

'LADY' JUSTICE: POWER AND IMAGE IN FEMINIST JURISPRUDENCE

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INTRODUCTION

Feminist jurisprudence unites two different discourses—the discourse of legal scholarship and the discourse of feminist scholarship. This newly forming dialogue enables us to examine gender issues from a legal perspective and to work toward removing gender bias both in the law and in American society.¹ If successful, it will enable practicing attorneys to articulate new arguments and engage in practices that will empower the law to take account of women.

In the context of Western civilization's historic marginalization of women, feminist jurisprudence raises fundamental issues about the politics of the law. In exploring these issues, this essay examines some of the images and metaphors feminist jurisprudence has used in developing its discourse. These images and metaphors help explain the important ethical and political contributions that feminist jurisprudence offers to legal discourse. Examination of these images is important because it facilitates the exploration of new legal practices and strategies for transforming the law. Reflecting on these images can enable those outside the feminist legal discourse to comprehend the world view and the value system which that discourse constitutes. It may also enable those who participate in that discourse to continue evaluating their work in terms of both its political/ethical messages and the aesthetic/rhetorical modes that carry them.

Feminist legal scholars are acutely aware that the struggle for justice must include feminist critiques. Feminist analysis occurs at two levels—at the level of argumentation and at the level of reflections on the language of that argumentation.² Contemporary language analysis and the linguistic turn in philosophy provide a good

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1. For an introduction to feminist analyses of the law, see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

2. For an example of feminist analysis at both levels, see *THE THINKING MUSE* (J. Allen & I. Young eds. 1989).

starting point for this analysis because they examine the form and rhetoric of arguments as well as the policies they support.

I. METHODS OF LANGUAGE ANALYSIS AND FEMINIST JURISPRUDENCE

Contemporary social analysis has turned to linguistic analysis as a way to understand the basic structure of social/political action.³ With this linguistic turn, citizens have become more aware of how language shapes their daily lives and how language and speech empower certain actions and inhibit others. Social theorists who want to understand how this happens have turned to discourse as a way of explaining how patterns of political action are embedded in professional conversations.⁴ The purpose of this analysis is not to lament that we are wholly captured by language and its limitations; rather, it is to become more aware of what we *do* by speaking the way we do.

While philosophical hermeneutics⁵ and poststructuralism⁶ have developed rich analyses of language and its social/political work, everyday experiences also alert citizens to the importance of language and the key role it plays in setting our political agendas. Both provide a philosophical background for the present analysis, whose goal is to understand how feminist legal scholars speak about the law in the interest of developing a richer understanding of how the law can move us toward justice for both women and men.

This essay focuses on three key images which illuminate the social/political issues raised by feminist jurisprudence. In connection with each of these issues, it offers policies and practices which could enable the law to address the situations of women at least as well as it has traditionally addressed those of men.

The first image is the way in which "contract" has been used to characterize the fundamental nature of relationships. In legal

3. For a summary of this evolution, see R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983). For its application to the law, see White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

4. See, e.g., F. DALLMAYR, *MARGINS OF POLITICAL DISCOURSE* (1989); *LANGUAGE AND POLITICS* (M. Shapiro ed. 1984).

5. For an overview of philosophical hermeneutics, see generally D. HOY, *THE CRITICAL CIRCLE* (1978).

6. For an overview of feminist analysis and poststructuralism, see generally C. WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* (1987).

discourse, the notion of the contract represents a primary way of characterizing relationships among citizens. The concept of the "social contract" has served as the fundamental image used in articulating the proper relationship between citizens and the state. However, the traditional notion of contract raises serious gender issues. Is the nature of a woman's relationship to the state different from that of a man's? Is the contract essentially a male model of relationships which gives males the advantage in male/female relationships, or is it a model for equality in male/female relationships? Does the contract model of relationships conflict with feminist models of good relationships?

The second image which illuminates important aspects of feminist jurisprudence is the metaphor of "voice." Feminist literature stresses the importance of women finding their own voices—public ways of articulating positions that genuinely represent women's experiences.⁷ "Voice" can be understood at two levels. First, it affirms the importance of women speaking in public about their experiences which have been sequestered into the private realm of the family. Second, it affirms the importance of speaking about these experiences in a way that will illuminate how gender politics has shaped women's public lives. It is equally important that feminists offer fresh solutions to long-standing gender problems, thereby enabling us to transform society so that women will no longer be second-class citizens.

