot of people think this is perfectly normal; they're not like you. So that not only have you been physically accosted, but now you're being told that because you're upset with what just occurred, you're wrong, there's something wrong with you. And it makes you shut up. It just makes you stop. And it makes you question yourself even more, which causes more isolation. Once they really get that self-doubt going, no matter how organized and directed you may have been before in your life, you really start to question what you do and whether your decisions are correct. I really questioned how competent and capable I was that year I was away from him and I was working. And now looking back on it I feel that I could not accomplish [what people knew I was capable of], and that I let them down. And I don't feel guilty about that. It's just that once you finally get away and start to heal, you look back at it and you say, oh my God. You know? I didn't realize I was that bad off.

[After I told the women what had happened to me] they grabbed me and hugged me. First off, I knew they understood and there was no admonishment there. When you tell people who haven't been involved in a situation

like this, they look at you (and twenty years ago I was the same way) and say, "God, I'd never let anybody do that to me." And you're very judgmental. And they were not judgmental at all that day. And that's what I needed. Otherwise, I would never have said it again. You know, it would have taken another year, year and a half before I could have said anything if someone had been judgmental. I still have not discussed all this with my daughter. Again, he knew that if he lost his temper and reached out and struck me across the face, or broke a rib or something of the sort, that I would not tolerate that and I would turn and walk away. He also understood that I would probably have to go to the emergency room or whatever the case was, and that I could go public. But something that was very private and intimate he knew I would not go public with.

I have not been in court except for one time since we started in May 1995. It has been advised to me by Womanspace, counselors, and my attorney, that the best thing for me to do is to not empower him by allowing him to see me or be able to make a scene. And to send my attorney and not show up for anything unless I absolutely have to, and that is exactly what I have done. Robert did not know that I was filing for the bankruptcy, so he would not have known that I was in court that first time. He has shown up for every bankruptcy hearing since then, I would assume on the off chance that I would be there. Every time that they have been in matrimonial court, in family court, I have sent my attorney. I have never been there. Robert has been there every single time with his attorney.

I found myself doing stupid things the day before I had to go to court [for the final divorce hearing in March 1997]. At one point I said, "My God, you've got to get it together. You've got to get control of yourself." And I've been away almost two years and was still so terrified and paralyzed by the fact that I had to be in the same place that he was and what he might do to me. And even though I knew logically he would do nothing to me there, my fear was that he would have somebody follow me. That he would find out where I was, and it would start all over again. I mean, because I am somewhat in the same area that he is in (not exactly, but our paths may cross in certain areas), I still find myself looking for his vehicle, being afraid that I'm going to turn a corner and pass him and he'll go, "My God, there she is," and start to follow me. And I don't know whether I'll ever lose that. I am seriously contemplating moving out of the state, and I don't know whether it's going to be in increments or whether I'm going to ultimately have to totally move and basically start a whole new life to feel safe again. Heaven

forbid a man asks me out to dinner. I'm mortified. Absolutely panic inside unless it's somebody I've know for years and years, that I trusted before. I cannot even have lunch or dinner with someone without panicking over the thought that it's because they would like to form a relationship and I become terrified of what might happen. I don't know if that will ever go away. So once you get into this situation, it's definitely life altering. You will always carry some baggage with you. It's a long process. A lot of us will be receiving some sort of counseling, psychological help, for years.

Women think that the courts are there to protect them and to help them, when in fact that couldn't be further from the truth. The courts are there to try to listen and make a decision. And paper trails are so important. And we, as women, don't understand that you need to have some sort of proof for everything that occurs. Otherwise, it's just your word against his. It's just hearsay. And women don't understand that just because they say something means that its been listened to. They need to be able to validate everything. Before a woman leaves, she needs to have copies of all deeds; she needs to know any and all bank account numbers, credit cards, because in a good portion of these cases, there are unknown accounts. There are unknown retirement funds or bank accounts where money is being siphoned off and hidden because the abuser, to be in power, has to have that extra stash on the side. He's not going to give it to the other side. That gives the other side some power. Even if he has ten thousand pebbles and you only have one thousand pebbles, he'd rather you had none.

I have a complete loose-leaf file on occurrences; I have a briefcase full of IRS material. I organized this for my attorney so that at any time if we needed it, I have indices: paid expenses in 1994; unpaid bills changed to my name by Robert. Incidents, harassment, stalking, police report—I have a section on that. Forms of harassment that were done. IRS late filings. Letters of help. (That's just letters from different attorneys that show that they either aren't dealing honestly and in good faith or that there are other problems, you know, that my personal injury attorney said that he should get someone else to represent him. He threatened my personal injury attorney. He threatened my marital attorney. He threw things at him. He sent a letter to my chiropractor and his wife.) The original domestic violence complaint, my copy of it. I've made it part of this information because it shows that if I say I need a restraining order, I needed one in the past. That just because he isn't being overtly threatening—by overt I mean physically a threat at this time—doesn't mean that he isn't more than capable of it and he has a history of it.

And then I just have a miscellaneous section. I have a copy of each of the deeds. We had a psycho file. And then an assortment of other odds and ends, letters and what-not that [my attorney] felt he didn't need any more, but I took with me just in case we needed them. And every single person, bar none, every single woman in this situation has to do this. You absolutely have to. I am so sorry that I didn't take the original letters that were written seriously. I just wanted to be rid of them, so I threw them away as soon as I opened them and we read them. I wish I had somebody to advise me to keep them and to show them to the police, because the only way you stand a chance of being taken seriously is by having any and all materials that have been sent to you, to take them as evidence. And I think all of our first reactions are: Oh, God, get that thing away from me. And you throw it away. I've thrown away three times as many things as I've kept because I thought it would end, because I'd hoped it would end, and didn't realize that I would need them.

You have to stay on top of everything that goes on in court, and that's very difficult to do. You're in no mental state to do it, but you really need to take every piece of paper that comes in so that you can see if an error has been made. And it's just like a job. If you don't do it, things fall through the cracks and you can't make the system work for you. We all approach this that the system is there to save us and to help us. The system is so overburdened and so untrained that you have to make it as easy as possible for them to see that you are truly in danger and that you are rational, and that you have logic and sense to what you're saying and doing. Because if you don't do that, they just blow you right off. I think the vast majority of the women that go into court do so upset and the minute they show that they are out of control in any way, no matter now legitimate it might be, the court takes offense to that. They either deal with you in a very negative way, or they decide not to deal with you. And it takes you months, sometimes years, to get that credibility back with that judge. Sometimes you lose your life because the court didn't take you seriously.

One of the things that has been a problem all the way through with this is that the judge has never seen me. I really felt that hurt us, and every time my attorney went in, he got the short end of the stick. The rulings went with the defendant. I think that the judge ruled against me because he took offense to the fact that I was not there, and because he presumed me guilty because I didn't come forward and speak for myself. He had no earthly idea that there were professional counselors that were advising me not to go to

court. He had no idea that there had been restraining orders involved, that there was a criminal case going on, until it was mentioned [at the divorce hearing] because it had to be asked for the final papers.

We ended up finally with the judge threatening to fine my husband's attorney because he felt that we had been at this long enough. He asked me if I wanted a divorce and I said yes. And my husband, and he said yes. So he said, "These people want to be divorced. There's no chance for reconciliation. You're just holding things up. So if you continue, I'm going to have to charge you $500, you're wasting all of our time." Well, they were still screaming about this $7,500 for 1993 and 1994 taxes. And they were carrying on that they were afraid I was going to dissolve my bankruptcy and the creditors wouldn't be paid. So I informed the judge that on February 27, 1997, I had signed the first portion of the personal injury case over to my bankruptcy attorney to be sent to the trustee. I said, "He has already received those funds. I in no way intend to renege on that joint debt." And I made sure I said joint debt because the vast majority of my bankruptcy is the joint debt.

