

Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA

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ABSTRACT: This Article seeks to challenge and change the way that we talk about gender—ways that make it difficult to progress on the work/family front. In the thirty years since the Pregnancy Discrimination Act (PDA) was passed in 1979, while the roles of men and women have changed dramatically, the American workplace has changed only incrementally, leaving women and men who wish to participate actively in childrearing still struggling to navigate both work and family successfully. The way we currently think about work/family matters reflects a number of unstated and undefended assumptions, as well as an inability to move beyond recycling the “sameness” versus “difference” debate, which asks whether women just need access to traditionally male opportunities and rights or whether women have real physical and psychological differences from men. Yet this and other debates within feminism—for example, antiessentialism’s debate over differences among women or the difference versus dominance debate—look very different once masculine norms are placed at center stage.

This Article introduces what I have termed “reconstructive feminism,” which, instead of focusing on women and women’s identities, focuses on the gender dynamics within which those identities are forged. Reconstructive feminism picks up on the insight that what women need is equality, but argues that attaining equality first requires changing our existing masculine norms. The central tenet of reconstructive feminism is that gender differences, real and imagined, create social disadvantage when women are measured against unspoken and unacknowledged masculine norms. The fundamental reason that working women’s pregnancies or disproportionate load of family work creates gender disadvantage is that we still define the ideal worker as someone who

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works full force and full time, uninterrupted for thirty years straight—that is, someone supported by a flow of family work from a spouse, which most women never receive. Once these masculine norms are unmasked, reconstructive feminism provides a new framework within which to think about gender equality at home and at work.

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INTRODUCTION

This Article seeks to change the ways we talk about gender—ways that make it difficult to progress on the work/family front. When the Pregnancy Discrimination Act (PDA) was passed in 1979, it sought to level the playing field for women in the workforce. Yet thirty years later, women—and indeed men who wish to take an active role in family caregiving—still face hydraulic pressures when attempting to successfully navigate both work and family. This

is largely due to the fact that, while the roles of men and women have changed dramatically, the American workplace has changed only incrementally. In 2009, just as in 1979, most good jobs in the United States require a total devotion to work and a constant availability that reflect a decidedly masculine norm of the “ideal worker” for whom someone else (for example, a “wife”) attends to all domestic and caregiving responsibilities.

The way we currently think about work/family matters, as illustrated by popular media coverage, reflects unstated and undefended assumptions about what is good for children, how easy it is for women to return to careers they have left, whether women are conflicted or contented with the choices offered them, and whether or not men are even part of the equation.¹ This framework reflects several key elements of a “separate spheres” ideology: that it is natural for women to take sole responsibility for child care, that doing so fulfills women’s deepest nature and makes them happy, that men are naturally suited to employment and not caregiving, and that homemakers’ economic vulnerability in the breadwinner/homemaker model is no big deal. Separate spheres ideology embeds certain assumptions about gender—both of people and of jobs—that shape work/family conflict and the debates surrounding it.

Separate spheres ideology also interprets gender through the lens of difference, a framing that leads to the endless recycling of debates over whether men and women are the same or different.² This Article changes that framework by moving up one logical level, to focus attention not on women’s differences but on the *masculine norms* that make women’s differences seem so important.

Because masculine norms are a prime mover of the social power dynamics within which men and women negotiate their daily lives, feminists need to attend to masculinity. For too long, feminism has struggled to come to terms with differences between men and women (the sameness versus difference debate), differences among women (the antiessentialism debate), and the relationship of gender difference to gender dominance (the difference versus dominance debate). Each debate looks very different once masculine norms are placed at center stage. For example, feminist debates over sameness and difference emerge as fights among women who take different strategies to survive and thrive in the face of masculine norms: “tomboys” who seek to access the roles and behaviors conventionally associated with masculinity, and girly girls or “femmes” who seek to empower women in traditionally feminine roles.

1. JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 4-10 (2006), *available at* <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>.

2. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 32 (1987).

This Article introduces what I have termed “reconstructive feminism,” which, instead of talking about women’s identities, focuses on the gender dynamics within which those identities are forged. The Article also touches upon the relationship of reconstructive feminism to other major strains of feminist theory, notably antiessentialism and dominance feminism.

The goal of reconstructive feminism is not an ungendered world: Gender is too infinitely available as an established metaphor of self-expression to be simply abolished. It is just too useful a trope for expressing too many aspirations, too many angers, too much humor. The goal, instead, is to decouple gender from the key habits and conventions that impoverish many men and women—and brutalize anyone who cannot fit into that comfortable dichotomy; the goal, instead, is to catalyze gender flux.³ In the past, if a man did “women’s work,” he might well hide that fact, for fear of being thought less of a man. When I was young in the 1950s, men who took care of their kids for even an afternoon were “babysitting.” Today, washing dishes does not threaten manliness; fathers walk around wearing their babies in carriers without feeling their dignity threatened. Reconstructive feminism seeks to identify the key levers for encouraging this process.

I. THE FRAMEWORKS OF FEMINISM

A. *Is Feminism’s Goal To Illuminate Identity or To Examine Gender Dynamics?*

A common, oft-unexamined assumption is that feminism’s key goal is to illuminate identity. The canon of second-wave feminism includes many explorations of personal identity, from Betty Friedan’s *The Feminine Mystique*, which involved interviews of Friedan’s college classmates, to the consciousness raising that flowered in the 1970s, to much more recent books such as Leslie Bennetts’s *The Feminist Mistake*, which begins by telling the story of her mother and grandmother.⁴ Explorations of personal identity also predominate in the writings of many second-wave feminists of color.⁵ Third-

3. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1 (1990) (“The very subject of women is no longer understood in stable or abiding terms.”).

4. LESLIE BENNETTS, *THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH?*, at xv-xviii (2007); BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 49-52, 74 n.3 (W.W. Norton & Co., 2001) (1963).

5. See, e.g., PAULA GUNN ALLEN, *Where I Come From Is Like This*, in *THE SACRED HOOP: RECOVERING THE FEMININE SIDE IN AMERICAN INDIAN TRADITIONS* 43 (1986) (describing the experience of a biracial American Indian Woman); GLORIA ANZALDÚA, *En Rapport, In Opposition: Cobrando Cuentas a las Nuestras*, in *MAKING FACE, MAKING SOUL: HACIENDO CARAS* 142 (1990) (describing women of color and feminism); YEN LE ESPIRITU, *Ideological Racism and Cultural Resistance: Constructing Our Own Images*, in *ASIAN AMERICAN WOMEN AND MEN: LABOR, LAWS, AND LOVE* 86 (1997) (describing the experience of an Asian-American woman); AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES*

wave feminists, if anything, have focused even more on personal identity than have second-wave feminists.⁶

Here's a controversial statement: Feminism does a poor job of illuminating identity for the simple reason that no woman is only a woman. Women are affected by many forces other than gender. For instance, I am a white, professional, able-bodied, anxious, earnest, Jewish-Episcopalian, heterosexual woman. Feminism captures some (although, interestingly, not all) of the social forces that provide the anvils on which I have forged my identity.⁷ It virtually never talks about religion or tensions between white ethnicities, and talks only fitfully about disabilities, race, or class (although this fitfulness is a rich source of guilt and guilt-tripping). At a more basic level, feminism ignores other important shapers of my identity that are not social forces, notably genetics, psychology, and family history.

Reconstructive feminism focuses not on *identity* but on *the gender dynamics within which identity is forged*. Those dynamics stem from social norms that create gravitational fields that work powerfully to pull men and women towards conventional gendered behavior—norms built into workplace ideals, into our sense of who is a good mother and a likeable woman, and into our sense of who is a good father and an admirable man. Gender norms define the social expectations that shape the contours of our comfort zones, molding what we expect from one another. The influential French sociologist Pierre Bourdieu called this backdrop of unquestioned expectations our *habitus*, a useful, if ambiguous, term.⁸ Social psychologists refer to “schemas,”

110 (1984) (describing the experience of a black lesbian feminist); Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437 (1997) (describing the politics of queer identities); Patricia Hill Collins, *The Social Construction of Black Feminist Thought*, 14 SIGNS: J. WOMEN IN CULTURE & SOC'Y 745 (1989) (describing the experience of black women); R.W. Connell, *Gender Politics for Men*, in FEMINISM AND MEN: RECONSTRUCTING GENDER RELATIONS 225 (Steven P. Schacht & Doris W. Ewing eds., 1998) (describing the experience of a man exploring masculinity); Roberta Galler, *The Myth of the Perfect Body*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 165 (Carole S. Vance ed., 1984) (describing the experience of a disabled woman); Michael S. Kimmel, *Judaism, Masculinity, and Feminism*, CHANGING MEN, Summer-Fall 1987, at 14, 14-15 (describing the experience of a Jewish feminist man); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies* (Working Paper No. 189, 1988), reprinted in FEMINIST FRONTIERS 29 (Laurel Richardson, Verta Taylor & Nancy Whittier eds., 5th ed. 2001) (describing a white woman viewing white privilege).

6. For a review of this literature, see Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 125-26 (2007).

7. See generally Joan C. Williams, *Notes of a Jewish Episcopalian: Gender as a Language of Class; Religion as a Dialect of Liberalism*, in DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 99 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) (describing the role of religion in framing identity).

8. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 16 (1980).

"expectancies," or "stereotypes" (the latter term derived from the printer's term for a template);⁹ sociologists and economists speak of "social norms."¹⁰

The bad news is that feminism is fatally flawed as a way of exploring individual identity, but the good news is that it does not matter: Feminism's proper subject is not *women* but the *gender dynamics that disadvantage them*. The news that feminism is not responsible for describing women's identities should alleviate feminist angst about how to accomplish the task of taking into account all of the differences among women (antiessentialism). This task is impossible, because an analysis of gender dynamics is necessarily an analysis of gender. It is partial and can never be a "view from nowhere."¹¹ But neither can any other analytic. Analysis of the ways that racism disadvantages people of color is not any better in this regard than feminism; just as feminism examines only gender, race analysis examines only race. Each is a tool designed for a certain job, and it should hardly shock us that a screwdriver is an inefficient hammer.

Reconstructive feminism's focus on gender dynamics leads it to social psychology, which for over thirty years has documented the patterns of human interaction that result in gender disadvantage. To limit our inquiry to work/family issues, social psychology documents four major kinds of gender disadvantage faced by employed women, all of which stem from unspoken masculine norms. First, unspoken norms that define high-quality, highly paid jobs as both masculine and male make it harder for women who "act femmy"—that is, women who behave in conventionally feminine ways—to establish competence. Second, unspoken norms also fuel workplace hostility towards women who act in ways traditionally associated with men and masculinity ("tomboys"). Third, as masculine norms force women to choose between tomboy and femmy strategies, "gender wars" result—fights among women over gender. The final and strongest impact of masculine norms is the "maternal wall"—the strong negative competence and commitment assumptions that stem from motherhood.

Stereotyping can have large impacts in the workplace. Classical music lovers will have noticed that only recently have any appreciable number of women been hired by symphony orchestras across the country. This is because (for reasons unrelated to gender) orchestras began to hold "blind" auditions where the identity and gender of the musician is hidden from the jury,

9. See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "stereotype" as "the method or process of printing in which a solid plate . . . cast from a . . . mould taken from the surface of a forme of type is used for printing instead from of the forme itself").