The opposite of voice is "silence," which suggests non-existence or absence, thus representing powerlessness. Voice, on the other hand, represents presence and participation, and as such evokes women's transformative powers. Feminists working in feminist jurisprudence seek to give voice to women's experience to enable the law more fully to address gender issues.

The third image focuses on how "vision" is used to represent knowledge, emphasizing the "eye" as the organ through which we come to know the world. We see and then we know. Vision underlies our cultural notion of objectivity. This notion of objectivity emphasizes the distant role of the witness as an observer, rather than the more connected role of the observer as a participant. In this sense, it does not afford an easy integration of those women's

7. See, e.g., M. DALY & J. CAPUTI, *WEBSTER'S FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE* (1987); C. GILLIGAN, *IN A DIFFERENT VOICE* (1982); A. RICH, *ON LIES, SECRETS, AND SILENCE* (1979); A. SEXTON, *TRANSFORMATIONS* (1971).

experiences which emphasize closeness and connections.⁸

My analysis of these three images will incorporate the work of feminist scholars who have focused on legal theory,⁹ as well as the work of feminists who have been active in constructing feminist jurisprudence.¹⁰ Rather than presenting a comprehensive survey of all American feminist legal scholars, I will focus on a few central texts. These texts give primary consideration to fundamental questions about the politics of the law. In the course of analyzing how feminists use these three images—contract, voice, and vision—to enable the law to speak to women's situations, this essay offers some concrete policies and practices which could be used to transform the legal and political system in a way that provides more justice for women.

II. THREE POLITICAL IMAGES IN FEMINIST JURISPRUDENCE

A. *Contracts, Relationships, and the Birth of State Power*

The social contract has been a central image used to explain and justify the power of the state over its citizens. However, in addition to representing relationships between citizens and the state, the social contract describes relationships among citizens themselves. The social contract is the theoretical foundation of the modern liberal democratic state. According to this theory, citizens (perhaps only male citizens) agree to surrender some of their own powers to the state in exchange for protection; the state, therefore, rules with the consent of the governed. Carole Pateman argues that prior to this social contract there is a sexual contract which subordinates women. Under the terms of this prior contract, women are made subordinate in the family. Hence, they are unable to give their consent to the social contract with the state.¹¹ It is through the social contract that men, as opposed to women, "gave

8. For a discussion of women's knowledge as integrating personal experience and objectivity, see M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986).

9. E.g., Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); C. MACKINNON, *FEMINISM UNMODIFIED* (1987); C. PATEMAN, *THE SEXUAL CONTRACT* (1988).

10. E.g., C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987); Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985-1986).

11. C. PATEMAN, *supra* note 9.

birth" to civilization.¹²

1. *Exchange and a Sexual Contract*

What does it mean to associate the birth of civilization with male persons? Giving birth is one of the most important events that serves to sustain the modern state; obviously, if a state is to continue, it must have citizens. The image suggests that while women give birth to bodies, the more important birth is brought about by men who give birth to civilization and citizens. Consequently, the birth image, which is ordinarily associated with women, comes to be appropriated to the end of legitimating men's power. In the context of the power of the state over the family and over women, this appropriation of the birth image has important ramifications. Pateman underscores its political and legal implications.

According to Pateman, the sexual contract is a silent part of the original contract which governs both the public political realm and the private family realm. The social force of the "private" aspect of this original contract has been largely overlooked, and as a consequence the sexual contract has become an especially powerful force for subordinating women. Pateman argues that the sexual contract generates a system in which "father-right" includes masculine sexual rights, thus giving men power over women as represented in the husband's authority over *his* wife.¹³ She explains that this original story of the political authority of the state presents two fictions. First, the story suggests that men give birth to civil society as they create political order through the law. Second, it likens this original creation to a contract, whereby all members through their ancestors agree to obey the state as children obey their fathers. It is a contract to which one is bound by virtue of one's birth. In return, the state undertakes to serve as its citizens' patriarchal protector.¹⁴ The law is the mechanism through which such protection is made manifest.