I will get my divorce. My attorney said to me, "He's not going to bother with [these small debts] in four years. Nobody's going to bother with this in four years." I looked at Pete. I put my finger in front of my lips, because I don't want them to hear him say that. I said, "You really don't think he'll drag me back into court in four years?" He paused and said, "You know, he would." You deal with normal people most of the time so that it takes a special mind-set to be able to deal with an abusive person. They're on the jihad. You know? It's a holy mission to them. They don't let go. They have to keep that hook in.

I spent a lot of this week being intermittently depressed and elated. Tuesday we were at court, Wednesday it hit me that I really hit another milestone and I was going to be divorced and I was happy. But after that, I went back to: he has a hook into me for four and a half years where he can drag me back into court. And I can't change my name for over two years so that I still have to carry that. And I also found myself being very sad at the fact that I had truly cared for this person.

I [was lucky to have] had an attorney who was compassionate, who never got upset with me. I'm sure there are some attorneys that would have said, if I had gone back to them after reconciling, "There is no way in the world I'm going to deal with this. He's a lunatic and you're stupid." But it is extremely common for women to go back at least once, if not more than once, because

women inherently want to make things right. And I think Cinderella should be shot and Disney should be burned because there is no such thing as the once-upon-a-time fairy tale. We are setting our daughters up for these nightmares instead of teaching them to stand on their own two feet, which thank God I didn't do with mine.

I am breathing a little easier [since the final divorce hearing] because he's indicated that he really has no earthly idea where I am, so I feel a little more secure. I'm not as apprehensive. I used to go to bed every night and when I went past the front door to go up the steps, I would always look out the window half expecting one night to see him out there. And I would do it and I would say, I know he's not out there. But I would have to do it anyway because in the back of my mind I always knew that he may very well one night be out there. And I don't feel as compelled to do that.

I had absolutely no contact with [experiences of abusive relationships] at all. I think that's why I was as vulnerable as I was. I had never even been introduced to it so that I just got sucked in—hook, line, and sinker. I believed what I was told; I was very vulnerable. You don't realize that you're being duped and set up. And then you just keep trying harder to make it right, and there is no way. I always approached everything as if it could be fixed, it could be solved, it's going to get better. And when you're dealing with someone like this in a situation like this, it doesn't get better, because you're not the one that has to deal with it. It's the abuser that needs to do some dealing with. And you don't realize that.[34]

I used to be [confident and capable] in every sense of the world. I would be that way for business, I would be that way for you, and I would be that way for myself. I have lost myself. And that's where I am still not capable of being decisive. I don't know what I'm going to do with the rest of my life, and I can't make that decision now. I'm coming back because I'm using my decision making ability, my organizational skills, to help other people, and in other areas, which is getting back on my feet. But inside I still am not

34. Roddy Doyle's character Paula Spencer says:

> I keep blaming myself. After all the years and the broken bones and teeth and torture I still keep on blaming myself. I can't help it. What if? What if? He wouldn't have hit me if I hadn't . . . none of the other fists and belts would have followed if I hadn't. . . . . He hit me, he hit his children, he hit other people, he killed a woman—and I keep blaming myself. For provoking him. For not loving him enough; for not showing it. (*The Woman Who Walked Into Doors*, 170)

capable of making a decision for myself. And I feel very lost in that respect. Very vulnerable. Because before I could have made a decision and picked up and gone on. And now, I don't know where to go or how to get there or what my next move should be. And that's not me. When I'm healthy, I'll be able to do that again.

There's a lot of emotional abuse that goes on, and I think that a lot of times that's far worse than physical. Because you can't show it, you can't prove it. It just goes on. If you have a bruise it heals, it goes away. The other is a lot deeper.

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Jane's narrative emphasizes that the focus needs to be on the complex situation of battering, not on the narrow confines of battered women's syndrome. After learning the details of her experience with her abusive husband, it is hard to pigeon-hole Jane into one diagnostic category or another. Her behavior was not masochistic or aggressive or controlled by drugs and alcohol. She did not accept the abuse as "punishment" she deserved. Things were much more complicated than that. She loved him and she left him, then they reconciled. She was scared and defiant. She was powerless to stop his tantrums and capable of smoothing things over once Robert had erupted. Jane's story is valuable because it gives us a chance to hear a woman victim of intimate violence tell what happened in her own words. And her narrative thereby challenges the conventional wisdom about battering, illustrates the importance of context in understanding situations of abuse, and presents some dilemmas of defining intimate violence.

Jane's story challenges the conventional wisdom about battering—it calls into question our classifications of severity of abuse (and, therefore, our determinations of what is "serious" and what is not) and the sources of our knowledge of the subject. Much of what is generally known about intimate violence is stereotypical. "The Burning Bed," Farrah Fawcett's movie-of-the-week, is widely credited with bringing battering into the public eye. That story, of a battered woman who killed her abusive husband while he slept, shaped public consciousness of the issue. Other dramatic stories include those of Joel Steinberg and Hedda Nussbaum, of Lorena Bobbitt and the wayward John Wayne, of Nicole Brown and O. J. Simpson.

Most of what we "know" about these dramatic stories of battering comes from the media frenzy. In those cases, there is often one grand act of destructive violence that brings the issue into the public eye. A murder, or

two, a graphic assault—those acts typify the saga of intimate violence. In comparison, other more parochial instances often seem less flamboyant (and, to some, less serious). We may know a woman whose boyfriend once hit her when he was drunk, or someone whose partner needed to know her precise whereabouts every minute of the day, or a wife whose husband determined if and when they would have sex. Are those examples of intimate violence? Or are they mundane examples of men being jerks? Because they don't come to trial, many people would say that they're not battery. But how do we know? In addition, much of what we know about intimate violence comes from sources either too remote or too near. We see movies and read articles about the experiences of battered women. We read newspaper accounts of the trials of women who kill their abusers. In those cases we really don't hear the whole story. Or we know about abuse because it happens to us or to people close to us. In those cases too we might not hear the whole story.[35]

In Jane's case, we have the chance to learn the details of one relationship of intimate violence. It is not a cinematic story. Indeed, it is not particularly exceptional. But this story of Jane's experience gives us a view of another example of intimate violence. Jane's husband did not break her bones or blacken her eyes, but he did terrorize her. That counts as intimate violence. He did not beat her to a pulp but he did use sex to illustrate his capacity to control her. That counts as intimate violence. He did not pummel her kids or kick her dog, but he did take every opportunity to belittle her, to make her question her perceptions, to demean her. That counts as intimate violence. He did not destroy her belongings, but he did destroy her finances. That counts as intimate violence. He did not kill her, but he did make sure that those years of her life were not her own by stalking her, wreaking havoc with her credit, and accusing her of harassing *him*. That counts as intimate violence. These are things we learn by looking at Jane's situation, not at whether she fits the definition of a syndrome.[36]

35. Despite their close relationship, Jane said, in her narrative, that she has not yet told her daughter the details of her relationship with Robert. Although Susan twice provided her mother with a safe place to stay and helped her to leave the abusive relationship, Jane has not yet felt comfortable telling her daughter some of the private details of the abuse. And Susan has not yet shared, with her mother, her impressions of the relationship and the deep misgivings she felt when Jane reconciled with Robert.

It makes me wonder how much we can ever, really know about the details of relationships of intimate violence without being inside them.