10. While drawing on all three literatures, I use the terms "schemas" and "social norms."

11. See generally THOMAS NAGEL, THE VIEW FROM NOWHERE (1989) (in which Nagel examines the dialectics of consciousness, exploring how even the most objective viewpoint is a view from *somewhere*).

sometimes literally behind a screen.¹² Those in charge of selecting musicians were neither sexists nor bad people; their perceptions of competence were shaped by the traditional image of classical musicians in ties and tails—that is, men.

Studies of the impact of stereotyping in the racial context show similarly dramatic results. When subjects were shown two identical resumes with only one difference—one had a European-American name on the top (“Greg”) while the other had an African-American name (“Jamal”)—white candidates got as many callbacks as black candidates with eight additional years of job experience.¹³ Another matched-resume study showed that, when race was indicated on a resume, whites recommended the white candidate seventy-six percent of the time, but they recommended the black candidate only forty-five percent of the time.¹⁴

Even small biases add up over time. One experiment constructed a computer model that built an eight-level hierarchy, to simulate promotional steps within an organization. Despite the fact that women comprised fifty percent of the entry level employees at the organization and that men were given only a tiny advantage in promotions—one percent—due to gender bias, by the time employees reached the top, women comprised only thirty-five percent of the highest positions.¹⁵

B. Such Great Heights: Do We Need a Trowel or a Back Hoe?

[E]verything looks perfect from far away. “Come down, now,” but we’ll stay . . .

– The Postal Service¹⁶

The threshold question—one typically skipped—is to make a conscious decision about what level of generality is required for a useful analysis. If the right tool is half the job, do we need a trowel or a back hoe? Though most theorists never ask this question, they ignore it at their peril. Gender theorists traditionally focused on a relatively narrow range of gendered interactions while proclaiming grandly to be explaining “gender”—presumably all of it.

12. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

13. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004).

14. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000).

15. Richard F. Martell, David M. Lane & Cynthia Emrich, *Male-Female Differences: A Computer Simulation*, 51 AM. PSYCHOLOGIST 157, 157-58 (1996).

16. THE POSTAL SERVICE, *Such Great Heights*, on GIVE UP (Sub Pop Records 2003).

Two prominent examples are Judith Butler and Catharine MacKinnon. To quote MacKinnon: "All this suggests that what is called sexuality is the dynamic of control by which male dominance—in forms that range from intimate to institutional, from a look to rape—eroticizes and thus defines man and woman, gender identity and sexual pleasure."¹⁷ Though Butler does not make sweeping statements explicitly, she inevitably focuses on what she is interested in: the way heterosexuality is naturalized. Her goal is to invent a language to loosen the tight conflation of biological sex and gendered behaviors. Butler's centering of drag and gender fluidity signals her nigh-exclusive focus on marginalized sexualities and gender identities, to the exclusion of gender conventionality as experienced by people who feel comfortable in their gender skins. "[A] feminist view," notes Butler, "argues that gender should be overthrown, eliminated, or rendered fatally ambiguous precisely because it is always a sign of subordination for women."¹⁸ Butler means what anthropologists often call "gender display"—clothing and body language.

To place Butler and MacKinnon in context, a whirlwind history of the second-wave of feminism is in order. From the mid-1960s until the early-1980s, U.S. feminism focused primarily on deconstructing and deinstitutionalizing the mandate that women become homemakers and men breadwinners. *The Feminine Mystique*, published in 1963, was a critique of the housewife role, a concern that framed much of feminism in the years that followed.¹⁹ The Equal Pay Act of 1963²⁰ and Title VII of the Civil Rights Act of 1964²¹ took crucial steps towards workplace equality for women. The "divorce revolution" of the 1970s saw courts reject the legal infrastructure undergirding the breadwinner/housewife system by instituting gender-neutral standards for property awards and child support.²²

By the mid-1970s, feminists had divided into those who believed that women should be treated the same as men ("sameness feminists") and those who believed that women were, in fact, different than men ("difference feminists"), and that courts and legislatures should be able to act on that fact. Though this was a conflict over the design of public policy, it became intertwined in the mid-1980s with the debate over Carol Gilligan's 1982 book, *In a Different Voice*. Gilligan argued that women have a different moral system

17. CATHERINE A. MACKINNON, *Pleasure Under Patriarchy*, in *SEXUALITY AND GENDER* 33, 38 (2002).

18. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY*, at xiv (rev. ed. 1999).

19. FRIEDAN, *supra* note 4.

20. Pub. L. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2000)).

21. 42 U.S.C. § 2000e (2000).

22. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA*, at xiv, 32-36 (1985).

than men.²³ Her followers advocated reshaping various institutions around women's voice,²⁴ while her critics denied that men and women differed in the ways Gilligan described.²⁵

By the mid-1980s, feminist attention in the United States shifted away from work/family issues onto sexual harassment, pornography, and domestic violence. Catherine MacKinnon had published *Sexual Harassment of Working Women* in 1979. The following year the Equal Employment Opportunity Commission adopted MacKinnon's framework in guidelines that helped establish sexual harassment as gender discrimination. This conclusion was adopted by the Supreme Court in the 1986 decision *Meritor Savings Bank v. Vinson*, which held that sexual harassment was a violation of Title VII.²⁶ Sexual harassment went from being seen as "something any woman worth her salt could handle" to being illegal gender discrimination.

Meanwhile, MacKinnon, along with Andrea Dworkin, began to focus attention on pornography, which both women viewed as inextricably intertwined with violence against women. The 1983 Minneapolis Anti-Pornography Ordinance²⁷ was vetoed by the mayor.²⁸ The 1984 Indianapolis Ordinance²⁹ was struck down as unconstitutional.³⁰ The anti-pornography campaign lost steam after 1990 as the result of opposition of civil libertarians and gay activists (who often felt that pornography was vital in reassuring gay youth that they were not alone).

The late 1980s saw the beginnings of widespread grassroots activism on the issue of domestic violence. Activism surrounding domestic violence became a massive world wide movement not associated with one particular spokesperson. Funding for anti-domestic violence programs poured into both national and international NGOs, and domestic violence went from being seen

23. CAROL GILLIGAN, IN A DIFFERENT VOICE 64-105 (1982).

24. See, e.g., Leslie Bender, *Gender Difference to Feminist Solidarity: Using Carol Gilligan and Ethic of Care in Law*, 15 VT. L. REV. 1, 3 (1990) (arguing that Gilligan's theories and difference feminism can be used to transform law); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 41-42 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

25. See, e.g., Mary Jo Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37, 45 (1992) (observing that in "a case specifically involving sex discrimination, Sandra Day O'Connor neither writes as a woman nor speaks on behalf of women"); Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39, 42-44 (1989) (cautioning that focus on "the woman's point of view" risks perpetuating stereotypical attitudes about gender).

26. 477 U.S. 57 (1986).

27. MINNEAPOLIS, MINN., ORDINANCES § 139.10 (1983), reprinted in ANDREA DWORKIN & CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A DAY FOR WOMEN'S EQUALITY* app. A, at 99-105 (1988).

28. DWORKIN & MACKINNON, *supra* note 27, at 95.

29. INDIANAPOLIS, IND., CODE § 16 (1984), reprinted in DWORKIN & MACKINNON, *supra* note 27 app. B, at 106-132.

30. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

as a private matter to be seen as illegal assault. In the United States, this movement led to passage of the Violence Against Women Act of 1994.³¹

By the 1990s the center of gravity shifted once again, this time to an examination of compulsory heterosexuality. Judith Butler became a central figure following publication of her highly influential book *Gender Trouble: Feminism and the Subversion of Identity* in 1990.³² Butler's book helped spark "queer theory," which focuses on the complex interrelationships of biological sex, sexual orientation, and gender display (whether one dresses and acts in feminine or masculine ways, or mixes the two).

Each new wave of gender theory purports to be a critique of, and an improvement on, the prior wave. But a closer analysis reveals that each new wave simply changed the subject from work/family issues during the initial period, to domestic violence and pornography in the late 1980s to mid-1990s, to the construction of sexuality thereafter. Once we recognize this, we need to address a threshold question: Should our goal be a unified theory of gender that subsumes all three basic themes?

The answer is no. Because gender is one of the central organizing principles of social life, building a model that subsumes all the social meanings of gender would perch one's analysis at such a lofty plain as to offer little but platitudes. Our capsule review of the second-wave of U.S. feminism shows that each era focused not only on a different topic area, but each also studied distinct social mechanisms through which gender structures social life.

The first period concentrated on the relationship between the two major types of work to which most adults dedicate their daily lives: market work and family work. I call this the work/family axis of gender. The second period focused on the eroticizing of dominance, in the workplace (sexual harassment), the home (domestic violence), and in (at least in the analysis of Catharine MacKinnon and Andrea Dworkin) pornography. I call this the sex/violence axis. Most recently, a focus of feminism has been on the enforced alignment of biological sex, gender display, and sexual orientation. I call this the queer axis.

The assumption that all three gender axes can be theorized simultaneously has proven untrue. In fact, analyses of each of these three axes of gender have largely ignored the other two. An alternative to continuing the assertion, or the assumption, that one's particular area of interest is *the* central gender dynamic is simply to acknowledge that gender plays many social roles, and that a deep analysis of one way that gender structures social life is more useful than a superficial analysis of all three.

This pragmatist approach enables us to make explicit what the last forty years of feminist theory has shown in practice: that the work/family axis, the sex/violence axis, and the queer axis (and perhaps others) should be theorized

31. 42 U.S.C. § 13925 (2000).

32. BUTLER, *supra* note 3.

separately. What follows, then, is a re-theorizing of the work/family axis, which has implications for, but is best analyzed apart from, the other two.

II. RECONSTRUCTIVE FEMINISM: MOVING BEYOND THE SAMENESS/DIFFERENCE DEBATE

The work/family axis of gender traditionally has been framed in terms of the vestigial sameness/difference debate for a very simple reason: It translates into theoretical terms the predominant vernacular framing of gender. Interpreting gender through the lens of difference has very concrete consequences relating both to the design of public and workplace policies (should women be treated the same as or different from men?) and to questions of whether men and women “really” are the same or different.

For example, take a workplace policy that grants family leave to any new parent. I designed such a policy for the law school at which I worked in the 1980s—when I still considered myself a sameness feminist—requiring that men and women be offered equal access to a semester’s leave following the birth of a child. The result: Women used the leave for child care, while one man went to Mardi Gras during his leave (without the baby) and another used his leave to write a law review article. Wags nodded, “That’s the problem with treating men and women the same, when they really are different.”

The other half of the sameness/difference debate also lives on today.³³ For example, in Lisa Belkin’s 2006 *New York Times Magazine* cover story, *The Opt-Out Revolution*, she framed the “revolution” in terms of women’s difference: “It’s not just that the workplace has failed women. It is also that women are rejecting the workplace.”³⁴ Belkin makes the self-proclaimed “dangerous” argument that women “leave [work] more easily and find other parts of life more fulfilling.” “There’s nothing wrong with money or power,” notes Belkin, “[b]ut they come at a high price”³⁵ that women are not willing to pay—perhaps for biological reasons (she approvingly quotes one woman who notes that women’s brains “light up differently”)³⁶ or moral ones (Belkin argues that she, and other women, have different values than men). “Why don’t women run the world?” asks Belkin. “Maybe it’s because they don’t want to.”³⁷ Women’s difference, it appears, explains their economic inequality.