Pateman points out that the argument that blood relationships provide the basis for political community through father-right fails to take note of the fact that the family is founded not on blood relationships but on the prior husband and wife relation-

12. *Id.* at 36.

13. *Id.* at 27-28.

14. *Id.* at 101-15.

ship.¹⁵ This means that the foundational relationship of the state is not based on blood or kinship but on a sexual bond—the marriage contract.¹⁶ Characterizing the party to the social contract as “father” rather than as “husband” forestalls questions about the appropriateness of the male figure as the “legitimate” representative of the household. The title “father” implies a man’s relationship with his children, and implies a position of power and authority. While some might argue that either “father” or “husband” can represent the interests of the wife, this argument fails to note an important dynamic in the structure of the state. Pateman argues that the political basis of this social contract is not a father-to-father relationship but a brotherhood—a fraternal relationship¹⁷ among individuals who have a shared interest in maintaining their sex-right political benefits.¹⁸

The contractual image not only becomes basic to the way we understand the state but also serves as a central image for understanding business, social, and even marital relationships. Such relationships are in turn understood from the perspective of a contract governing an exchange of goods and services. As Pateman explains, “the contractarian conception of social life implies that there is contract ‘all the way down’; social life is nothing more than contracts between individuals.”¹⁹ Contracts are the social bonds which establish family, community, and the formal powers of the state.

However, the social contract and the marriage contract are arguably closer to choices about ways of living than about specific exchanges of goods and services.²⁰ Both the social contract, which legitimates the state, and the sexual contract, which forms the marriage, fail to specify the particular duties, responsibilities, services, and goods that are part of the agreement. Both depend upon cultural practices and norms to fill in the list of responsibilities and obligations. Both rely more on a spirit of good will for enforcement than on a clear enumeration of duties, obligations, and responsibilities.

Having alerted her audience to the sexual contract and its po-

15. *Id.* at 27.

16. *Id.*

17. *Id.* at 102.

18. *Id.* at 102-03.

19. *Id.* at 59.

20. *Id.* at 157-88; Wolgast, *Wrong Rights*, 2 *HYPATIA* 25, 37-38 (1987).

litical import, Pateman concludes that the social contract is a "political fiction" with an unfinished "story."²¹ She calls for new ways of thinking and talking about the state and freedom by reexamining both the social contract and the sexual contract which serves as its base.

The contract analogy is consistent with the rights-based theory of justice that has been the basis of liberal democratic theory. In contrast to the rights-based theory, some feminist theorists have proposed a care-based notion of justice,²² emphasizing nurturance, commitment, and responsiveness instead of rights and mutual obligations.²³ While this model has not yet been fully developed, it holds promise for generating new relationships both among citizens, and between citizens and the state.

2. *New Practices: Moving from Contracts to Relationships*

Feminist analyses can replace the hegemonic notion of contract as the archetype of all relationships. It offers richer analyses which are more expressive of the vast array of relationships found among citizens, and between citizens and the state. I propose an approach built upon a legal analysis of relationships that incorporates a communitarian model emphasizing the social/cultural context in which agreements take place.²⁴ Such a communitarian model would not so much alter the expectations of individuals who enter into such relationships as it would enable the law to take fuller account of the context in which agreements take place. It is a model for legal analysis rather than a model for transforming individual relationships or agreements.

Contract law attempts to ensure that contracts take place between equally free and mutually consenting parties. What the law fails to acknowledge is the degree of disparity in bargaining power within various relationships. What I call a communitarian model of relationships holds that the formation of agreements does not take place between independent free agents but under conditions in

21. C. PATEMAN, *supra* note 9, at 234.

22. For a legal analysis of this, see D. RHODE, JUSTICE AND GENDER 306-13 (1989); Scales, *supra* note 10. For a summary of various perspectives on the care model, see WOMEN AND MORAL THEORY (E. Kittay & D. Meyers eds. 1987).

23. See N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984).

24. Such an approach builds upon relational feminism. See Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39 (1988).

which one party may well have more power than the other. Power shapes relationships in uneven ways. For example, employees who fear for their economic livelihood may not be as free as the employer who wishes to hire them. Women who have been socialized into valuing themselves in terms of their relationships to others may experience marriage as more of a necessity than men. Women who have given up career opportunities in order to make a relationship work may be more compelled than their male partners to choose marriage. A pregnant woman with limited economic resources may be less free to reject marriage than her un-pregnant male companion.