36. My emphasis on the centrality of the battered woman's perspective to all discussions of intimate violence is shared by Nancy Hirschmann in her "The Theory and Practice of Freedom: The Case of Battered Women," in Mary Lyndon Shanley and Uma Narayan, eds., *Reconstructing*

Another lesson demonstrated by Jane's story is that these situations are complicated and contextual. Robert was not an entirely demonic person. At the beginning of the relationship, he seemed charming and loving, and Jane was very happy. As Susan said, "It's not like she brought this guy home and he was a complete whacko from the first day you met him. He was very charming, and couldn't be nicer. He was so sweet." And even after everything that happened, Jane seems to still have some concern for him. She said, "Even though I know he's the one with the problem, . . . even though I would never have anything to do with him again, a part of me loved him and will always have some kind of feeling for him." It is important to remember, too, that the change was gradual and that hindsight is twenty-twenty.

For the first few years they were involved, the relationship was quite stable. Certainly there were disagreements about money and in-laws, but nothing notable. Later, the disagreements were still about money and family, but the intensity had changed. But what makes the relationship one of intimate violence is the context of those interactions. When Jane learned that Robert had a record of violence (expunged thought it was), she reacted to his threats differently. When he threatened her in anger and had guns in the house, it was not "just a disagreement." Because he knew Jane's weaknesses so well, he was able to manipulate her feelings and reactions, to gauge what she would take and what she wouldn't. For a while, he was able to dominate her through abusive sex, as long as he could try to persuade her that she was too naive to enjoy it. This is why Jane thinks abusive sex was one of his forms of control. He knew that she wouldn't tell her family about something so intimate.

Yet despite some examples of abuse, in other situations Jane stood up to him. She was both powerless and powerful. When he demanded that she sell her jewelry to help replace her lost wages, she acquiesced. When he demanded that she fire her personal injury lawyer, she did, but Jane also chose the new attorney. (Although she suffered Robert's rage in consequence.) When he wanted them to make wills favorable only to his mother, she refused. But in 1994 she did agree to splitting the property deeds in a way financially detrimental to her. Sometimes she would defend him to others,

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Political Theory: Feminist Perspectives (University Park: Pennsylvania State University Press, 1997), 194–210. Hirschmann and I disagree, however, on the implications for freedom. She believes that the concept itself is gender-biased, while I maintain that the prevailing conceptions are so, produced in a context of gender inequity.

sometimes she would not. (Even as she knew a failure to protect him would be viewed as an assault, and Robert would retaliate.) She was wooed. She left. She returned. She left again. She loved him and pitied him and despised him. Jane's behavior cannot be classified as either "victim" or "agent." She was both, interchangeably, sometimes simultaneously. And those critics who want to see her in either one role or the other, as they ask "Why didn't she leave?" miss the complications of intimate violence. In their rush to determine precise levels of complicity and responsibility for Jane and women like her, these observers dismiss the contexts in which situations of intimate violence occur.

To some extent, the constant focus on leaving violent relationships is ironic. As Jane's narrative show us, whether she left the relationship is but a small piece of the story. And her interactions with the legal system indicate how often lawyers and judges overlook the issue of intimate violence, particularly when the case is in civil court. Despite the paper trail Jane collected, the judge in her final divorce hearing had no knowledge of prior restraining orders. Because she had agreed to a no-fault filing in an attempt to end the relationship quickly (rather than spending years battling motions in a for-cause divorce and being stalked), there was no institutional way for Jane's abuse to be made known to the judge. And, therefore, there was no way for the judge to understand that Jane was absent from court appearances because she was concerned for her safety. Indeed, the fact that Jane physically left the marriage affected the divorce proceedings in only one way. It made it nearly impossible for her to claim any marital property (including household furniture and goods from the antique shop).[37] These are the sort of interactions many battered women have with the system. And they are very different from the more dramatic, movie-of-the-week cases. In those cases, which end in severe physical injury—particularly those in which the battered women strikes back, killing her abuser—legal institutions move from being uninformed participants to assigning blame and guilt. As Christine Littleton sardonically remarks: "The legal system is somewhat more generous [than traditional society]. It does not blame *all* battered women for their plight, only those who do not immediately sever their relationships and leave their batterers."[38]

37. Remember that, after Jane left in 1992, Robert held a going-out-of-business sale at the antique shop. Jane never received her share of the profits.

38. Littleton, "Women's Experience and the Problem of Transition," 328.

But I argue that, for *all* victims of intimate violence, the question "Why didn't she leave?" is theoretically and ethically irrelevant. And as long as the question is raised, the combination of two wrongs (the abuse plus the failure to leave) will deny rights to the victim of intimate violence. This is true for five reasons: (1) the question demands overgeneralization that effaces the experience of individual women; (2) the question implicitly contains dangerous assumptions about the extent of women's agency; (3) the question wrongly focuses on the victim rather than the perpetrator; (4) the question leaves the systemic problems unexamined; and (5) the question assumes that there is only one right answer.

Regarding the first reason, the sweeping explanations necessary to answer the question threaten to block out the actual experiences of women. Battered women are not all alike. They cannot be reduced to a collection of psychological tics and glib descriptions in order to show that they are "not like us." The overgeneralizing statements about women victims of intimate violence and the situations of violence themselves efface the significance of the collected events. As I mentioned previously, Martha Mahoney has observed that focusing on a complete break in the relationship tends to discount the many instances in which women separate temporarily.[39] The actions victims of intimate violence take can rarely be understood in black-and-white terms. In one study, nearly three-quarters of battered women had left home after a violent episode; in another, approximately one quarter "left temporarily after each battering incident."[40] These temporary separations do not often register to experts as "actions" battered women take. It seems that unless a permanent split results, the actions of these women are understood as taking no action. In Jane's case, such generalization would mean that the first separation would go unnoticed, and, of course, that the importance of the subsequent reconciliation (following Robert's commitment to seek counseling) would be ignored. And, more important, overgeneralizing about battering might lead observers to conclude that Jane's departure from the marital home was the end of that relationship. What would be missed, of course, are the many instances of telephone harassment, the details of his financial shenanigans, and the stalking. In Jane's case, leaving had no effect on Robert's efforts to control and intimidate her. Overgeneralizing, reducing the sum total of Jane's experience to the moment of departure, would clearly misrepresent

39. See Mahoney, "Legal Images of Battered Women."
40. Mahoney, "Legal Images of Battered Women," 343.

"what happened." As Shirley Sagawa writes: "In almost all respects, individualization is preferable to the battered woman syndrome approach which both neglects the plight of women who do not fit the legal definition of the battered woman and labels as psychologically impaired the women who do."[41]

The second reason the question is irrelevant is that it doubts the extent of women's agency. Battered women are, by definition, the victims of abuse. But that doesn't mean that they are lacking agency altogether. By the same token, it does not mean that their powers to affect change in their own lives are unencumbered and idealistically "free." As Elizabeth Schneider, an expert on battering, urges: "As lawyers for battered women we must take account of battered women's experiences in being acted upon *and* acting."[42] Jane's story is not that of an unremitting victim, though neither was she the sole determinant of the events of the marriage. Consider, for example, the circumstances of the reconciliation. Jane wasn't forced to give the relationship another try. She chose to do so for many complex reasons, including her affection for Robert, his contrition, his commitment to counseling, and her desire to make the marriage work. From our vantage point it might seem clear that Jane should not have returned to the relationship. But try to imagine her perspective at the time. He's sorry, he's determined never to let it happen again, the first years were happy—why not give it a second try? Although her reasons for reconciling might seem reasonable, that doesn't mean that Jane was responsible for all the actions that followed. Robert had the shotgun, Robert made the threats, Robert set her up for financial ruin.