33. See, e.g., JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (1992) (Gray has now written nine relationship self-help books predicated on his view of the practical differences between men and women); DEBORAH TANNEN, *TALKING 9-TO-5* (1994); DEBORAH TANNEN, *YOU JUST DON’T UNDERSTAND* (1990) [hereinafter TANNEN, *YOU JUST DON’T UNDERSTAND*]; Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 23, 2006, § 6 (Magazine), at 42.

34. Belkin, *supra* note 33, at 44.

35. *Id.* at 45.

36. *Id.* at 47.

37. *Id.* at 45.

We are doomed to recycle debates over sameness and difference because we have not yet resolved them. The initial step is to recognize that two distinct debates are inadvertently lumped together: whether public policy, including the courts, should be allowed to treat women differently from men; and whether there are “real differences”—physical, psychological, and social—between men and women. Lumping these debates together has caused massive confusion because they involve quite different issues. Some people who do not believe in the accepted description of the psychological differences between men and women (that women have a “different voice” centered on an ethic of care) nonetheless embrace difference in the sense that they believe public policy that blindly treats women the same as men is seriously flawed. I am one of them, which may explain why I have been called both a sameness feminist and a difference feminist,³⁸ and even a radical feminist;³⁹ this labeling, no doubt, has contributed to my bleak view of the usefulness of these traditional categories. In their place, I will introduce two new categories: assimilationist feminism and reconstructive feminism.

A. Assimilationist Feminism: Equality for Tomboys

I got into this work because I'm a tomboy. . . . If you try to do your share and don't come off real femmy you're all right.

— Kathy Shaughnessy, phone line repair staff⁴⁰

One persistent strategy for women's equality in the United States has been to allow women to gain access to traditionally masculine rights and roles. These fights for access started in the nineteenth century. First-wave feminists Elizabeth Cady Stanton and Susan B. Anthony sought the right to vote. They and others fought for married women to have the same rights to property as men. Fights for access continued in the twentieth century, when the Supreme Court required roughly proportionate gender representation on juries⁴¹ and Congress passed the Equal Pay Act of 1963,⁴² guaranteeing equal pay for equal work in the higher-paying jobs that were traditionally held by men.

In the 1970s, the Supreme Court began to articulate women's rights to access more systematically, as the result of a concerted litigation strategy

38. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1902 (2000) (critiquing “joint property” feminists, including Joan Williams, for what Schultz sees as their failure to recognize the dangers that women who focus on family work face); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806-10 (1989) (critiquing difference feminism as represented by Carol Gilligan).

39. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1064-65, 1065 n.109 (1994).

40. TRUDI C. FERGUSON, *BLUE COLLAR WOMEN: TRAILBLAZING WOMEN TAKE ON MEN-ONLY JOBS* 129 (1994).

41. *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

42. 29 U.S.C. § 206(d) (2000).

orchestrated by Ruth Bader Ginsburg, then General Counsel for the American Civil Liberties Union.⁴³ In landmark cases in the 1970s, the Supreme Court invalidated an Idaho law that favored men over women as estate administrators;⁴⁴ a federal law that required breadwinner-wives, but not breadwinner-husbands, to prove that their spouses were, in fact, dependent for them to receive certain medical and dental benefits;⁴⁵ and federal laws that gave survivors' benefits automatically to homemaker-wives of breadwinner-husbands but not to husbands of breadwinner-wives.⁴⁶

These cases are typically cited as formal equality cases, yet Ginsburg's goal was not merely formal equality. Her goal was a society in which women could gain access to roles traditionally reserved for men,⁴⁷ and men could gain access to roles traditionally reserved for women.⁴⁸ In other words, she sought to end separate spheres by prohibiting legislatures from embedding separate-spheres templates into federal and state legislation. From very early on, Ginsburg's goals included not only allowing men into the "women's" sphere and women into the "men's"; she also sought to replace the institutional infrastructure of separate spheres, including professional schedules shaped by the assumption that go-getter breadwinners have a spouse caring for their children. In a 1975 law review article, Ginsburg advocated part-time educational schedules "for students unable to undertake full-time study because of social family obligations that cannot be met by customary financial aid (notably, care of preschool children)."⁴⁹

Ginsburg clearly recognized that formal equality, or mere access for women to men's traditional roles, was not enough: True equality required reconstructing career tracks, including schooling. She also called for additional supports for working families. "If Congress is genuinely committed to the eradication of sex-based discrimination and promotion of equal opportunity for women, it will respond to the uneven pattern of adjudication by providing firm legislative direction assuring job security, health insurance coverage, and income maintenance for childrearing women."⁵⁰ Ginsburg, from the beginning,

43. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 30, 2009).

44. *Reed v. Reed*, 404 U.S. 71 (1971).

45. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

46. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

47. See, e.g., *Reed*, 404 U.S. at 76-77 (striking down as a violation of equal protection a Florida statute that appointed men rather than women as administrators of decedents' estates if a man and a woman were equally qualified pursuant to existing rules).

48. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (striking down as a violation of equal protection the existence of a state nursing school that was limited to women students); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down as a violation of equal protection state statutes that require husbands, but not wives, to pay alimony); *Weinberger*, 420 U.S. at 651-53 (striking down as a violation of equal protection a rule allowing spousal benefits for widows, but not widowers, of service members).

49. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 31 (1975).

50. Ruth Bader Ginsburg, *Some Thoughts on Benign Classifications in the Context of Sex*, 10 CONN. L. REV. 813, 826 (1978).

was focused on reconstructing gender: We can see her as perhaps the first reconstructive feminist.

Yet the early cases litigated by Ginsburg are understood as formal equality cases, designed to allow women into roles traditionally reserved for men and insistent on treating women the same as men. This is assimilationist feminism, which is a liberatory strategy for a specific group of women: those whose gender subordination stems solely from their inability to access roles traditionally reserved for men. "Formal equality works best in situations when men and women are enough alike that the same rule operates equally well for both,"⁵¹ to quote a leading casebook by Katharine Bartlett and Deborah Rhode, which features in its discussion of formal equality women who seek access to traditionally masculine roles.⁵²

Assimilationist cases continue up to the present day. One 1989 landmark case, *Price Waterhouse v. Hopkins*,⁵³ involved a senior manager who brought in more business in one year than any of the men in her partnership class, but whose promotion to partner was deferred because she was faulted for failing to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" and for needing to take "a course at charm school"—a tomboy if there ever was one.⁵⁴ Others typically categorized as formal equality cases involve women who want to be prison guards,⁵⁵ female union members seeking to enter factory jobs traditionally limited to men,⁵⁶ women who want to enter the Rotary Club,⁵⁷ and girls who want to enter into the Boys' Club.⁵⁸ These women don't want to change existing structures; they just want in.

The focus here is on assimilation: to allow women and girls access to institutions designed around boys and men. This was the easiest, earliest demand of second-wave American feminism—to insist that women be treated the same as men when they behave just like men. If you're a tomboy, all you need is to be allowed to play ball with the boys. So-called formal equality feminists never argued or implied that women should be satisfied with merely formal, as opposed to substantive, equality. Instead, these feminists' goal—to gain access for women to rights and roles traditionally reserved for men—helped women whose goal was to assimilate into what was still, in the 1960s, unselfconsciously called "a man's world."⁵⁹

51. KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 151 (4th ed. 2006).

52. See, e.g., *id.* at 17 (highlighting *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973)).

53. 490 U.S. 228 (1989).

54. *Id.* at 235.

55. *Dothard v. Rolinson*, 433 U.S. 321 (1977).

56. *UAW v. Johnson Controls*, 499 U.S. 187 (1991).

57. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

58. *Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985).

59. See, e.g., JAMES BROWN & BETTY JEAN NEWSOME, *IT'S A MAN'S MAN'S MAN'S WORLD* (King Records 1966).

1. *The Limitations of Assimilationist Feminism: Pregnancy*

The demand for women to be treated the same as men helped tomboys who sought to assimilate, but it disserved women whose gender inequality stemmed from their insistence on “acting femmy,” including divorced women who had been homemakers for decades (discussed at greater length elsewhere),⁶⁰ and, crucial to the work/family context, employed women who did girly things like getting pregnant.

Women requiring pregnancy leave did not face inequality stemming from their lack of access to traditionally masculine roles but, instead, were disadvantaged because their conventionally feminine life patterns differed from those of men. Disagreements about pregnancy leave came to a head in the 1987 case of *California Federal Savings & Loan Association v. Guerra*.⁶¹ In the *Cal. Fed.* case, the California Chamber of Commerce and its allies challenged California’s maternity disability policy on the grounds that it conflicted with, and so was preempted by, the federal Pregnancy Discrimination Act’s requirement that pregnant women be treated “the same” as other workers.⁶²

One high point of the famous *Cal. Fed.* debate was the celebrated law review article by Wendy Webster Williams (no relation to the author), *The Equality Crisis*.⁶³ Published in 1982 at the height of internal strife among legal feminists over *Cal. Fed.*, Williams’s article opposed the California statute, comparing maternity leaves to protective labor legislation and arguing that, like the latter, the former would redound to women’s detriment.⁶⁴ Williams argued that “[t]he equality approach to pregnancy . . . necessarily creates not only the desired floor under the pregnant woman’s rights but also the ceiling If we can’t have it both ways,” she warned, “we need to think carefully about which way we want to have it.”⁶⁵

The clear implication was that feminists should insist that women be treated the same as men. So: no maternity leave. Again, this is a liberatory strategy for a specific group of women—those whose gender subordination stems from their inability to access roles traditionally reserved for men. This position predominated within the Beltway for decades, and arguably still does

60. For a more detailed discussion, see WILLIAMS, CLASS ACTS AND GENDER WORKS: THE POLITICS OF WORK AND FAMILY (forthcoming 2010).

61. 479 U.S. 272 (1987).

62. Pregnancy Discrimination Act (PDA), Pub L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. 2000e(k) (2000)). The PDA provides in pertinent part:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits . . . as other persons not so affected but similar in their ability or inability to work. *Id.*

63. Wendy Webster Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982).

64. *Id.* at 190.

65. *Id.* at 196.

today. One prominent feminist confided to me in 2006 that women's groups in Washington could have gotten maternity leave a decade before the passage of the Family and Medical Leave Act in 1993,⁶⁶ but refused to support legislation that contained only maternity leave. Instead, they fought on for ten more years, insisting that the right to maternity leave be folded into the right of all workers to take leave for their own health reasons. All I could think of was all the women who, for ten years or more, had gone without maternity leave—including me.

2. *Assimilationist Feminism in Popular Culture*

For most women, femme and tomboy refer to strategies, not identities. Many women adopt some masculine strategies, but very few perform conventional masculinity top-to-bottom. Doing so, outside of a few academic environments, would trigger social sanctions—informal but severe. Some women are pure femme, but most women (particularly those who work in historically masculine jobs) mix masculinity with feminine “softeners.”⁶⁷

Hillary Clinton is a good example. Throughout her professional life, she has struggled to project an image that's feminine enough to avoid turning off a lot of people. Maureen Dowd asked, “Should Hillary pretend to be a flight attendant?,” quoting a grandmother advising her doctor daughter, in 2005: “Never let a man think you're smarter. Men don't like that.”⁶⁸ A 2006 study of speed dating found that men valued intelligence in a woman, “but only up to a point It turns out that men avoided women whom they perceived to be smarter than themselves. The same held true for . . . ambition—a woman could be ambitious, just not more ambitious than the man considering her for a date,” said the study's author, economist Ray Fisman.⁶⁹ “We males . . . [have] fragile egos in search of a pretty face and are threatened by brains or success that exceeds our own.”⁷⁰ Fisman is right to tie this phenomenon into gender pressures on men who, after all, are taught to “measure masculinity by the size of a paycheck.”⁷¹

Hillary entered the White House with a severe hairstyle featuring straight hair and a black headband. The press pounced, and gradually her appearance got femmier and femmier. By the time of her campaign she had long since

66. Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2000)).