The communitarian model does not deny the usefulness of considering relationships in terms of the contract model, but it allows for additional considerations. Such a model emphasizes that building relationships involves long-term commitments which concern much more than the exchange of goods and services. Relationships confer new social roles and positions on the parties to the agreement.

By relying on the contract model to examine various relationships, the legal model limits its ability to take account of the social/cultural context which shapes agreements. For example, because marriage creates new social relationships that go beyond the interests and concerns of the parties involved, it affects, to some extent, their relationship to society; it turns persons into husbands and wives just as an employment contract turns parties into employers and employees. A woman entering a marriage or a love partnership will find that this relationship changes her situation in a range of social situations—*e.g.*, at work, in church, and even in politics. Hence, one's position in society is altered by such a foundational relationship. At the same time, the social setting and culture shape that private personal relationship.

Using a communitarian model of agreements can enable us to take account of the ways in which agreements are tied to cultural practices. Such a model can illuminate the social effects of the relationship as well as its internal dynamics. It can enable us to take account of the sacrifices which women make to further their husband's careers. Because wives are expected to follow their husbands, they do not in any real sense freely or voluntarily give up their own careers to further the careers of their husbands. Social pressures, mores, and economic circumstances constrain the wife's choice. A communitarian model has the advantage of avoiding the

assumption that parties freely consent to particular arrangements, by taking account of the ways in which cultural norms shape agreements and limit choices.

Because a marriage relationship is more of an agreement to enter into a type of relationship than it is an agreement about the exchange of goods and services, it exceeds the law's ability to comprehend it. As a result, women who come to the law seeking assistance either in enforcing the contract or in extracting compensation for damages experienced through its violation find little or no relief. The law's inability to address their problems has to do in part with the emphasis that we have placed upon the image of the "contract" as a way of depicting the responsibilities that individuals have to each other. In the present cultural legal context, marriage puts many women at risk financially, emotionally, and physically. Pateman points out that marriage, unlike other contracts, "requires that one party gives up the right to self-protection and bodily integrity."²⁵ If divorce actions and other marital legal actions took better account of the ways in which the relationship is constituted, it could become less of a risk for women to marry.

B. Legal Silencers and Women's Voices

The ways in which male imagery has been inscribed into the law go beyond the emphasis on contract. The very forms of argumentation contain conversational formats which make it more difficult to speak about women's experiences than about men's experiences. Feminists have for some time been discussing the notion of empowering women by giving them "voice." The idea of voice stands for power and also emphasizes differences between men and women. To speak about women's voice is to accept the proposition that women have a different way of conceptualizing their experiences. Carol Gilligan's work has popularized this understanding.²⁶ Gilligan shows how women conceptualize moral decision-making differently than men. The discussion of voice does not argue that this difference is biological. Rather, it may be produced by variations in the way men and women are socialized, and to that degree it is a culturally generated difference. In America finding one's

25. C. PATEMAN, *supra* note 9, at 163.

26. See C. GILLIGAN, *supra* note 7. For an overview of Gilligan's work and the law, see DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985).

voice has been a traditional symbol of public political power.

What feminist scholarship has shown us is that the law has had difficulty hearing women because it has heard them as if they were men.²⁷ At the same time the law hears men as if they were generic "persons" who embody cultural norms. Catherine MacKinnon points out that many sex discrimination cases that have been won at the Supreme Court have been brought by males.²⁸ Zillah Eisenstein, taking the perspective of the pregnant body, shows how the law treats pregnancy as a disability which marks women as the "different" ones, special and not normal, while at the same time treating pregnancy as a non-sex specific category.²⁹ Even in the face of tremendous efforts in the last two decades to secure women's rights under the law, these rights, even when secured, have failed to produce the desired relief. Why? MacKinnon argues that the standard "person" from whose perspective the law is structured is in fact a male person. The law helps women when they can be shown to be similar to men. Conversely, when women are found to differ from men, the law is unable to speak adequately to their needs. It may make an attempt by labeling those needs as "special," yet a white male perspective is written into the law. As MacKinnon summarizes, "[e]quality has come to mean a right to be treated like the white man when you can show you *are* like him."³⁰

Those interested in feminist jurisprudence have begun to examine ways in which the law has relied upon rules and practices for legal proceedings and formal legal discourse which discriminate against women. Because these rules and practices operate within a culture which has a long history of discrimination against women, they often go unnoticed. Three examples help illustrate how such discriminatory practices operate in legal proceedings to silence women's voices.