This leads to the third explanation—that the question wrongly focuses on the victim of intimate violence rather than the assailant. In some cases, victims of intimate violence question themselves even more. Susan, Jane's daughter, said of her mother:

> I think she's embarrassed [about what happened]. I think you say to yourself—how could I be duped, tricked, deceived? And then you start to question yourself. What is it about me that allows me to be

41. Shirley Sagawa, "A Hard Case for Feminists: *People v Goetz,*" *Harvard Women's Law Journal* 10 (1987): 267.

42. Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," *Women's Rights Law Reporter* 9, nos. 3–4 (fall 1986): 222.

> tricked and deceived? Do I have good judgment? And she's been through all these things.

Although these questions are often asked, they focus on the personality of the victim rather than on the intimate relationship that gave rise to the violence. There is no evidence that women who have once been involved in abusive situations are doomed to a series of dangerous relationships. Violence arises in specific relationships involving individual people. Any theories that ignore that in favor of sweeping generalizations are worth little.[43] Note, for example, that Jane's first marriage, which lasted nineteen years, stands in stark contrast to the second. Although it ended in divorce, the proceedings were amicable and, by all accounts, the marriage was not violent or abusive. That suggests that there might not be anything "special" about Jane that led to the intimate violence.

Besides, why do so many insist it is wrong for her to stay? Why should *she* leave? If a bank had been robbed three times would we wonder why it did not close the branch and move to another neighborhood? Why does no one question why the abuser gets to stay? If a battered woman does leave, she faces even greater odds of being injured. And if she does not leave and acts to protect herself, causing harm to her assailant, she is in serious legal trouble. All at once, the violence inflicted by the abuser, which was seen as "a domestic problem," fades away and all the focus is on the violent act of self-defense, which is of course "a crime." Women who fight back are held to standards that were never considered for their abusers. Donald Downs and Evan Gerstmann, in *More Than Victims,* suggest an important legal reform—a jury instruction for cases of murder designed to level the playing field for battered women.

> A person has no legal obligation to leave a violent relationship. . . . The right of self-defense can never be waived, regardless of the status of the attacker. If you find that the defendant killed because she reasonably believed that lethal force was necessary to prevent imminent serious bodily injury to herself, you must find that she acted in

43. Now, of course, generalizations have their worthy place. They can be useful descriptions of broad patterns and gradual changes. My objections arise when generalizations are substituted for the difficult (and necessarily imperfect) work of close examination of particular cases. Differences among those cases, visible only with contextual analysis, might help further our understandings.

> self-defense. That the defendant had earlier opportunities to leave the relationship, or that the victim is related to the defendant, does not deny or diminish her claim of self-defense in any way.[44]

This proposal is laudable. It is one way to help courts move beyond the tendency to blame only the women who do not leave, and it puts the focus back on the abuser.

But we must be careful, too, in how we examine the abuser. As Katha Pollitt points out, the tendency to demonize the abuser makes him seem like an anomaly, and all our attention then reverts to figuring out what's wrong with the battered woman. Pollitt writes of the Steinberg-Nussbaum case:

> Ms. Nussbaum's warped psyche, her inability to flee a savagely violent relationship, her inaction the night Lisa lay dying—these are interesting subjects, endlessly discussed on TV, in the papers, at the dinner table. But surely they are not more interesting that [Joel] Steinberg's warped psyche, his descent into brutality and megalomania. He, too, was a human being with moral choices to make, a product of the same society that produced Hedda. But it was she who got the in-depth analysis; what he got was epithets: "monster," "devil."[45]

If our focus on the abuser is too sensational, too exceptional, we run the risk of spending all our energy examining the woman who was abused. Is it surprising that nobody asks, "Why did he hurt her?" That might require taking a good, hard look at the many ways, less dramatic, perhaps, than the Steinberg nightmare, that women are harmed. We cannot do that as long as we stick to the old question.

That points to the fourth problem, asking, Why didn't she leave? The systemic problems are left unspoken as critics everywhere continue to dissect the victims. When tragedy strikes, public critics often identify isolated failings of the judicial system. But rather than assuming the system works as intended to protect battered women (through restraining orders and the

44. Evan Gerstmann in Donald Alexander Downs, *More Than Victims: Battered Women, the Syndrome Society, and the Law* (Chicago: University of Chicago Press, 1996), 234.

45. Katha Pollitt, "Violence in a Man's World," in her *Reasonable Creatures: Essays on Women and Feminism* (New York: Vintage, 1994), 28.

like), accounts such as Jane's point out the difficulty of even inserting issues of abuse into civil legal proceedings. Too often, women decline to pursue a charge of violence out of a desire to just settle the legal conflict and be rid of the abuser. What if we instead ask: how can the legal system better protect the victims of intimate violence? We regularly read newspaper reports of women who are killed by abusive partners, despite the fact that they have obtained restraining orders against the assailants. In many cases, the police are simply unable or unwilling to devote personnel to enforcing restraining orders. It seems to be assumed that the specter of the law alone will keep the abuser away from his target.

In Jane's case, the police who took the domestic violence complaint in 1992 were more concerned about the guns Robert owned than with the threats he had made to his wife. And although Jane followed the recommendations, having a permanent restraining order really gave her very little protection. After she moved to her daughter's house, she went to the local police department to inform the authorities about the situation. She recalls: "[A] woman took me in, took a copy [of the restraining order], and basically patted me on the head and said, have a nice day. Didn't ask whether this man was around. Didn't say is there a pattern so that we can have an officer that just rides through. Nothing. Just shuffled the papers and sent me on my way." Asking "why didn't she leave?" certainly doesn't provide any impetus to address the problem of police apathy.

Another example of an institutional problem left unquestioned is the ease with which mutual restraining orders are granted. Jane went to court in June 1996 to get a restraining order after several incidents of harassment. But Robert had the same goal in mind, as he sought protection from Jane "stalking" him. When he saw her in the courthouse that day, Robert created a scene, yelling "I'm terrified of that woman." Naturally, he got a lot of attention. Jane's attorney recommended that they agree to mutually dismiss the restraining orders, as he believed that Robert would use the restraining order to harass Jane (accusing her of following him, calling him, and so on). Jane agreed. It has been established that granting mutual orders of protection can be harmful to women victims of intimate violence.

> The New York Task Force on Women in the Courts concluded that a woman with a mutual order of protection is in a worse position than a woman with no order at all, since the mutual order makes her

> look equally violent in the eyes of the courts, and the husband may not be held responsible if there is another violent incident.[46]

Mahoney urges that courts need to take a closer look at the situation in which the requests for restraining orders occurs. Courts should ask, "Which of these people needs her [or his] capacity to separate protected?"[47] That would take more time and effort than simply granting requests, but the alternative is unacceptable. As Jane observed:

> It takes a year or better for the courts to see who it is that's doing the harassing and the manipulating, because initially the woman is on the receiving end of it, but the man is saying she's the cause. So since he's the only loud voice, that's the one everyone listens to. . . . Women think that the courts are there to protect them and to help them, when in fact that couldn't be further from the truth.

That problem cannot be solved by demanding to know whether the woman left the relationship. Indeed, it usually arises after the woman has "done the right thing" and left.

This leads us to the fifth reason we must refuse to ask the question. "Why didn't she leave?" assumes implicitly that there is only one right answer: "She did." For the many reasons discussed previously, this assumption that leaving is the universal solution to intimate violence is simplistic at best, naive, and patronizing to the core. As we have seen repeatedly, leaving a violent relationship is no guarantee that the violence will end. In some cases, it causes the abuse to escalate. Leaving does not help the women who seek legal redress. Leaving does not promote stable financial and physical futures for the abused women and children. For many women, leaving a violent relationship is the best thing to do. But how do we respond to women who don't leave? Do we deny them moral personhood? Do we denigrate their agency? Do we dismiss their subsequent requests for protection? Do we assume that any further violence is "deserved"? None of these options is acceptable. I do not believe a woman ever has a political, ethical, or legal obligation to leave an abusive situation.