67. Linda L. Carli, *Gender and Social Influence*, 57 J. SOC. ISSUES 725, 730-34 (2001).

68. Maureen Dowd, *Should Hillary Pretend To Be a Flight Attendant?*, N.Y. TIMES, Nov. 14, 2007, at A23.

69. *Id.*

70. *Id.* (quoting Fisman).

71. See, e.g., Robert E. Gould, *Measuring Masculinity by the Size of a Paycheck*, in MEN AND MASCULINITY 96 (Joseph H. Pleck & Jack Sawyer eds., 1974).

settled on a much softer hair style and wore tomboyish pantsuits—but in bright, femmy colors like pinks and oranges.

Successful professional women generally do much the same. Typically they offset the masculine life patterns and personality traits they embrace (“hard-driving,” “ambitious”) with strong signals of femininity. Perhaps the most commonplace today are high heels, which serve to signal femininity without requiring women to enact the feminine behaviors that women typically demonstrate in mixed-sex groups (although not when they are around only women)⁷²—for example, talking less than men,⁷³ using more tentative speech patterns,⁷⁴ making fewer task suggestions,⁷⁵ and using gestures that display less assertiveness.⁷⁶ These behaviors directly undercut status and perceived competence; wearing high heels does not. High heels may be bad for one’s feet (women have eighty percent of foot operations in the United States),⁷⁷ but they also allow women to signal femininity while sending messages that draw on the association of women’s sexuality with power (through additional height, sexual confidence). This is more savvy, in the professional context, than signaling femininity by including verbal hedges (“don’t you think?”) or enacting devalued roles (the office mother, princess, or pet) that directly undercut one’s credibility and perceived competence.⁷⁸

The two mainstream authors who spring to mind as recent exemplars of assimilationist feminism are Linda Hirshman and Leslie Bennetts. Linda Hirshman has made a name for herself insisting that women need to remain employed and harshly criticizing women who leave employment to care for children.⁷⁹ Leslie Bennetts also argues that women should not leave

72. See Cecilia L. Ridgeway, *Gender, Status and Leadership*, 57 J. SOC. ISSUES 637, 640 (2001) (citing four studies showing that the status-related stereotypes of professional gender relationships affects the enactment of leadership).

73. See John F. Dovidio et al., *Power Displays Between Men and Women in Discussions of Gender-Linked Tasks: A Multichannel Study*, 50 J. PERSONALITY & SOC. PSYCHOL. 850, 853-54 (1988).

74. See Linda L. Carli, *Gender, Language, and Influence*, 59 J. PERSONALITY & SOC. PSYCHOL. 941, 944, 946-49 (1990).

75. See Wendy Wood & Stephen J. Karten, *Sex Differences in Interaction Style as a Product of Perceived Sex Differences in Competence*, 50 J. PERSONALITY & SOC. PSYCHOL. 341, 344, 346 (1986).

76. See Dovidio et al., *supra* note 73, at 944.

77. Gardiner Harris, *If Shoe Won't Fit, Fix the Foot? Popular Surgery Raises Concern*, N.Y. TIMES, Dec. 7, 2003, at A1.

78. See Alice H. Eagly et al., *Social Role Theory of Sex Differences and Similarities: A Current Appraisal*, in THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER 147 (Thomas Eckes & Hanns M. Trautner eds., 2000) (office mother, princess, pet); Peter Glick et al., *The Two Faces of Adam: Ambivalent Sexism and Polarized Attitudes Toward Women*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1323, 1324-25 (1997) (describing three sub-types of women: (1) traditional women, for example, housewives; (2) nontraditional women, for example, careerwomen and feminists; and (3) sexy women). See generally Peter Glick & Susan T. Fiske, *Hostile and Benevolent Sexism: Measuring Ambivalent Sexist Attitudes Toward Women*, 21 PSYCHOL. OF WOMEN Q. 119, 128 (1997) (suggesting that most stereotyping occurs at the sub-type level, rather than toward women as a whole); Joan C. Williams, *The Social Psychology of Stereotyping*, 7 EMP. RTS. & EMP. POL. J. 401, 421 (2003) (participation in traditionally feminine behaviors causes women’s perceived competence to decrease).

79. See generally LINDA HIRSHMAN, GET TO WORK: . . . AND GET A LIFE BEFORE IT’S TOO LATE (2007) (advocating that women remain employed, and criticizing those who do not).

employment, pointing to the risk of divorce and the harsh economic consequences faced by displaced homemakers.⁸⁰ This is an important message, but—like Hirshman—Bennetts takes a judgmental tone towards women who disappoint by taking lamentably femmy paths.⁸¹

Assimilationist feminism may well be stronger in the United States than anywhere else in the world, because Americans take the Enlightenment commitment to equality so seriously. When Americans discuss “equality,” they generally mean something quite specific: equality of opportunity, to fit into society as it is currently structured.⁸² As a result, the United States is probably the best country in the world for tomboy women, who need only equal opportunity to perform on the terms traditionally available to men. Sarah Palin, who returned to work when her son was three days old, is a classic example of the “anything you can do, I can do better” assimilationist tradition.⁸³

Yet Sarah Palin provides another example: She looks and acts the part of a desirable woman (a former beauty queen, no less) but conforms where it counts in terms of access to power. She literally hid her pregnancy and then took on an all-consuming job despite the fact that two of her five children—a five-month-old with special needs and a pregnant teenager—clearly needed parental attention. Her spouse left work to pick up the pieces.⁸⁴ As Palin well illustrates, the dress-for-success strategy for American women is to dress femmy but act the tomboy, by being firm, commanding, competent, confident—and a breadwinner. This strategy works for many professional women while in their twenties, but for most, assimilation opportunities end abruptly once they have children. Bennetts and Hirshman gloss over this uncomfortable fact,⁸⁵ as have

80. BENNETTS, *supra* note 4, at xxiv.

81. See, e.g., *id.* at xxiii, 2 (“Fortified by a strong sense of their options and entitlements, many of today’s young mothers see their decision to give up paid work and stay home with their families as a positive choice that reflects their values—one that should therefore be respected. But the real issues involved here can no longer be assessed in terms of such familiar catch-words as ‘choice’ or ‘values’ or ‘respect.’ Hein looks every inch the contemporary suburban mother, appropriately attired for her active life. But while she may not be wearing the crisp shirtwaist dress, sensible pumps, and single strand of pearls that characterized Donna Reed or June Cleaver, Hein’s lifestyle resembles that latter-day ideal more closely than not.”).

82. JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 55 (1995) (“Americans are close to unanimous in endorsing the idea of the American dream. Virtually all agree that all citizens should have political equality and that everyone in America warrants equal educational opportunities and equal opportunities in general.”).

83. Lisa Demer, *Palin Baby Has Down Syndrome*, ANCHORAGE DAILY NEWS, Apr. 22, 2008, at A1 (“Gov. Sarah Palin was back at work . . . three days after giving birth to her fifth child.”).

84. Jodi Kantor, Kate Zernike & Catrin Einhorn, *Fusing Politics and Motherhood in New Way*, N.Y. TIMES, Sept. 8, 2008, at A1; Katherine Q. Seelye, *Palin’s Teen Daughter is Pregnant*; *New G.O.P. Tumult*, N.Y. TIMES, Sept. 2, 2008, <http://www.nytimes.com/2008/09/02/us/politics/02PALINDAY.html>.

85. See, e.g., BENNETTS, *supra* note 4, at xviii (“Our mother left the house every morning with a briefcase and commuted into the city with all the men in their gray flannel suits. In an era when such choices were rare, I was the only one of my friends whose mother was a professional woman. But in other respects, she functioned like a typical 1950s housewife. Every night she came home and made an elaborate meal for our family—no TV dinners for us!—along with baking cookies for the next day’s Girl Scout meeting, cleaning the house, washing and ironing our clothes for school, and helping us with

assimilationist feminists since the 1970s.⁸⁶ Perhaps one reason Palin so captured the American imagination is that she fed the fantasy that women can succeed without anything having to change.

B. Difference Feminism: The Traditional Approach to Equality for Femmes

[Formal equality] has been questioned as an approach . . . when men and women are different in some significant respect, and when, as the result of the differences, the same rule leads to unequal outcomes.

– Katharine Bartlett & Deborah Rhode⁸⁷

A common formulation is that, while formal equality feminists refuse to recognize “real differences” between men and women, difference feminists are more realistic and less doctrinaire. No doubt exists that, while assimilationist feminism focuses on women acting like tomboys, difference feminism sought to meet women where they were: It accepted women’s femmy life patterns as a fact of life. In Bartlett and Rhode’s casebook, the sections on difference feminism involve women in traditionally feminine roles that are socially devalued and economically vulnerable.⁸⁸ Thus, the focus is not on female breadwinners (as in the casebook section on formal equality) but on “eliminating the disadvantages of women’s differences”⁸⁹ for homemakers⁹⁰ and pregnant women.⁹¹ Similarly, the focus is not on women in traditionally masculine jobs, but on comparable pay for devalued, traditionally feminine jobs—that is, whether courts should order wage increases for job categories such as nursing.⁹²

Indeed, the Bartlett and Rhode casebook lumps together a hodgepodge of cases in which courts treat men and women differently. Some involve “real physical differences” such as pregnancy leave (“Eliminating the Consequences of Women’s Differences”)⁹³ and the fact that women as a group live longer than men as a group (“Recognizing Sex-Linked Average Differences”).⁹⁴

our homework while my father dozed in front of the television set . . . [M]y mother never complained. To the contrary; she told us all the time how lucky she felt.”); HIRSHMAN, *supra* note 79, at 56-63 (suggesting that women should focus on work, which is possible if they “marry young or much older,” adopt an “ignorance and dust” strategy to housework, and only have one child).

86. See, e.g., BARBARA BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* (1986); FRIEDAN, *supra* note 4; Schultz, *supra* note 38.

87. BARTLETT & RHODE, *supra* note 51, at 151.

88. *Id.* at 151-397.

89. *Id.* at 208-53.

90. Kahn v. Shevin, 416 U.S. 351, 361 (1974) (White, J., dissenting); State v. Bachmann, 521 N.W.2d 886, 887-88 (Minn. Ct. App. 1994).

91. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 291 (1987); Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738-39 (7th Cir. 1994).

92. Am. Nurses’ Ass’n v. Illinois, 783 F.2d 716, 719, 728 (7th Cir. 1986).

93. BARTLETT & RHODE, *supra* note 51, at 208-53.

94. *Id.* at 253-313.

Others involve real differences in women's lives, notably their disproportionate load of family work and consequent economic vulnerability upon divorce. All of the "differences" are treated as real and uncontroversial, in contrast with another chapter that discusses psychological differences between men and women, which acknowledges that its description of psychological differences is controversial.⁹⁵

Reconstructive feminism rejects the view that any of these are "real differences" in any meaningful sense. It does so by shifting attention away from women, onto the masculine norms.