1. *Individual Intent and Cultural Bias*

Discrimination seems to be largely beyond the reach of the law in part because of its emphasis upon "intent." MacKinnon ex-

27. For a general discussion of the role of gender difference in judicial action, see Minnow, *supra* note 10.

28. C. MACKINNON, *supra* note 9, at 35.

29. Z. EISENSTEIN, *supra* note 9.

30. C. MACKINNON, *supra* note 9, at 63.

plains that the emphasis on intent is one way in which the law discriminates against women and minorities.³¹ Generally speaking, the law does not recognize discrimination as such unless it is shown that it was an intended action. If the general practice in the culture is to discriminate against women and certain ethnic groups, men and women can engage in discrimination without any special intent on their part by merely following culturally embedded discriminatory patterns. Accordingly, the emphasis on intent relieves the individual of responsibility for actions that merely echo cultural norms. Since the law makes no provision for bringing the culture to trial, the discriminating individual is exculpated by the intent standard and the practice goes unnoticed by the legal system.

In this way, the law's emphasis on intent rather than on the effects of actions favors those in positions of power and protects cultural practices to the disadvantage of women and minorities. The law then affirms its own "neutrality" and constitutes women as persons asking for *special* attention when they request relief. This compounds the problem. Feminists want to put the stress on the consequences of actions rather than the intention or lack of intention underlying those actions. This would enable the law to take account of cultural bias and would make both men and women more responsible for the ways in which they perpetuate unjust cultural practices. Such an emphasis could be accompanied by a system of penalties in which penalties for culturally reinforced acts of discrimination were less severe than those in which intent was plain, thus enabling the law to charge guilty parties and recognize unsavory actions without bringing excessive suffering upon the victimizers.

2. Precedent and Patriarchy

A second practice by which the law privileges men's voices over women's is its reliance on precedent.³² Historically, women were not even allowed to testify in court. Hence, by relying upon historical precedent, courts have amassed countless legal narratives written to support men's concerns. This renders the law biased against women and women's situations.

31. *Id.* at 63-64.

32. See C. MacKINNON, *supra* note 10, at 238.

3. *Adversarial and Conciliatory Conversations*

A third practice which silences women in judicial proceedings is the basic structure of litigation as adversarial. It is organized on the basis of distance and opposition. Two sides engage in conflict from which the legal truth is expected to emerge victoriously. According to psychological analysis, there is a tendency among women to think in terms of a relational model while men's thinking follows a more distant adversarial model. This suggests that the very structure of the law is biased against the ways in which women are socialized into being persons in American culture. Feminist lawyers, drawing on the work of Carol Gilligan, argue for feminizing the law on the basis of non-combative communication models.³³ What feminists bring to the law is a set of enriched models of communication which expand the law's ability to articulate issues in a number of different ways. While mediation has always been a part of the law, some feminist analyses show how it can be used more fully to open the law to transformation at the level of communication as well as at the level of case law.

4. *Women Entering into Courtroom Conversation: A Feminist Hermeneutic*

The problems of discriminatory intent, precedent, and the adversarial format of the judicial process emerge from the law's dependence on interpretation. Feminists do not, of course, argue that the law should position itself beyond interpretation. Instead, feminist jurisprudence can be understood as an argument for a new interpretive model. Because the law depends on the culture for its context of interpretation, the interpretive process itself is as biased as the culture. Compelling feminist analyses have revealed the phallographic underpinnings of American culture. This culture provides the context in which it is far too easy for the law to express the same phallographic norms. Feminist jurisprudence attempts to recontextualize contemporary legal practices by revealing the ways in which women fail to get a fair *hearing*. MacKinnon makes the point dramatically and succinctly:

No law silences women. This has not been necessary, for women are previously silenced in society—by sexual abuse, by