46. Mahoney, "Legal Images of Battered Women," 351, citing New York Task Force on Women in the Courts, *Fordham Urban Law Journal* 15 (1986–87): 11, 38–39.

47. Mahoney, "Legal Images of Battered Women," 351.

Using departure as a yardstick with which to measure culpability is the beginning of a long slow slide down a slippery slope. If critics can assign blame to a woman who doesn't leave an abusive relationship, where do they go next? If a woman who is repeatedly abused and does not leave is partially responsible for her treatment, what about a woman who is beaten three times? Or two? Or one? What about a woman who is subject to verbal harangues? What about a woman who accedes to her husband's desire to abort a pregnancy? Where will the lines be drawn? The ridiculousness of this exercise strengthens the argument I am making—that focusing on the behavior of the woman victim of intimate violence to make moral judgements is a mistake. Women must be allowed and encouraged to make decisions for themselves. And perpetrators of violence (in intimate situations or not) must be stopped.

As long as we continue to require explanations for an abused woman's failure to leave, we will be stuck in the same intractable he said–she said situation. Battering is wrong, as is placing the onus on the victim. Women should not have to leave their homes and their families in order to have their claims of abuse taken seriously. Once we refuse to ask the age-old question we can begin to see the place for freedom. Because a feminist theory of liberty *must* include (at its heart) the freedom to do what others might call the "wrong" thing. It must contain a commitment to The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process—as well as the recognition that, definitionally, application of this principle must be contextual and contingent.

The Agency Principle does not lead to licentiousness. It does not include the freedom to terrorize intimate partners; it does not include the freedom to abuse. But it does mean that victims of intimate violence are entitled to respect and consideration regardless of whether they were hurt once or countless times, regardless of whether they fought back or cowered, regardless of whether they left.

This approach to freedom well illustrates the problems with hewing to a strict dichotomy of negative and positive liberty. Were we to advance either conception, as generally defined, the political implications would be bleak for victims of intimate violence. A strict negative conception of liberty would

focus only on limitations on abusive actions. That is a crucial point. Batterers must not be allowed, by law or by social convention, to hurt others. We have a right to be free from abuse. But what comes next? If, despite the admonitions, abuse continues, what options are open to the victim? How might institutions and culture be arranged to support a situation in which victims of abuse receive the care and protection they deserve? Negative freedom offers us little on this point. Similarly, positive freedom, as usually defined, provides only a partial solution. Under this conception, we might feel justified in forcing a victim to break free from her abuser, perhaps through police interference. And although that might be a desirable immediate solution, I have argued herein that the theoretical and political implications for women's freedom are dark. Such an approach, even though it is respectful of women's safety, ultimately deprives a victim of agency. If she is hurt and then further infantilized (even by well-meaning folk), the prospects for equal personhood are diminished.

Instead, the approach I advocate—The Agency Principle—fits well with the idealist notion Miller advances: "To be generally free, a person . . . must decide himself how he is to live, not borrow his ideas from others." Individual conscience in politics must begin on an intimate scale—for example, a decision about the conditions of one's life. Self-determination is an important facet of freedom, and freedom requires that persons be treated with respect, even as we may disagree with the choices they make. Exerting control over the victimized is not an appropriate feminist solution. We should work to improve the range of choices for women, we should work to diminish the incidence of battering. But we must allow individuals to make their own decisions, even as we disagree. Only then can we hope to be equal, and free.

7

TOWARD A FEMINIST THEORY OF LIBERTY

Identity, privacy, and agency are undoubtedly important, theoretically and practically, to women's lives. But what is also needed are explicit connections to the construction of a feminist theory of liberty. How are these principles related to a coherent whole? Each of the three case studies in Chapters 4, 5, and 6 illustrated one principle of a feminist theory of liberty. I chose to focus on contextual studies in order to examine how liberty interests might be detected, articulated, and exercised in legal settings. Each case study gave rise to a principle, which was generated contextually and applied contingently. The

significance of this work appears on three different levels. First, there is the specific argument of the case study, as it relates to identity, privacy, or agency. Second, there is the general principle generated by the conclusions of that argument—a precept that voices some general normative conclusions about the role of liberty, specifically a feminist theory distinct from traditional notions. And third, there are the contingent implications of that principle—speculation as to how the principle would encourage liberty, quantitatively and qualitatively.

The Identity Principle, examined in Chapter 4, was created from the conviction that the U.S Supreme Court's decision in *Romer v Evans* produced the correct practical result (the overturning of Amendment 2) by the wrong means. The Court's conclusion had the effect of saying that, in the eyes of the law, (sexual) identity is irrelevant to equal protection. Because of the atmosphere of intolerance, such a ruling is dangerous for gays, lesbians, and bisexuals, as well as for heterosexual people generally. When the Court declares certain categories of identity irrelevant to legal consideration, people who are constituted by those categories, and who may suffer discrimination based on their participation in those categories, are left out in the cold. I have suggested that the problem with Colorado's Amendment 2 was not that it classified people on the basis of sexual orientation *per se* but the way in which people were classified. The determination of individual identity was the province of external imposition, not self-definition. Such identity construction is problematic because it does not allow for self-government in an arena so personal and central to liberty—it makes not just what we do but *who we are* subject to the classifications (thoughtful, whimsical, or malicious) that others impose.

In addition, such a broad dismissal of identity from the province of the law misunderstands the complicated nature of individual identities, and the ways self-description and generalized group characteristics can collide. Individuals do not self-evidently belong in only one category of identity, they do not belong in perpetuity, and the significance of their participation (for example, whether chosen or forced) is not static. Because of these concerns and the conviction that they are central to liberty, I have proposed The Identity Principle—that individuals should be able to define themselves as they wish, and that such definitions are not mutually exclusive, permanent, or of fixed meaning. I argued that self-definition is necessarily prior to claims of freedom: I must know who I am before I can clearly decide what I want and how I want to behave; and I must be able to distinguish between who I

believe myself to be and who I am declared by others to be, in order to determine the course and character of my life.

The implications for theoretical understanding of liberty are several. First, acceptance of this principle places the (self-identified, self-defined, self-governing) individual squarely at the forefront of politics. The individual so centered is neither atomistic nor filled with anomie. She is separate and connected, autonomous and related to others, ruling herself and cognizant of the interconnectedness of all of us. Second, adoption of this principle challenges the broad categorizations used in legal reasoning, and questions the reliability of such classifications. Judges and lawyers must ask themselves if considering the treatment of broadly defined classes in discrimination cases could prove harmful for the individuals so categorized. It raises the possibility that the stereotyped group may be far less than the sum of its diverse parts. My suggestion here is not that all group identity-based justifications be eliminated from legal reasoning, nor that we dismiss the role of law in forming identities. Of course it will be necessary to consider group identity in cases involving stereotype-based bias. But judges and lawyers and legislators should remind themselves that group identity is an imperfect proxy; that the differences among group members are often greater than the differences between groups. Identity does matter in the legal realm, and it must be considered in its complexity. Third, the principle deals a blow to the conventional understanding of identity politics. No longer should group labels serve as shorthand for individual characteristics. Accepting The Identity Principle means that each individual is recognized to be the arbiter of identity, and the parameters of that identity are understood to be contingent, contextual, and impermanent. Without such a principle, a feminist theory of liberty is doomed to replicate the dangerous generalizations of patriarchal politics.