C. Reconstructive Feminism: Deconstructing Masculine Norms

While tomboy women fare well in the United States, it is probably the worst industrialized country for women living traditionally feminine lives: Levels of maternal and child poverty are wildly higher in the United States than in Europe.⁹⁶ This uncomfortable fact shapes the contours of reconstructive feminism, the basic precepts of which have been around for a long time. Reva Siegel articulated the basic premise while she was still a law student, in a 1985 student note for the *Yale Law Journal*.⁹⁷ Supreme Court Justice Thurgood Marshall did so as well, drawing upon the Congressional Record for his opinion in *Cal. Fed.* that upholding maternity leave was required by basic equality tenets: "The entire thrust . . . behind [the Pregnancy Discrimination Act] is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."⁹⁸

Reconstructive feminism picks up on the insight that what all women need is equality, but identifies that attaining equality requires first changing our

95. *Id.* at 637 ("[A] majority of feminists theorist view [this form of] difference theory with suspicion.").

96. See JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK* 73-75 (2003). For example, in 1997, seventeen percent of all American families with children were poor, as compared to less than half as many (five to eight percent) in Belgium, France, Germany, and the Netherlands and less than one quarter as many (two to four percent) in Sweden, Norway, Denmark, Finland, and Luxembourg. Canada and the U.K. had levels closer to the U.S. rate, yet still lower at twelve and sixteen percent respectively. *Id.* at 73-74. For single-parent families, the numbers are even more dramatic: forty-five percent of all American single-parent families with children were poor, nearly twice as many as in Canada and Germany (twenty-seven to thirty-one percent), three times as many as in the U.K., France, Luxembourg, and the Netherlands (fifteen to eighteen percent), and five to ten times as many as in Belgium, Sweden, Norway, Denmark, and Finland (four to ten percent). *Id.* at 74-75.

97. Reva Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 952-56 (1985) ("Recognizing a disparate impact claim of pregnancy discrimination would require simply that pregnancy be treated as a normal condition of employment, barring institutional as well as individual presumptions to the contrary. At root, recognizing such a claim accords women the dignity of a history—acknowledging that the primary determinants of their economic status are social, not biological, in origin.").

98. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (quoting 123 CONG. REC. 29,658 (1977)).

masculine norms to allow women, as well as men, to have both conventional careers and conventional family lives simultaneously. A more recent case goes further. Decided by the conservative Seventh Circuit Court of Appeals, *Washington v. Illinois Department of Revenue* involved a woman's claim that her employer had retaliated against her for filing a race discrimination complaint by rescinding her flexible schedule. For years, she had worked from seven a.m. to three p.m. in order to be home when her son, who had Down syndrome, arrived home from school.⁹⁹ Judge Frank Easterbrook adopted a broad interpretation of what constitutes an "adverse employment action," which is what courts have required to sustain a retaliation claim. Citing that great legal authority *Dilbert*, Judge Easterbrook voiced a suspicion that "the Illinois Department of Revenue may have a Catbert in its management," informing us that "Catbert, the Evil Director of Human Resources in the comic strip *Dilbert*, delights in pouncing on employees' idiosyncratic vulnerabilities."¹⁰⁰ Judge Easterbrook reasoned that the change in schedule may not have been materially adverse for every employee, but that Washington was not a normal employee. "She has a vulnerability: her son's medical condition. Working 9-to-5 was a materially adverse change for *her*, even though it would not have been for 99% of the staff."¹⁰¹ Who'd have thunk it! Workers have children, and employers have to build that fact into their employment practices. This opinion may signal a shift from the old-fashioned ideal-worker norm to a new norm of the balanced worker.¹⁰²

Reconstructive feminism aims not only to help tomboys gain access to workplace structures designed by and for men, but also to help women who do the femmy things women conventionally do, like getting pregnant and caring for children. The accepted—and flawed—approach of feminists focused on femmes is to insist on the need to recognize "real differences," which are thought to include real physical differences, such as pregnancy; real social differences, such as the fact that women still handle a disproportionate load of family work; and real psychological differences, generally described as the view that women embrace an ethic of care and nurturance.¹⁰³

Reconstructive feminism starts from a simple premise: Thousands of "real differences" exist that lack social consequences. The question is not whether the physical, social, and supposed psychological differences between men and

99. *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 659 (7th Cir. 2005).

100. *Id.* at 662.

101. *Id.*

102. See also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (citation omitted)).

103. See, e.g., BARTLETT & RHODE, *supra* note 51, at 654 (discussing cultural feminist explanations for women's ethic of care, the implications of women handling disproportionate amounts of family work, and the role of pregnancy in establishing "real differences").

women exist. It is, instead, why *these particular differences become salient* in ways that create and justify women's continuing economic disadvantage. After all, women to this day earn only thirty-eight percent of the lifetime wages of men.¹⁰⁴

The central tenet of reconstructive feminism is that gender differences, real and imagined, create social disadvantage when women are measured against unspoken and unacknowledged masculine norms. The only reason women's disproportionate load of family work creates gender disadvantage is that we still define the ideal worker as someone supported by a flow of family work from a spouse—support most women never receive. The “real physical differences” between men and women become salient only because the masculine ideal-worker norm is designed around men's bodies and life patterns, rather than starting from the not-so-heroic assumption that workers have responsibilities for children, elderly parents, and other family members. “Real psychological differences” describe not the actual psychological profile of women as a group, but social norms that allocate care work and supportive roles to women.

Once these masculine norms are unmasked, reconstructive feminism provides a new framework within which to think about gender equality.

1. How Masculine Norms Create “Real Physical Differences”: Pregnancy

Surely, if anything is a real difference between men and women, pregnancy is; the law should not close its eyes to this commonsense conclusion. The standard sameness-versus-difference formulation intimates that our only choices are to deny “real differences” or to realistically acknowledge their existence. Not so. The key drawback with formulating the inquiry as one of “real differences” is that this approach locates the “difference” in women's bodies. In fact, the gender trouble stems not from women's bodies but from masculine norms.¹⁰⁵

Let's begin with physical differences, typically focused on pregnancy. The only reason pregnancy represents a problem for employed women is because the norm of the ideal-worker defines the committed worker as someone who works full time and full force for forty years straight. This template is designed around someone with a man's body (needs no time off for childbearing) and men's traditional life patterns (needs no time off for childrearing or other care work). Once again, the issue is not whether men and women are really different; the issue is *why this particular difference matters in this context*. As

104. STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN'S POLICY RESEARCH, STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9 (2004).

105. See BUTLER, *supra* note 3, at 1, 3-6, 9-13 (discussing Simone de Beauvoir's deconstruction of the gender dialectic); *id.* 43-57 (discussing gender as a “masquerade”); *id.* 90-91; *id.* 146-49 (discussing “the performative status of the natural itself”).

Martha Minow pointed out long ago, men are as different from women as women are from men: What gives women's difference workplace salience is the unstated masculine norm.¹⁰⁶

This approach of shifting attention away from women onto the masculine norms that make women's difference salient is best illustrated by an analysis of *Los Angeles Department of Water & Power v. Manhart*,¹⁰⁷ a 1978 case that involved a constitutional challenge to the Los Angeles pension system. The pension system required women to make greater contributions than men, on the theory that women live longer than men, so women (as a group) would receive greater pension payouts than men.¹⁰⁸ The Supreme Court struck down the pension system as a violation of equal protection.¹⁰⁹ Is this a dramatic example of how demanding equal treatment leads feminists into nonsensical positions and that women need to have their differences realistically acknowledged?

The answer again is no, and again the reasoning stems from social psychology. Los Angeles city employees were, and are, divisible into a potentially infinite number of categories: men and women, people with long and short noses, smokers and nonsmokers, whites and people of color, couch potatoes and the physically fit. Sex was the only "real difference" the city chose to build into its pension system actuarial tables. The tables ignored all sorts of unhealthy behaviors, like smoking and lack of exercise. They ignored that people of color as a group die earlier than whites as a group, though it would be equally logical (though equally unconstitutional) to offer whites lower premiums. The tables also ignored differences of age, although an actuarial analysis no doubt would show that older workers cost a pension system more than younger ones.

None of these differences seemed relevant, but the difference between men and women did. Why? Because women were newcomers, their presence in the labor pool seemed contingent. Having old workers and young workers, ill workers and healthy workers, smokers and nonsmokers, seemed like unavoidable "costs of doing business." But the costs associated with women seemed somehow different, reflecting the unspoken sense that the default worker was a man, so that any costs associated with women were seen as extra, avoidable costs—and any insistence that employers treat those costs as ordinary costs of doing business seemed to be interfering with the natural functioning of the market. In a very specific sense, this is accurate: The beauty of the market is its ability to transmit socially created preferences efficiently—including racism and sexism. What the Supreme Court did in *Manhart* was interrupt the efficient transmission of those well-documented social preferences by refusing

106. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 56-60 (1990).

107. 435 U.S. 702 (1978).

108. *Id.* at 704.

109. *Id.* at 723.

to allow Los Angeles to reinforce women's economic vulnerability as a matter of city policy.

Though the Court ultimately struck down the Los Angeles pension system, its rationale was weak. The Court reasoned that equal protection required women to be treated as individuals,¹¹⁰ overlooking the fact that the whole point of actuarial tables is to draw inferences from demography to structure decisions about how to pool risk. The Court's inability to supply a cogent explanation for why using gender in this context was taboo resulted from a flawed theoretical apparatus—precisely the kind of ellipsis that gives rise to charges that “political correctness” is prohibiting us from acknowledging “basic realities.”

Reconstructive feminism provides a stronger rationale. By shifting the focus from women's bodies to social norms—which are what make the physical differences relevant in the workplace context—reconstructive feminism avoids fueling a common pattern, in which the “real differences” between men and women are used to justify continuing sex discrimination.

2. *Women's Supposed Psychological Differences*

Within feminist theory, the notion that women have different values, or a different voice, is on the defensive. Thus the Bartlett and Rhode casebook, which makes bold assertions about real physical and social differences between men and women, acknowledges that the claim that women have different values than men is controversial.¹¹¹ This acknowledgement reflects the flood of studies, across a wide range of fields, that discredit the thesis that women have a “different voice,” reflecting an “ethic of care,” while men are focused not on relationships but on hierarchy.¹¹²

An important question is why the view that Bartlett and Rhode call “the different voice hypothesis” remains so influential long after the hypothesis has been discredited.¹¹³ The different voice thesis arises again and again in not only in the scholarly literature¹¹⁴ but also the popular press: Lisa Belkin tells us that she and others rejected ambition because their values changed after they had

110. *Id.* at 707-08.

111. BARTLETT & RHODE, *supra* note 51, at 637 (“A majority of feminist theorists view difference theory with suspicion . . .”)

112. See, e.g., Judy Auerbach et al., *Commentary: On Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149, 156-57 (1985); John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Linda K. Kerber, *Some Cautionary Words for Historians*, 11 SIGNS: J. WOMEN CULTURE & SOC'Y 304, 306 (1986); Debra Nails, *Social Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983).