33. See, e.g., Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L.J. 39, 49-62 (1985).

not being heard, by not being believed, by poverty, by illiteracy, by a language that provides only unspeakable vocabulary for their most formative traumas, by a publishing industry that virtually guarantees that if they ever find a voice it leaves no trace in the world.³⁴

The same point is made with more detail by Kristin Bumiller in her study of rape.³⁵ She argues that the ways in which we engage in public legal discussions of rape silence women's experience. Because legal discourse focuses on the issue of "consent" and assumes consent in the absence of active refusal, the court cannot take account of the fact that the woman may perceive herself in such a dangerous situation that even to voice an objection will increase the danger to which she has already fallen victim. For example, Bumiller points to a case of a woman who was gang-raped and who may have quite accurately perceived her situation to be so threatening that attempts to fight and give other indications of protest could only have put her at further risk. After leaving a party with a man whom she trusted, she suddenly found herself in a gang-rape situation. Her own experience of trust, and the horror of the immediate realization that that trust had been misplaced, added to her own vulnerability and was an important factor in the case since it showed fraud on the part of the man.³⁶ However, fraudulent relationships and entrapment are not part of the legal discussion of rape cases. This is the problem. By focusing on consent rather than on the social context within which the rape took place, the woman's story is lost; her experience is silenced. By failing to take legal account of the differences in size between the woman and her rapists, and of their male solidarity against her, her situation is obscured. It is as if the law assumed she was occupying a male body equal in size to those of her assailants. This assumption of equality in cases in which the situations of the parties are quite different is part of the way in which the law turns a deaf ear to women. In addition, a general cultural belief system that stereotypes women as irrational, hysterical, or perhaps merely "too sensitive" creates an environment in which women's testimony is not trusted. In such a context women's testimonies are rendered suspect before they say a word. A *cultural* context which portrays

34. C. MACKINNON, *supra* note 10, at 239.

35. Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 UNIV. OF MIAMI L. REV. 75 (1987).

36. *Id.* at 78-84.

women as deceitful temptresses who are irrational and emotionally unstable does not supply a *legal* context in which women can start out on an equal footing with men.

The issue of cultural bias need not, however, be left out of the legal conversation. This is why MacKinnon argues that a feminist jurisprudence needs to keep at the forefront the assumption that women are to be believed. Under present practices, women are assumed liars until they show that they are not "that kind of a woman." Laws and legal practice need to take account of the different positions of men and women within the culture in order to give a fair hearing to a woman's testimony. Treating men and women alike will not produce equality because there is greater suspicion toward women. This suspicion appears especially strong in cases involving sexual issues such as rape.

Christine A. Littleton suggests that feminist jurisprudence needs to construct a legal discourse which begins with women's experiences and refuses to force women's experiences into existing legal categories.³⁷ This means that those interpreting the law need to consider the ways in which the law fails to take account of women's experience and thereby insert feminist categories of analysis into the legal discourse. She shares the position articulated by Eisenstein who explains that "the silent male referent masks the hierarchy and inequality."³⁸ This silent male standard makes the law *appear* to be acting fairly while using a male biased standard.³⁹ The feminist call for a new standard that includes women involves rethinking fundamental issues such as the relationship between law and society.⁴⁰ These questions go beyond those raised by critical legal studies.

One way of bringing women's experiences into legal discourse and thus laying the groundwork for a new model that includes women is to employ a radical hermeneutics that reveals the way in which the law was constructed and interpreted on the basis of a faulty gender model. To make way for a new model, such a hermeneutics will require more vigorous interpretive moves than have been made thus far within legal discourse. If the court is viewed as

37. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 UNIV. CHI. LEGAL F. 23, 25.

38. Z. EISENSTEIN, *supra* note 9, at 222.

39. *Id.* at 1-5, 201-24.