The Privacy Principle, the focus of Chapter 5, was inspired by a desire to sort out the implications of treating women and men differently in the arena of reproductive rights. How can it be just for men and women to have different (and unequal) extents of procreative freedoms? Would giving women the power to make primary decisions about reproduction risk aligning too closely the interests of women with the interests of society in propagation of the species? Would expanding women's reproductive rights result in decreased rights in nonreproductive contexts? The examination of several cases of conflicting parental rights claims arising from noncoital reproduction convinced me that the very parameters of the argument were

faulty. Most discussions of the propriety and desirability of surrogacy have focused on the implications of making parenthood an explicitly contractual relationship. Freedom to make contracts has been the traditional crutch of surrogacy apologists. The ability of women to participate (freely) in such contracts has been the bugaboo of opponents of surrogacy arrangements. But that debate misses the crucial ethical problem.

The issue is not whether women or men can engage in contractual exchange of their parental rights. The issue is whether it is acceptable for the power of the state to be brought to bear when such agreements are contested. Is it appropriate for the state to force a parent to forfeit parental interests because a contract had been signed? I suggested that The Privacy Principle—that individuals have the right to control their bodies, and that the state should not force individuals to act against their (declared) wills in ways that compromise standards of human dignity—could be a guide for judgment.[1] I asserted that the right of individuals to control the use of their bodies and body products is foundational. The state must respect and act to support the procreative decisions of individuals. That responsibility, however, is not absolute. Individuals should be free to make decisions regarding reproduction and sexual expression. They should be free to make those decisions even if they are not popular (as in the case of commercial gestational surrogacy) or even tolerated (such as adoption by homosexual couples). They should be allowed to make those decisions within the confines of a legal contract. The liberty of an individual to control or contract the terms of reproduction, however, is not limitless. That means that the state may support the decisions of some contracting parties (say, gestational nongenetic mothers who want access to their children) and not others (for example, intending parents, or genetic nongestational mothers who want custody of an infant born of a surrogate).

That discrepancy does not trouble me. The limits must be drawn in accordance with a standard of antisubordination, not a notion of strict, formal equality. It is unacceptable, ethically and politically, for the state to force individuals to complete the requirements of a contract that violates standards of human dignity. Those standards are, admittedly, contentious, but should be considered in light of a desire to avoid the exploitation and commodification of persons. This is a complex way of stating a simple moral

1. One reviewer asks: what about the draft? I suggest that the draft can be reconciled with The Privacy Principle only if there is a meaningful exemption for conscientious objection.

precept: people should decide for themselves how to conduct their reproductive and sexual lives, and the state has no business forcing them, against their wills, to behave contrary to standards of human dignity.

The implications of The Privacy Principle are important and complementary to the concerns and goals of feminism. First, it does not imply a roll-back of reproductive rights. Feminism is not simply dedicated to expanding the abilities of women without regard for the consequences of those possibilities. Suggesting limits to reproductive rights is no more threatening to women's freedom than the notion that procreative liberty is acontextual, ahistorical, and infinite. I suggest that defining the limits of liberty in light of a principled commitment to avoid the subordination of persons can help to clarify the terms of the debate. (Of course, I contend that the fetus is not a person and that the interests of the fetus are not equivalent to those of the pregnant woman.) When it comes to procreative freedom, an absolute lack of restraint is neither advised nor desired. Indeed, the emphasis that freedom is limited by an antisubordination principle underscores my assertion that liberty and equality should be considered partners in the search for justice.

Second, a naive faith in contracts is contested. Free market ideology does not require abdicating moral standards. Contracts and ethics are not inimical. Upholding a surrogacy contract, and requiring the gestational mother to surrender her parental rights solely on the basis that she signed a contract, is unacceptable. So too would be a decision enforcing a verbal agreement for a wife to provide sexual services on demand for her husband just because she had once agreed to do so. Both instances would require the state to compromise standards of human dignity in order to complete a contract. Contracts are not and should not be indefeasible. The right to control one's own body does not extend to the right to control another's body, even if access was granted contractually. We must not sacrifice the substance of justice to the interest of contractual procedure.

Third, endorsement of The Privacy Principle echoes the death knell feminist theorists have delivered to the notion of equality-as-sameness. Justice does not require that liberties be identical. Sometimes, as in the contexts of parental rights disputes arising out of noncoital reproduction, treating people differently and unequally is necessary for fairness. The basis for these disparities must be identified and understood in a particular context—in this case, the social reality that men and women are not similarly situated vis-à-vis either reproduction or social, economic, and political status. The Privacy Principle recognizes the importance of social context and moral precepts in

determining the scope of liberty. A feminist theory of liberty requires such grounding.

The Agency Principle, presented and discussed in Chapter 6, arose out of my deep concern that feminist critics not replicate the paternalistic attitudes of our opponents. There is a tendency, even among those of us whose business is critical thinking and close analysis, to mistake a self-assured opinion for a universal truth. When speaking or writing about women victims of intimate violence, the tendency persists to refer to "them" as a unified and foreign group. Scholars who write about battered women have often assumed that there is a battered women's syndrome—a pattern of behavior and emotion that identifies battered women, and which can be used to explain their unfamiliar ("irrational") behavior.[2] And for most lay commentators, the solution to the problem of battering is clear: women who are abused should leave their abusers immediately. They assume that abusers never change, violence only escalates, and women who believe they have no choices always have the choice to leave. The observers are rarely shy about speaking for battered women, generalizing their experiences, glossing over their concerns, and minimizing their feelings of power and impotence. Seldom heard are the women victims of intimate violence themselves.

The case examines in Chapter 6 focuses on the experience of one woman, Jane. She tells her story in her own words. The narrative presented is long but is justified by its intrinsic importance—it provides a rare opportunity for a woman victim of intimate violence to relate the context, the history, the details, and the aftermath of an abusive situation. Rather than having her experience related by an "objective" commentator (a journalist, a social worker, a judge), Jane's own words serve as the authoritative source of information.

Because I believe that such a respectful approach is vital for useful discussion of intimate violence, I have suggested The Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process. Liberty demands that individuals be considered capable of directing the goals and means of their own lives. If we

2. Although there were sound and pragmatic reasons for using this as a legal strategy, we must be careful not to reduce our comprehension of these situations to a labeled syndrome. The reality of intimate violence contains more complexity than can be managed by a clinical category.

allow social pressure to delineate which options are "correct" and to enforce accordant behavior, liberty is threatened. Even if the external observers have good intentions and hope to help a woman in need, the imposition of their biases is unacceptable. A bully who means well is still a bully. And even feminists can be bullies.

So how can inaction be justified if it might lead to further harm? If, for example, a battered women's group knew of a situation of abuse, knew the victim had decided to stay, and knew the violence would be repeated, how could those well-intentioned people stand silently and do nothing as the victim was hurt again? Wouldn't intervention in fact increase the freedom of the victim? The dilemma is difficult—impossible, perhaps. But my own concern about treating victims of intimate violence as persons entitled to respect means that I must encourage support for individual decision-making, even when I might not approve of the result. I think those of us who want to help have a political and moral obligation to work to improve structural options for victims of intimate violence, and we should encourage the abused to liberate themselves. For example, had Jane's daughter and her lawyer more strenuously encouraged her not to return to Robert, further violence might have been avoided. But The Agency Principle remains valid. We must be free to make our own choices, and it must be clear that in situations of intimate violence a victim who does not immediately leave is in no way "wanting" or "deserving" additional abuse.