113. BARTLETT & RHODE, *supra* note 51, at 637 (discussing different voice feminism).

114. See, e.g., Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1500 (2008) (noting that women place a lot of emphasis on relationships); see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST THEORY 53-62 (2d ed. 2003).

children.¹¹⁵ She quotes one woman: “I don’t want to be on the fast track Some people define that as success. I don’t.”¹¹⁶ Belkin herself attributes her decision to give up her dream of becoming editor of the *New York Times* to a lack of ambition:

I decided to leave that full-time job in the newsroom for a more flexible freelance life writing from home, and I must admit that it was not a change I made only because my children needed me. It’s more accurate to say I was no longer willing to work as hard—commuting, navigating office politics, having my schedule be at the whim of the news, balancing all that with the needs of a family—for a prize I was learning I didn’t really want.¹¹⁷

Sociobiologists make arguments remarkably similar to Belkin’s. “[M]y central thesis is that *much* of what we call the glass ceiling and gender gap is the product of basic biological sex differences in personality and temperament,” differences that stem from men’s and women’s different reproductive roles, argues Kingsley R. Browne.¹¹⁸ Browne argues that women don’t reach the C-suite because they lack the qualities that get men there: “aggressiveness, ambition and drive, strong career orientation (‘a passion for success’), and risk-taking.”¹¹⁹ “Combined with women’s greater commitment to families these temperamental differences have a powerful effect,”¹²⁰ concludes Browne, explaining women’s failure to reach the top rungs in the world of work, which he sees as reflecting women’s choice rather than a glass ceiling.¹²¹

If feminists like Belkin and anti-feminists like Browne agree, there must be some powerful gravitational force pulling them in the same direction. The description each gives of women, as less aggressive and focused on care rather than personal ambition, reflects not an accurate description of women but an accurate description of femininity. As psychologists tell us, women are typically seen as expressive, nurturing, and responsive to the needs of others.¹²² “Praising women’s sensitivity and emphasizing the importance of mothers’ nurturing of children . . . may be a less incendiary way of invoking the notion that women are suited for domestic life, but not for business,” note Peter Glick

115. Belkin, *supra* note 33, at 47 (“My first readjustments were practical . . . I learned you can’t hop on a plane every morning to explore the wilds of Texas while leaving a nursing baby back home. Quickly, though, my choices became more philosophical.”).

116. *Id.* at 44.

117. *Id.*

118. Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 984 (1995).

119. *Id.* at 1065.

120. *Id.* at 1066.

121. *Id.* at 1075-76.

122. See Ridgeway, *supra* note 72, at 639-41.

and Susan Fiske.¹²³ Social psychologists have documented that both men and women hold “benevolent” stereotypes of women—indeed, women hold them more strongly than men.¹²⁴ Different voice feminism is an embrace of these benevolent stereotypes.

The classic modern description is Carol Gilligan’s work in the 1980s. When Gilligan set out to record the self-descriptions of (upper-middle class, predominantly white) women, she described women’s “different voice” as the view of the “moral person [as] one who helps others; goodness is service, meeting one’s obligations and responsibilities to others, if possible without sacrificing oneself.”¹²⁵ Note the “if possible”: Gilligan’s acute ear picked up the abiding influence of the gender ideology that sees men and women as naturally suited to separate spheres. Gilligan’s subjects describe the influence of their mothers, whom they saw as “endlessly giving” and “selfless.”¹²⁶ This theme of “moral motherhood” has flourished since the late eighteenth century, when the old ideology of gender inferiority was replaced by the new view that women and men were equal—in their separate spheres. Women were too good for that “bank-note world”; their natural proclivities led to the private rather than the public sphere.¹²⁷

Thus it should not surprise us that the stereotypes constructed as part of this gender system are readily used to explain why women are ill-suited to progress in the world of (market) work. This is why these stereotypes—embraced by “cultural feminists,” and many other women, as a celebration of women’s strengths—are so readily flipped to provide an explanation for why women’s failure to achieve economic equality reflects only their psychological indisposition, their lack of “a passion for success” (to quote Kingsley R. Browne).¹²⁸

In short, women’s supposed psychological differences reflect benevolent stereotypes drawn from separate-spheres ideology, intimating that all women not only “act femmy” all the time, but also internalize only values associated with separate-spheres femininity. This is clearly untrue: As discussed above, many women mix behaviors and values associated with masculinity along with those associated with femininity. As Hillary Clinton shows us, femininity acts

123. Peter Glick & Susan T. Fiske, *Ambivalent Stereotypes as Legitimizing Ideologies*, in *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 278, 301 (John T. Jost & Brenda Major eds., 2001).

124. Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 *AM. PSYCHOLOGIST* 109, 110-12 (2001); Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counter-stereotypical Impression Management*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 629, 641-42 (1998).

125. GILLIGAN, *supra* note 23, at 66.

126. *Id.* at 54, 136.

127. JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 31, 181 (2000).

128. Browne, *supra* note 118, at 1065.

as a powerful force field that influences women's behavior but does not always determine it.

Again, the different voice is an accurate description not of women but of social norms, of the way women are expected, and often required, to behave: as femmes who conform to the expectations that surround conventional femininity. Ultimately, the claim that women have different values, or a different voice, boils down to a claim that women as a group are more feminine than men as a group. No revelation there. Women are under immense pressure to conform with what social psychologists call descriptive stereotypes of women—the everyday assumptions that women will conform to the mandates of femininity. But saying that “women as a group are more influenced than men by the norms of femininity” is very different from saying that “women have different values,” which intimates that all women act consistently femmy all the time. The conflation of women with conventional femininity may not bother women to the extent that they “act femmy” or adopt stable identities as femmes, but this claim is greeted with howls of outrage by tomboys. Said one, referring to the comment that every woman recognizes herself in Gilligan's description of women (focused on relationships and an ethic of care):

I *literally* recognized myself in [Gilligan's] . . . book When I was a college student I participated in one of the psychological surveys discussed in the book. . . . I was one of the women who gave the “archetypical” masculine response My “different voice” and the voices of the other women in the study who gave similar unladylike responses (and the male subjects who gave “sissy” answers) even if we were in the minority, apparently were not worthy of discussion ¹²⁹

Feminists can avoid feeding into antifeminist blame-the-victim arguments that women's disadvantaged economic position reflects only their own choice, and feminist femmes can avoid deeply offending feminist tomboys, by framing different-voice arguments as arguments about the voice of femininity rather than the voice of women.

3. *Using Past Discrimination To Justify Future Discrimination*

The risks of continuing to conflate the voice of women with the voice of femininity are aptly illustrated by the current hoopla over whether *Women Don't Ask*.¹³⁰ This book, by Linda Babcock and Sara Laschever, is a media hit, as are so many books that recycle benevolent stereotypes of women (think Deborah Tannen's *You Just Don't Understand*¹³¹ and John Gray's *Men Are*

129. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1143 n.12 (1990).

130. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

131. TANNEN, *YOU JUST DON'T UNDERSTAND*, *supra* note 33.

*From Mars, Women Are From Venus*¹³² franchise). *Women Don't Ask* was covered or reviewed in many widely-distributed, national-profile newspapers and magazines both domestically and abroad, legitimizing its message that women have only themselves to blame for their failure to achieve economic equality.¹³³

What wimps women are! No wonder the pay gap persists. "[Babcock and Laschever] cite hundreds of studies and present scores of revealing anecdotes to explain why women's reluctance to negotiate leads to lower salaries and job positions."¹³⁴ Descriptions of women in press coverage of the book track what social psychologists document as the "typical woman": "Babcock said a woman's approach to negotiating—when she actually does negotiate—is more collaborative. That's good, she said, because it helps maintain long-term relationships in the workplace and at home."¹³⁵ Once again, the web of relationships and the ethic of care. "Women need to acknowledge that they often have dual goals in any negotiation—substantive goals and relationships goals They need to find ways to achieve both."¹³⁶ Ah, those women, still focused on relationships. Still selfless, too. "Babcock argues women are reared to be selfless—and that this may be a reason why they are not smashing the glass ceiling."¹³⁷ "We fundamentally haven't changed the way we raise our kids," notes another article, "girls are taught to focus on the needs of others, not on themselves."¹³⁸ "While detractors might rubbish the idea women are naturally more retiring—and suggest instead that the lack of female advancement in the workplace is down to inadequate childcare," observes a British writer, "the book argues that women's psychology and upbringing turns them into caring, selfless adults."¹³⁹ Separate-spheres ideology forms the basic architecture of the book, which jumps from a discussion of "Real

132. GRAY, *supra* note 33.

133. The titles of a small sampling of such articles are revealing: Allyce Bess, *The Biggest Hurdle for Women That Want a Raise? They Don't Ask for One*, ST. LOUIS POST-DISPATCH, Oct. 26, 2003, at G1; *Ground-Breaking Study: Women's Negotiating Style Leads to Lower Pay Offers Than Men Receive*, ASCRIBE NEWSWIRE, July 21, 2003; Denise Kersten, *Women Need To Learn the Art of the Deal: Pay Gap Linked to Negotiation Skills*, USA TODAY, Nov. 17, 2003, at B7; Alan B. Kreuger, *Women Are Less Likely To Negotiate, and It Can Be Costly to Them*, N.Y. TIMES, Aug. 21, 2003, at C2; Tessa Mayes, *Selfless Women Too Backward in Coming Forward for Promotion*, SUNDAY TIMES OF LONDON, Aug. 24, 2003, at 7; and Susan Schwartz, *Women Could Get More, Just By Asking*, GAZETTE, Dec. 15, 2003.

134. Caroline E. Mayer, *Readings*, WASH. POST, Sept. 21, 2003, at F3.

135. Bess, *supra* note 133.

136. Jaine Carter & James D. Carter, *Women Are More Likely To Shrink from Negotiating*, SCRIPPS HOWARD NEWS SERV., July 24, 2003 (internal quotations omitted).

137. Catherine Jones, *Shy Women Lose Thousands Not Asking for Promotion; Failure To Negotiate Is an Expensive Trait*, W. MAIL, Aug. 25, 2003, at 3.

138. Bess, *supra* note 133 (internal quotations omitted).

139. Jones, *supra* note 137.

Differences”¹⁴⁰ to its proposed solution: We need to recognize that “Women Are Better” and act on “The Female Advantage.”¹⁴¹

Much of the coverage of the book offers self-improvement tips, such as when Babcock is described as urging “women to read trade journals that publish salaries.”¹⁴² “Babcock and . . . Laschever,” says another article, “also maintain that women could make up some ground if they’d simply learn how to ask for raises and negotiate for higher pay, rather than waiting for a reward unbidden.”¹⁴³ Get with it, gals! *The Economist* develops this theme with abandon, lumping its coverage of *Women Don’t Ask* together with a discussion of studies showing that only one-third as many women as men regard themselves as “work-centered,” that “the average man did about 50% better” than women when experimental subjects were paid sharply more if they won; and that boys run faster if paired with girls (quoting one of the study authors as concluding that “if men try harder when competing, they will disproportionately win the top jobs”).¹⁴⁴

Now let’s look at a recent social psychology study, co-authored by none other than Linda Babcock, a few years after she published *Women Don’t Ask*. In a series of four experiments, Hannah Riley Bowles, Linda Babcock, and Lei Lai looked at whether and how women negotiate for compensation.¹⁴⁵ The first experiment asked whether subjects were willing to hire candidates who initiated a salary negotiation, and found that both male and female evaluators penalized female candidates who did so more than males.¹⁴⁶ The second experiment asked whether subjects were willing to work with women who negotiated salary.¹⁴⁷ The results: Women, but not men, incurred a large penalty for attempting negotiations—women’s penalty was five and a half times as steep as men’s.¹⁴⁸ Both men and women were less willing to work with women who initiated salary negotiations.¹⁴⁹ The third experiment involved the same task as the second, but used a video of the candidate’s interview rather than a resume, and found that male evaluators (but not female) penalized women for salary negotiations and insisted on a greater degree of likeability from women than from men.¹⁵⁰ The final experiment manipulated the sex of the interviewer

140. BABCOCK & LASCHEVER, *supra* note 130, at 184.

141. *Id.* at 180, 186.