40. Wishik, *supra* note 10.

a "passive" interpreter of the law—a view consistent with positive legal interpretive strategies—then it will be very difficult to include women in the legal conversation. However, if the court is understood as an active player in the work of interpretation, then it will be more possible to include women's experience in legal conversations.⁴¹

C. Lady Justice: Blindfolded or in Bondage to Cultural Injustices?

The third image found in the foreground of feminist discourse is that of "vision" as a representation of truth. As feminists have shown, however, the law's eye does not envision women clearly.⁴² MacKinnon and others point out that relying on the eyes of the law means relying on a viewpoint that is seemingly unable to bring women into focus. MacKinnon makes her point by quoting Justice Stewart's position on obscenity and then deconstructing the quotation:

'I know it when I see it.' I see this as a statement connecting epistemology—what he knows through his way of knowing, in this case, seeing—with the fact that his seeing determines what obscenity is . . . because of his position of power.⁴³

MacKinnon acknowledges that her own path to knowledge is explicable in terms of the vision metaphor, but she notes that her eyes are positioned differently from those of Justice Stewart—because hers are female and "out of power" relative to his. Hence, for her pornography represents violence because it defines female bodies by "eroticizing hierarchy";⁴⁴ it uses images of the female body—her body—and in so doing degrades that body. Male bodies are not eroticized in the same way insofar as their sexuality is not dependent on their subordination. Creating pornography that degrades male bodies would offer no relief.⁴⁵

MacKinnon and Andrea Dworkin urge legislation that treats pornography as the denigration of a class, as libel, as part of a

41. This assumes that communication depends equally on the listener and the speaker and assumes a semiotic theory of language that is consistent with hermeneutics. See E. BURER, *POLITICS THROUGH A LOOKING-GLASS* (1987). For a legal focus on these issues, see J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

42. See Minow, *supra* note 10, at 47-78.

43. C. MACKINNON, *supra* note 9, at 163-64 (footnote omitted).

44. *Id.* at 172.

45. R. TONG, *WOMEN, SEX, AND THE LAW* (1984).

more general strategy that draws public attention to the ways in which pornography harms women as a group.⁴⁶ By generating a new discourse which treats pornography not as protected speech but as speech which inflicts damage on women, they reveal how pornography functions within the culture. The pornography issue has created controversy among feminists as well as in other circles. The important legal point is that by focusing on legal discourse, especially as found in legislation and litigation, MacKinnon and Dworkin have sharpened our focus on pornography. They have engaged the issue in ways which go beyond the question of whether, on the one hand, pornography is an expression of free speech or whether, on the other hand, it leads to actions which harm women. They have asked us to look at pornography as expressive *acts* which harm women. It is not so much the resolution of the controversy that is important as it is their ability to introduce, from a legal perspective, the topic in a way that fosters new ways of talking about it.

MacKinnon asks us to see the world with new eyes. However, even the vision metaphor is suspect because from the philosophy of science we have learned that the notion of objectivity as a neutral position from which to view society is an unrealistic and unwisely coveted dream. Acknowledging the value-laden partiality underlying our viewpoints affords a more honest and credible position. Embracing this perspective, however, brings into question the image of justice as a "blind" female figure weighing only the evidence and unable to "see" concrete differences between litigants. Yet, what counts as evidence itself is the result of the culture and the attendant legal practices which that culture sustains. To the degree that that traditional cultural context is shaped by patriarchy, it simply is *not* blind to gender but instead is biased in favor of males.

While feminist jurisprudence so far has expended little or no effort exploring the image of justice as a blindfolded woman, in the context of feminist jurisprudence the image of "Lady Justice" is notably ironic. Is she blindfolded, and therefore fair? Or is *she* blindfolded, and therefore deceived about the masculine bias in the law? Is she a goddess figure serving to give significance to women's role in justice or is she a token female image that serves only to represent the law as a lady whose desires are to be served

46. See generally D. RHODE, *supra* note 22, at 266-73.

by chivalrous males?

As suggested above, Lady Justice is not blind, but rather engages in practices that treat men in a favorable light because they are men. In another sense, however, both she and the law are blind. Neither can see women as distinct beings; each sees only persons who are either like men or who differ from men and hence are special, unusual, or even abnormal persons. This creates a double bind for women because if one attempts to use equality as a norm, women are treated as equal only so long as they are similar to men; but if women are treated as women, they are considered special or unusual because men are considered the norm. Neither of these two approaches is able to take account of women as women. Implied by my feminist critique of the image of blind justice is the assertion that no position is without a viewpoint—an argument already well articulated in the general critique of absolute objectivity rendered by the philosophy of science in demonstrating the role values play in shaping observations and analysis. There is no value-free analysis, and there can be no analysis without a point of view.