The Agency Principle recognizes that individuals, regardless of their status or situation, are entitled to form and follow their own inclinations (provided, of course, that they do not harm others). Its implications for feminism and liberty are cautionary. First, it must be a reminder to feminists that pluralism is preferable to perfectionism. Despite our desires that women do what is best for us, we must emphasize that individual women are the best suited to judge. It is better, ethically and politically, that women decide individually how best to lead our lives rather than that women as a group lead the best life.[3] Even the best choice is compromised if it is not selected by an individual deciding for herself. And it is better to make our own choices than to be directed to a single correct choice. Hegemony is threatening to liberty,

3. I do not intend here to create a false dichotomy between woman and women. Instead, I underscore the claim that a utilitarian calculus (determining the greatest good for the greatest number) will harm the interests of many individual women. And as feminists, that is unacceptable.

regardless of whether the pressure comes from patriarchy or feminism. Second, The Agency Principle demonstrates that transcendent solutions are undesirable. There is no single appropriate course of action. Contexts and contingencies rightly interfere with universal solutions. That does not mean that we cannot work toward preventing situations of intimate violence. But it does mean that all situations of violence do not contain the same psychosocial dynamics, do not hold the same prospects, and cannot be resolved in the same way. I do not tolerate or endorse violence. But I do contend that an approach to liberty is better understood with reference to the "wrong" actions than the right. The Agency Principle is vital for feminism because it underscores the necessity of individual women doing what they believe is best for themselves, not just what the state or society or other feminists say is best.[4]

These three principles of liberty arise from distinct contexts and address different areas of legal conflict, but they are not mutually exclusive. The intersections of the principles emphasize the values of self-government, respect for human dignity, and encouragement of diversity. These values are important, but they are also vague. What, exactly, does human dignity mean? How much control is necessary for self-government? When does diversity verge on chaos? Those questions cannot be answered definitively. But they are necessary to the theoretical project. I suggest that, like liberty itself, the values' definitions should not be rendered concrete and immutable. Modern American jurisprudential equations of liberty are generally clear and consensual at the center.[5] Most of us, for example, will agree that it is impermissible for the state to dictate the strength and character of religious observations. We will accept that expression of political ideas should be protected. We will grant that the sale of human organs is unacceptable. But disagreements arise as the details of liberty are questioned and the contingencies of its applications are confronted. Does religious tolerance demand acceptance of ritual animal sacrifice?[6] Are public displays coincident with religious holidays ex-

4. I understand that these suggestions may be met with great reluctance by feminists concerned with the well-being of abused women. My concern for the recognized personhood of a victim of intimate violence led to The Agency Principle. Perhaps my critics and I can agree that state intervention in such difficult decisions ultimately, and inappropriately, treats women as children. The related issues, of the role of civil society, are troubling. I do hope my suggestions will further the conversation, not end it.

5. I do acknowledge that the notion of a consensual center is troubling for some.

6. See *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217,

amples of freedom or threats to it?[7] Can the state sanction participants in a religious exercise that includes ingesting hallucinogenic drugs?[8] Is pornography political speech?[9] Is flag burning?[10] Is cross burning?[11] And, as we discussed in Chapter 5, is selling sperm like donating blood or like selling a kidney? Does prostitution involve selling human organs, renting them for use, or selling services separable from the body?[12] These sorts of questions are vexing and intriguing. They are the hard cases—the situations in which solutions to difficult ethical and political judgments are complex and sometimes impossible. They are the issues that define the boundaries of the concept of liberty rather than the center—they arise where clear and consensual notions of liberty are lacking.

It is this border area that most interests and concerns me. If we can agree about much of what liberty includes, the stakes of politics are connected to those things or practices or beliefs that are uncategorized. We know that these disputes are related to liberty, but we do not know how or when or why the connection matters. In these case studies, I have focused on the theoretical skirmishes and political disruptions around and between the

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124 L.Ed.2d. 472 (1993). In keeping with The Agency Principle, I would answer Yes. Religious freedom means we must tolerate a variety of religious practices, not just those that we endorse.

7. See *Allegheny County v Greater Pittsburgh ACLU*, 492 U.S. 573 (1989)

8. See *Employment Div. Oregon Dept. Of Human Res. v Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d. 876 (1990). In keeping with The Privacy Principle, I would allow the use of peyote in a religious ceremony attended outside work hours. Although employers may well be justified in prohibiting drug use in the workplace, except for people in certain critical jobs (airline pilots, for example) that affect public safety, ritual religious use of drugs may properly be pursued in private time.

9. See *American Booksellers Ass'n v Hudnut*, 771 F.2d 323 (7th Cir.1985); and Catharine A. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993). Standards of human dignity—avoiding the subordination of women and commodification of persons—would exempt pornography from the protections given to political speech. I believe a lower bar of protection is justified.

10. See *Texas v Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

11. See *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992).

12. See Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988). Although a thorough discussion of the issue of prostitution is beyond the scope of this section (indeed, this book), I do suggest two ways in which a feminist theory of liberty might be applied. First, The Privacy Principle would ensure that the state be disallowed from enforcing a prostitution contract in which a customer claims he was deprived of sex despite his promise of money. In contrast, a prostitute who provided sexual services and was not compensated should be free to claim theft (or rape). Second, The Agency Principle would stipulate that prostitution could, at least theoretically, be a *choice* for a woman (even as we work to improve her range of choices, in the hope that she will not opt to be exploited).

boundaries of the concept. My goal in doing so was not to clumsily constrain the meaning and significance of liberty, but instead to focus on the unfocussed, on the hard cases. By demonstrating how liberty can arise, challenge, and prevail in difficult disputes, I show the relevance of a new feminist conception of liberty. This liberty is both similar to and distinct from canonical notions and legalistic understandings. Its details emerge in the interstices of political theory, law, and policy.

I recognize that this description sounds tentative and conditional. It is and is intended to be. Think of liberty as a structure, a building.[13] We are the designers. At the center of the proposed building the structure is straightforward. The rooms included (their intended uses, their dimensions, their configurations) are known and agreed upon. This is the clear and consensual center. But what surrounds that small and generally comfortable space? And beyond that, what and where are the exterior walls? Think of the three principles presented herein as generic designs for three exterior walls. In construction, they may not be built identically to each other or to the plan. The actual structure depends on the geography of the location, the materials available, the skills and predilections of the builders, the budget of the owner, and countless other variables. No two architects or contractors would produce exactly the same building. The most noticeable differences, however, would not be in the fact of the exterior walls, but their composition and placement. These are the details of geneses and applications of the principles of liberty. Despite their general and prescriptive nature, they are not steadfast rules. Rather, the principles are guidelines, the actual use of which depends on the context in which they are deployed and the contingencies of the applications. And, importantly, differences in the placement of exterior walls change the internal configuration of the building.[14] Understanding the boundaries of the building, of the concept, help us to understand the contents. I have advanced the three principles of liberty to demonstrate a building technique and a suggested blueprint. I am not interested (and think

13. By proposing the trope of a building, I am suggesting a sort of foundational notion, even as I urge it to be understood in an anti-foundational context. (Notice that there is no mention of a poured concrete slab or a basement.) Because the metaphor (and the theory) must be built, it is (self-consciously) constructed. The difficulties of such an approach are recognized, but I don't believe they can be avoided. Theory construction must begin from *someplace*, even as we acknowledge that the foundation may be both contingent and contextual.

14. Implicit in my approach are notions of "inside" and "outside." Boundaries are necessary for a theory of liberty, but they need not be fixed or rigid.

it both impossible and inadvisable) in charting out all the minutia of the interior. Such control would render the whole project useless. Instead, I want to encourage exploration of the interior, from the recesses of its niches and through the expanse of its atria. The interior area and the shape of the building will vary with the placement of the external walls, or conceptual boundaries. The possibilities are vast. Different decisions about the boundaries of liberty will yield strikingly different conceptions—a skyscraper, perhaps, or a pyramid, a mega-warehouse, a gazebo, even a yurt. The structure need not be permanent or inflexible. The details must be determined by thoughtful individuals, working together for equal justice. Those decisions create the substance of a feminist theory of liberty. And that is a task for all of us, together and singly.