142. Marilyn Gardner, *Women Still Find It Hard To Say, “Let’s Make a Deal,”* CHRISTIAN SCI. MONITOR, Sept. 3, 2003, at 14.

143. Stephanie Earls, *His and Hers: Although Some Gains Have Been Made, Women’s Paychecks Remain Smaller Than Men’s*, TIMES UNION, Dec. 22, 2003, at C1.

144. *Be a Man*, ECONOMIST, June 28, 2003, at 64, 64-65.

145. Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity To Initiate Negotiations: Sometimes It Does Hurt To Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007).

146. *Id.* at 88-89.

147. *Id.* at 89.

148. *Id.* at 91.

149. *Id.* at 92.

150. *Id.* at 92, 95.

and found that women were more reluctant to negotiate compensation when the evaluator was male, but not when the evaluator was female.¹⁵¹

To quote the researchers: "We posed the question . . . of whether women's greater reluctance . . . to initiate negotiations over . . . compensation[]could be explained by the differential treatment of male and female negotiators [T]he answer . . . is yes."¹⁵² In the first three experiments, the authors pointed out, male evaluators punished women more than men for attempting to negotiate salary.¹⁵³ In the fourth, women's reluctance to negotiate salary was reduced when they were negotiating with a woman.¹⁵⁴ "We show with this research that women's disinclination relative to men to initiate negotiations over resources, such as compensation, may be traced to the higher social costs that they face when doing so."¹⁵⁵ The authors point out that their results reflect that society rewards women for living up to the feminine ideals of modesty, niceness, warmth, and sensitivity to others, and often penalizes women for engaging in the kind of competitive, self-promoting behaviors that are accepted as appropriate for men.¹⁵⁶ "As lower status group members making claims to the privileges of higher status group members, women are likely to appear inappropriately demanding if they attempt to negotiate for higher levels of compensation,"¹⁵⁷ especially (but not only) if the evaluator is a man. Other studies confirm that women's inability to negotiate disappears when they are negotiating for others; it is only when they negotiate for themselves that they falter,¹⁵⁸ for fear they will transgress the separate spheres' mandate of selflessness. Additional social psychology studies support this observation, notably a meta-analysis of sixty-two different studies.¹⁵⁹ One key reason women don't ask: They risk being perceived as "bitchy" if they do.

While femmes may embrace traditional stereotypes of women as proof that women can lead the world to a better way, others seize on their arguments as proof that women are just too femmy to cut the mustard in the big bad world. For example, the *Business Week* reviewer notes that *Women Don't Ask* "explains a large part of the persistent pay differential between men and women," and *Fortune* finds it to be "[t]he first book to adequately explain the dramatic differences in how men and women negotiate and why women do

151. *Id.* at 95, 98.

152. *Id.* at 98-99.

153. *Id.* at 99.

154. *Id.*

155. *Id.* at 99-100.

156. *Id.* at 85, 99.

157. *Id.* at 86.

158. Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, *When Does Gender Matter in Negotiation?*, NEGOTIATION, Nov. 2005, at 3.

159. Amy E. Walters, Alice F. Stuhkmacher & Lia L. Meyer, *Gender and Negotiator Competitiveness: A Meta-analysis*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 4 (1998).

often fail to ask for what they want.”¹⁶⁰ Neither of these reviews considers the fact that women do not negotiate because they face steep social costs if they try.

When conventional femininity is characterized as the voice of women, past discrimination against women (that is, norms that punish women for negotiating) is used to justify future discrimination against women (that is, workplace gender bias that imposes a steep price on women who negotiate). A particularly clear example is from *The Sun*. “[The authors] suggest . . . [that women don’t ask] because women have lower expectations of what they can achieve, are grateful for the job offer in the first place and have less knowledge of the job market and what they are really worth.”¹⁶¹ Why do women have lower expectations? Because of discrimination against women: Gender discrimination in the past is being used to justify gender discrimination in the future.

To their credit, Babcock and Laschever try to head this off at the pass, by asserting that they are not offering a “fix the women” argument.¹⁶² But in interviews and in the book, they often offer suggestions about how women should change. The book’s preface begins: “Women don’t ask. They don’t ask for raises and promotions and better job opportunities. They don’t ask for recognition for the good work they do. They don’t ask for help at home.”¹⁶³ The introduction tells a story about several female Ph.D. students who came to Babcock when she was director of their program, complaining that “male grad students were teaching courses of their own,” while they were relegated to teaching assistant positions.¹⁶⁴ When Babcock asked the relevant dean why, he explained: “More men ask. The women just don’t ask.”¹⁶⁵ The dean leans on talk of women’s socialization, without a glimmer of a suggestion that unspoken messages he and others in the department send may well have played a crucial role in creating women’s reluctance. Poor men! They try so hard, but women are so baffling.

Why would two feminists embrace traditional stereotypes that can be, and regularly are, used against women? I assume they do so because they feel those stereotypes to be true. To quote the book’s introduction: “Women often worry more than men about the impact their actions will have on their relationships.”¹⁶⁶ This is not the voice of deference-challenged women who

160. Laura D’Andrea Tyson, *New Clues to the Pay and Leadership Gap*, BUS. WEEK, Oct 27, 2003, at 36; Jerry Useem, *The Smartest Books We Know*, FORTUNE, Mar. 21, 2005, at 148.

161. *Arguing Works*, SUN, Oct. 2, 2003, Capital Careers, at 6.

162. See BABCOCK & LASCHEVER, *supra* note 130, at ix (opening their argument by asserting that it is the process of negotiation that has changed: “[N]egotiation has increasingly been seen as, ideally, a collaborative process This change in attitude makes negotiation more attractive to women because many women dislike the competitive nature of much negotiation.”).

163. *Id.*

164. *Id.* at 1.

165. *Id.*

166. *Id.* at 4.

worry not a bit, and pay the price. Chapter One quotes a woman architect as “working and working until I fell apart,” stating that “asking [for help] didn’t seem like a possibility, but I’m sure it was.”¹⁶⁷ This is not the voice of a woman who actually asked her husband to make career sacrifices, only to find out that her husband refused to help. Chapter Two discusses women who don’t negotiate because they are “satisfied with less”: less money, less status, an unequal division of household chores.¹⁶⁸ Not a word about women who demand more and are written off as lacking in interpersonal skills. Only one of the book’s eight chapters features tomboys chafing against the mandates of feminine niceness. The remaining seven chapters overwhelmingly feature femmes reluctant to negotiate for internal psychological reasons. It’s a book about women who feel that descriptive stereotypes aptly describe them and are baffled about why their attempts to meet other people’s expectations don’t pay off.

Difference feminism’s embrace of conventional femininity also raises acute problems of coalition building. These problems emerge clearly in the *Women Don’t Ask* debate when Babcock recommends, in one interview, that women should use a “cooperative negotiation” style to get what they want. The trick is:

don’t go to a manager and say, “I have another job offer and unless you match it, I’ll leave.” That approach would be as threatening from a woman, even if it could be accepted from a man, Babcock said. So instead, reframe it: “I have this other offer, but I’d like to find a way to stay here. Can you match it so I can stay?”¹⁶⁹

That may be good advice for femmes, whose hesitancy comes from within. But to tomboys, who may comply with feminine niceness reluctantly or not at all, it feels like a requirement that they conform to a sexist insistence to act femmy. Ultimately, why does it matter whether the woman has adjusted her behavior wholesale or retail to the mandates of conventional femininity? The fact is that masculine workplace norms often make it politically riskier for women to negotiate than for men.

The surest way to preclude a feminist coalition is to insist, as the only true path, *either* on the agenda of giving women access to masculine gender performances (the tomboys’ access-to-masculinity agenda) *or* on the agenda of making the world safe(r) for conventional femininity (the femmes’ femininity-empowerment agenda).

One thing both sides can agree on is the need to displace masculine norms, in this case, the “common sense” idea that the way to get a high salary is to bargain hard. Adopting this traditionally masculine style is costless for most

167. *Id.* at 9.

168. *Id.* at 41.

169. Amy Joyce, *Her Pay Gap Begins Right After Graduation*, WASH. POST, Apr. 29, 2007, at F1.

men. In fact, bargaining hard enhances their masculinity and, as we have seen, masculinity is an implicit job requirement for most high-status jobs—so men have little to lose, and something to gain, from hard bargaining. Women, femmes and tomboys alike, face a Catch 22. If they act femmy and don't negotiate, they get lower salaries and look ineffectual. If they act like tomboys and do negotiate, they may well find themselves triggering negative responses stemming from ambivalent sexism. The solution is not to advise tomboys to negotiate in a deferential, reassuringly femmy way. The solution is (again) to notch the analysis up one logical level and change the norm. It is perfectly possible to design a compensation system—or a system for selecting which graduate students teach their own courses—in a way that does not systematically disadvantage women. But we need to stop depending on a system of giving good starting salaries, good raises, and good teaching assignments only to those people who negotiate hard for them. There are many alternative systems. That's the direction we need to go, because that's the only direction that will offer true opportunity—not just for tomboys or for femmes, but for the broad band of men, gay and straight, who are not at home with hard-hitting, self-promoting conventional masculinity.

III. THE RELATIONSHIP OF RECONSTRUCTIVE FEMINISM TO OTHER FEMINISMS

This Article has explored, at some length, the relationship of reconstructive feminism to assimilationist and difference feminisms (the sameness/difference debate). While a complete discussion is beyond the scope of this Article,¹⁷⁰ this Part will touch on the relationship of reconstructive feminism to four other strains of feminist theory: queer theory, dominance feminism, antiessentialism, and third-wave feminism.

A. *Queer Theory*

Reconstructive feminism is a “queer eye for the straight guy” (and girl).¹⁷¹ It applies the intellectual tools developed by queer theorists to conventional masculinity and femininity (note the use of the singular). Reconstructive feminism draws inspiration from queer theory's explorations of the way people try out, play with, mold, and are molded by femininity and masculinity. Queer theory's core insight is that gender does not reside naturally in people's bodies; rather, it is a set of social scripts that people either follow or resist (or both). Gender is a cultural resource people use to shape their persona and their social interactions. It is not something you are but something you do, and involves “crafting conduct that can be evaluated in relation to normative conceptions of

170. See WILLIAMS, *supra* note 60.

171. *Queer Eye* (Bravo Television 2003-2007).

manly and womanly natures and assessing conduct in light of those conceptions—given the situation at hand,” to quote the influential formulation of sociologists Candace West and Don Zimmerman.¹⁷² As a specific example, my use of the term “femme” is intended to show that to enact femininity as a strategy of self-expression is not limited to the butch-femme dialectic in lesbian culture; conventional (and often straight) women in conventional workplaces do so, too.

Although reconstructive feminism makes explicit its debt to queer theory, it simultaneously stresses that the three different axes of gender analysis study distinct arenas of human conduct: the relationship of market work and family work, the eroticization of dominance, and the complex relationships of sexual orientation and gender display.¹⁷³ Acknowledging the independence of these three axes of gender allows gender theorists to avoid unnecessary disagreements over terminology and analytical tools—for example, use of the terms “sex” and “gender.” From the standpoint of queer theorists, whose goal is to explore the complex relationships between biological sex, gender performance, and sexuality, work/family feminists’ insistence on distinguishing between biological sex and socially constructed gender is counterproductive, because the sex/gender distinction sends the message that sex is natural rather than socially constructed.¹⁷⁴ Yet for analysis of the work/family axis of gender, the distinction between sex and gender is a vital tool, useful to point out the ways that people with vaginas do not always behave in the ways separate spheres ideology describes as feminine: Not all women share an ethic of care, or embrace the homemaker or even the mother role. In short, the tools for analysis of the queer axis of gender are different from the tools necessary for analysis of the work/family axis. Reconstructive feminism’s call to distinguish (at least) three distinct feminist axes and agendas should help keep things sorted out.

B. Dominance Feminism

Reconstructive feminism also shares many of the premises and conclusions of dominance feminism, which focuses on masculinity as a source of social power. More than twenty years ago, Catharine MacKinnon (the architect of dominance feminism) wrote insightfully about the prevalence and the influence of masculine norms: “Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define

172. Candace West & Don H. Zimmerman, *Power, Inequality, and the Accomplishment of Gender: An Ethnomethodological View*, in *DOING GENDER, DOING DIFFERENCE: INEQUALITY, POWER, AND INSTITUTIONAL CHANGE* 41, 42–43 (Sarah Fenstermaker & Candace West eds., 2002).

173. See *supra* Part I.B.

174. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995).

workplace expectations and successful career patterns.”¹⁷⁵ MacKinnon even mentions what I later termed the ideal-worker norm, noting that jobs are “structured with the expectation that [their] occupant would have no child care responsibilities.”¹⁷⁶

From there, the divergences begin. One divergence is MacKinnon’s undefended, and fundamentally indefensible, claim that the eroticization of dominance is the central (and possibly only) dynamic of gender.¹⁷⁷ Another is MacKinnon’s claim that her approach is “feminism unmodified,” intimating that other feminisms don’t deserve the name, and her often harsh judgments, such as her claim that sex-positive feminists are just “procuring women for men.”¹⁷⁸ Yet another difference is dominance feminism’s consistent failure to distinguish between masculinity and men: Just as many women do not buy into the least attractive parts of femininity, many men do not buy into the profoundly unattractive parts of masculinity that MacKinnon’s work so aptly plumbs.¹⁷⁹ Last but not least, reconstructive feminism takes issue with MacKinnon’s understanding of the social processes that link men with power. Her simple model of men enforcing gender privilege with their fists works well in the domestic violence context, but the workplace dynamics that block women from good jobs reflect processes more subtle than man’s foot on “our necks.”¹⁸⁰ Workplace gender privilege stems from the ways gender is built into time norms and work devotions that systematically disadvantage not only women, but also many men.

C. Antiessentialism

Reconstructive feminism shares with antiessentialism a commitment to inclusion. The classic antiessentialist text critiques white feminists for reflecting white, straight privilege when they describe gender problems from their own perspective, thereby erasing the perspective of women of color, lesbians, and other women disadvantaged by more than one axis of social

175. MACKINNON, *supra* note 2, at 36.

176. *Id.* at 37.

177. MACKINNON, *supra* note 2, at 14, 32. See CAROL QUEEN, *REAL LIVE NUDE GIRL: CHRONICLES OF SEX-POSITIVE CULTURE* (1997); Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 605 (2003); Crawford, *supra* note 6, at 122 (“Offering women the opportunity to shop for sex toys, to make their sexual desire primary, is an example of sex-positive feminism at work.”); Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (“Sex-positive feminists challenge the premises of dominance feminism.”).

178. MACKINNON, *supra* note 2, at 14, 32, 45.

179. *E.g.*, *id.* at 86 (discussing a singular “point of view of men.”).

180. MACKINNON, *supra* note 2, at 45 (“Take your foot off our necks, then we will hear in what tongues women speak.”).

power.¹⁸¹ Some white feminists, notably MacKinnon again, go further, insisting that all women are united by gender oppression—even over the protests of women of color who insist that their experience of social oppression does not invariably foreground their experience as women.¹⁸²

The accepted metaphor for responding to these concerns is Kimberle Crenshaw's metaphor of intersectionality.¹⁸³ Black women, she argues, exist at the intersection of race and gender, and it is time to "demarginalize" their experience. "Intersectionality" has proved a useful tool for highlighting the need for feminists to discuss the experience not only of black women, but also of other women of color and lesbians.¹⁸⁴ Yet today we find ourselves bumping up against its limitations. First, intersectionality as a metaphor itself reinforces white privilege and heteronormativity by erasing the fact that women of color are no more and no less at the intersection of race and gender than are white women, and gay women are no more and no less at the intersection of sexuality and gender than are straight women. Second, the metaphor of intersectionality fails to allow us to separate the experience of black women from the experience of blacks in general (to avoid changing the topic from black women to black men) and the experience of black women from the experience of women in general (to avoid changing the topic from women of color to white women).

We need to jump-start the study of the racialization of gender bias—the ways the experience of gender differs by race. Obviously, women of color often encounter gender bias: One recent study reported that sixty-nine percent of black women surveyed had encountered gender bias at work.¹⁸⁵ But how women of color experience gender sometimes differs from how white women experience gender. Feminists need to spark sustained study of how the experience of gender differs by race, a literature that is still in its infancy. Studies exploring how glass ceiling biases (double standards and double binds) differ by race are sorely needed. The maternal wall literature is less insular: Despite the fact that this area of study began as recently as 2004, initial studies have explored maternal wall bias among black women, Latinas, Asian-

181. See CHAMALLAS, *supra* note 114, at 78-88.

182. Compare Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991), with Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

183. Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL. F. 139, 139-67 (1989).

184. See generally CRITICAL RACE FEMINISM: A READER (Adrien Wing ed., 1997) (exploring the "intersection" of race and gender); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1995) (exploring ways essentialism complicates an honest effort to bring meaning to "lesbian experience" as she outlines the contours of a lesbian legal theory).

185. CHARISSE JONES & KUMEA SHORTER-GOODEN, *SHIFTING: THE DOUBLE LINES OF BLACK WOMEN IN AMERICA* 282-83 (2003).

Americans, and lesbians.¹⁸⁶ In-depth qualitative studies on the racialization of gender in the work-family context have just begun to emerge.¹⁸⁷

The importance of this project is highlighted by Maureen Perry Jenkins's study of the psychological aspects of work/family conflict in working class families, which found marked differences according to race. Immigrant Latina women are most likely to experience depression when they returned to work after the birth of a child, reflecting strong norms against employed mothers in Latin American cultures.¹⁸⁸ African-American mothers experience the lowest levels of depression upon their return to work, reflecting a cultural norm that paid work is an integral part of responsible motherhood.¹⁸⁹ White women are in the middle—no more at the intersection of race and gender than either of the other groups of women.¹⁹⁰ The crucial point, captured by the term “double jeopardy,” is that to study gender responsibly one must study how the experience of gender differs in different racial groups.¹⁹¹

The next obvious question is how to account for the fact that gender and race are not the only categories of social power, which also include class, sexuality, disability, and so on. How should we account for them all? This has been a key stumbling block for antiessentialism. The solution is to recognize, once again, that the right tool is half the job, and which tool we pick will depend on the job we wish to do. One can only account for race, class, gender, disability, sexuality, and every other category of social power at once in the way antiessentialism typically does: with an exhortation to take invariably everything into account, always. In practice, studies ultimately examine specific social locations (such as Latina working-class mothers, black professional women, white lesbians). Note the term *locations* not identities: recall that what we are talking about are the social norms and forces within which people negotiate their individual identities, not the identities themselves.

186. See Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1377-78 (2008) (discussing Leticia Anne Peplau & Adam Fingerhut, *The Paradox of the Lesbian Worker*, 60 J. SOC. ISSUES 719 (2004)); Amy J.C. Cuddy, Susan T. Fiske & Peter Glick, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 714 (2004); Rebecca Glauber, *Marriage and the Motherhood Wage Penalty Among African Americans, Hispanics, and Whites*, 69 J. MARRIAGE & FAM. 951, 958-59 (2007); Ivy Kennelly, *“That Single-Mother Element”: How White Employers Typify Black Women*, 13 GENDER & SOC'Y 168, 176 (1999); Amy J.C. Cuddy & C.M. Frantz, *Race, Work Status, and the Maternal Wall 1-7* (May 3, 2007) (unpublished paper presented at *Gender Roles: Current Challenges*, a symposium conducted at the seventy-ninth annual meeting of the Midwestern Psychological Association in Chicago, Illinois); Tanya Koropecj-Cox, Victor Romano & Susan Codd-Rydzewski, *Biases, Premiums, and Penalties: Students' Perceptions of Parents and Childless/Childfree Couples 16-24* (2008) (unpublished manuscript)).

187. See, e.g., Cuddy & Frantz, *supra* note 186; Koropecj-Cox et al., *supra* note 186.

188. Maureen Perry-Jenkins, Juli Anna Smith & Amy Claxton, *A Socio-cultural Lens on Parents' Mental Health Across the Transition to Parenthood 20-21* (2008) (unpublished manuscript, on file with author).

189. *Id.* at 20.

190. *Id.*

191. See JONES & SHORTER-GOODEN, *supra* note 185.

D. Third-Wave Feminism

A final brief word about the relationship of reconstructive and third-wave feminisms. One significant divergence is discussed above: Third-wave feminism is intensely focused on personal exploration; it seeks to play a very different role than does reconstructive feminism, which is oriented towards the change of institutions. Yet a significant overlap is that third-wave feminism, like reconstructive feminism, is intently committed to explorations of the values associated with the traditions of femininity. Unlike the tomboys of early second-wave feminism, so often focused on gaining access to roles traditionally limited to men, the femmes of the third-wave share with reconstructive feminism a focus on femininity.¹⁹²

CONCLUSION

Reconstructive feminism rejects the recommendation to address the needs of women who conform to traditionally feminine life and behavior patterns by insisting on the need to recognize “real differences.” If I were writing in the 1980s, I would deny that real differences between men and women exist—but that is too precious and would just prove confusing. The main point is that what we see as “real physical and social differences” seem “real” and “important” only by reference to unstated masculine norms that make women’s differences seem to carry weighty explanatory power. “Real psychological differences” reflect only the unsurprising fact that, given hydraulic social pressures to conform to societal expectations surrounding gender, women as a group tend to behave more femininely than do men as a group. Conversations focused on how women, more than men, act in conformity with the mandates of femininity need to replace loose talk about “women’s voice” or “values” with talk about the “different voice” as the voice of conventional femininity rather than the voice of women. This voice has some elements we need to preserve—as does the voice of conventional masculinity. Each also has some elements we need to lose, and quickly.

The dark underside of the ethic of care is separate spheres’ linkage of caring with self-erasure. Surely, caring for family, friends, and the world is an important value, but the version of caring enshrined in conventional femininity is seriously flawed. Care work is not logically linked with an inattentiveness to one’s own needs: that neglect is an aspect of the “ethic of care” we need to rethink. In fact, any basic psychology text will tell you that raising children, to take the paradigmatic case of care work, is not best accomplished by someone who ignores her own needs. The “ethic of care,” to the extent that it is

192. See, e.g., Crawford, *supra* note 6, at 110-16, 120-22, 141-50.

associated with self-erasure, reflects not a logical linkage but a cultural one: It stems from the societal devaluation of caregiving, including the fact that it is not considered work, and so is not linked with the kinds of entitlements that seem to flow naturally from work. The point is not that caregiving is unimportant. The point is that it is too important to continue to occur within a cultural framework that associates it with economic vulnerability and social devaluation, celebrated as self-denial.