In addition to the specific conclusions about the role of liberty in three legal conflicts, I have demonstrated the importance and relevance of three theoretical claims, all of which have exciting implications for politics. They are: (1) that liberty and equality are not necessarily antagonistic concepts; (2) that liberty is best understood as a complicated notion incorporating both negative and positive elements and bridging the divide among the republican, liberal, and idealist traditions; and (3) that attention to context and acknowledgment of contingency are integral to a feminist theory of liberty.

First, the resolution of the liberty-equality dilemma is complete. There is no dilemma. To feminist legal scholars who have consistently exalted equality and ignored liberty, I respond: understand the liberty-equality relationship in a different way. The concepts are neither mutually exclusive nor hierarchical. Liberty does not threaten equality. A desire for equal justice does not preclude attention to liberty. The concepts are more complex and more closely connected than often assumed. Like the important advances feminists scholars have made in understanding the dynamics of equality—particularly in dismantling the equality-difference opposition—my approach to liberty has the potential to reconfigure our theoretical assumptions, our scope of practical possibilities, and our possibilities for justice. Liberty need not replicate the problems of liberalism. It should not be associated with a conception of humans as atomistic, self-absorbed, and hyperacquisitive. It is, rather, a political tool as well as an aspiration. It is both a good distributed according to a principle of equality and a standard by which to measure the extent and character of substantive equality. Increases in the number and frequency of individuals claiming liberty interests may indicate increasing formal equality. Such claims are a form of political action, one that depends on a willingness

to accept the equal moral personhood of individuals. Liberty is in part a function of equality, equality is in part a function of liberty; but, more importantly, they can be complementary and cooperative concepts. Both aid us in our progress toward a feminist goal—a recognition of the value of individual human dignity in all its diversity.

I have also demonstrated the importance of understanding liberty as a complicated and multifaceted concept. The popular distinctions made between negative and positive definitions of liberty may help historical understanding, but they are not useful conceptually or practically. As I demonstrated in Chapter 2, such divisions of liberty are not accurate reflections of the treatment of the concept in the canon of political thought. Notions of liberty advanced by such political thinkers as John Locke and John Stuart Mill cannot be easily categorized into positive or negative. Their theories contain aspects of both understandings. Indeed, the theories are most interesting and provocative at the places where positive and negative elements overlap—particularly as they relate to the possibilities of state action. I argued that a proper understanding of liberty requires both limits on the state's ability to interfere in the lives of its constituents and affirmative institutional change to encourage the development of human potential in the greatest diversity. Those goals are not necessarily in conflict. Indeed, in the work of Mill the connections between the state's interest in the improvement of humanity and the individual's interest in being left alone are explored. The solution to potential conflicts is not to declare those goals inconsistent, but to offer a guideline for adjudicating disputes that may arise. Mill suggests the harm principle which, despite its gaps, is the ancestor of the approach to liberty I propose herein. The recognition that liberty is complex and rich in possibilities can also be supported by drawing on the three traditions of thought about liberty described by Miller. His assertion that liberty must incorporate elements of the republican, liberal, and idealist traditions is correct. By emphasizing the active and the passive roles the state should play, Miller reminds us that self-determination, government noninterference, and the importance of individual judgment are not inconsistent values.

The three principles of liberty I suggest each draw from the three traditions. Although each principle appears to be most closely related to one of Miller's three prongs (The Identity Principle and the notion of self-determination; The Privacy Principle and the realm protected from state interference; and The Agency Principle and the importance of self-definition and independent judgment), readers will have noticed that the principles in

fact overlap. In each of the three case studies, it is useful to imagine a different principle in play—and to notice that the legal conflicts would be resolved in much the same way. The synthesis that occurs in the creation and the execution of these principles demonstrates how close the theoretical traditions are conceptually and how their goals can be harmonic. I hope that this discussion has contributed to the assertion that the concept of liberty must not be reduced to bare bones; indeed, that a complex and cosmopolitan notion of liberty holds both theoretical and practical promise.

And third, I showed how central attention to context and contingency must be to the creation and implementation of feminist theory. One facet that distinguishes feminist theoretical projects from theory generally is the focus on women's lives, especially from the perspective of women ourselves. Sometimes theoretical projects sacrifice attention to detailed context in the desire to create grand, sweeping theories. That is a problem. Theories can only be as good as their explanations are relevant to specific situations. Feminist theorists have understood that claims about women's lives must be made about *actual women's lives*, not about women generally. Women are no more homogeneous than any other demographic group (perhaps even less so). There can be no theory that perfectly explains or justifies the ways we behave and the goals we value. Feminist theory is most useful when it emerges from the context of women's lives. That means acknowledging that, equal moral status aside, women and men are not similarly situated with respect to power, privilege, or opportunity.[15] That means recognizing that the physiological effects of reproduction affect men and women differently. That means accepting that valuing a pluralistic society precludes the possibility of creating a universal theory. Feminist theories must be created and examined and discussed within the context of women's experiences. But the practical applications of the theory must also be contextual. What is right for one women may not necessarily be right for another, or even for the same woman in different circumstances. This is the place for contingency. Feminist theories must avoid the possibility of universal applications. Despite the value of any particular theory for women generally, its relevance to the plight of a specific woman must not be assumed. The only way to keep the value of feminist theories is to grant that they are partial and contingent—their

15. This does not mean that I endorse a victim feminist approach or an epistemology that claims that the most oppressed can see truth most clearly. Indeed, I think such approaches are largely misguided.

utility depends on the context of their use, and their value depends on the contingency of their application. I have been careful to theorize accordingly: basing conceptual claims in contextual understanding and seeking solutions that take account of the contingency of individual conflicts. Such an approach must be central to the feminist theoretical enterprise. This reliance on contingency is scary for some. It threatens to fracture theory centrifugally. If every situation is different, how can we talk about them all? The answer is that this flaw is not a consequence of the focus on contingency but a necessary result of honestly appraising politics. Every situation *is* different. Any generalizations we make must be acknowledged to be rough and partial. This is not a theoretical problem to be solved; it is a given. To be politically and ethically relevant, feminist theory must accept the imperfection.

A feminist theory of liberty—grounded in contextual understanding, guided by appeals to principle, and applied contingently—is important essentially and instrumentally. Feminist scholars who have decried the lack of a feminist jurisprudence must recognize that a grand theory of rights and justice must contain a theory of liberty. Indeed, I argue that the jurisprudential project has been slowed as the primary focus of attention has been on issues of equality with less emphasis given to liberty. If we can work together to better understand and articulate the value of liberty for feminists, we will move closer to the creation of a feminist theory of justice. This project is but a small first step. In that respect, concluding is difficult. My concerns have not been fully allayed by this project. If anything, it has raised more questions than it has answered. What would other feminist principles of liberty look like? How do applications differ in legalistic and nonlegalistic contexts? Are these principles useful only in the context of American constitutionalism? How can the principles take account of the insane (and not merely "irrational," that is, contrary) individual? What is the role of autonomy in a feminist understanding of liberty? How will feminist theorists respond? My goal was to offer and explore some principles of a contextual, contingent, feminist theory of liberty. I did not intend to propose a fixed and finite theory. The desired outcome was, in the words of Clifford Geertz, "marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other." That is the most we can hope for.

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