In the context of these considerations, perhaps the image of the blindfolded woman has become inappropriate. Perhaps it is in fact the blindness of Lady Justice that limits her capacity for administering equal justice to culturally unequal genders. It is difficult, of course, to abandon a figure so long cherished as the symbol of justice. But can such a figure help us identify the ways in which the law might generate justice for women as well as for men? Can women participate in serving Lady Justice? Or does this symbol serve only as the token image of woman in the context of a tale of male knights serving the "lady" of the castle, who must remain helpless, inactive, pedestalled, and ethereal in order to make the story work? Does this female figure serve as the object of our gaze,⁴⁷ while never daring to look back at us, never daring to look at the world?

Perhaps we need to reconsider the place of the blindfolded image of justice in the mythology of our legal tradition. Because it represents a model of truth which no longer sustains us, this image

47. For an analysis of women as the object of male gaze in Western culture and the ways in which women are presented as figures who cannot look at the world, see the semiotic feminist work of K. SILVERMAN, *THE ACOUSTIC MIRROR: THE FEMALE VOICE IN PSYCHOANALYSIS AND CINEMA* (1988), and L. MULVEY, *VISUAL AND OTHER PLEASURES* (1989).

may be especially inappropriate for representing the ideals of justice. Removing her blindfold, however, might suggest that justice can now actually see. The figure of a woman who is able to see the world, to look back at us as we look at her, may be a more equitable way of representing justice's dependence on cultural awareness.

CONCLUSION

I have argued that the study of feminist jurisprudence generates new insights into the law which can open up new avenues for action. Certain images illuminate aspects of feminist jurisprudence which can serve as vantage points from which to reflect on the politics of the law.

First, an examination of the contract as a model of relationships shows how women have been excluded from the law. The marriage contract is inconsistent with the more general understanding of contract as an exchange of goods and services. Such a model does not effectively explain ways in which women participate in relationships—those between a wife and her husband, a mother and her child, a female worker and her employer, female friendships, and others in which females consider themselves committed to relationships which involve loyalties that go beyond a mere exchange. Indeed, the contract model may misrepresent many of the relationships men experience. In any case, it no longer serves as a useful way of understanding the responsibilities we have to one another and to the state. In order to transform the law, new images of relationships are needed. Such images might draw on other metaphors to represent relationships. These might include communitarian or care models that emphasize the bonding process itself and the responsibilities persons have to one another. Such models would encourage emphasis on responding to needs. In the context of the contract model, women are expected to sacrifice themselves for others. Practically, they end up giving too much away. In the context of a different model, women's care functions could be seen as embodying a more responsible approach to others than is seen under the contract model. In the context of creating a more diverse model that would accommodate various types of relationships, legal discourse could build up precise definitions that would enable us to make judgments based on appropriate new criteria.

Second, legal discourse needs to be structured so that it can

more fully take account of women's experiences. To hear women's voices requires a reevaluation of the law's emphasis on intent and a search for new ways to hold individuals responsible according to criteria of fairness—even if the culture urges unfair practices upon them. To hear women's voices will require interpretations of the law that employ precedent in ways that go beyond using the past to justify the present. To do otherwise will only sustain the traditional patriarchal bias against women. If women's voices are to be heard, it will be necessary to develop conversational modes that are conciliatory as well as adversarial.

Finally, the politics of the blindfolded image of Lady Justice needs to be made the subject of critical reflection. Since both the social sciences and the philosophy of science have shown us that the notion of a value-free knowledge is untenable, it may be preferable to adopt a more encompassing vision of justice. To argue that blindness and neutrality are one is no longer appropriate. For the most part, American law has not been gender blind but instead has viewed women from a male perspective. Feminists have argued that the pedestalling of a woman as "lady" is one way of discriminating against women. "Ladies" do not take up the fight for justice; "ladies" are too delicate for such work.⁴⁸ Even though it may be painful to challenge this long revered icon, it may be very important to do so in the light of new understandings of knowledge and the recently attained roles of women in public life. The image of the blindfolded "lady" may fail to represent a reality in which women and men work together to serve the law. Perhaps removing her blindfold can symbolize the ways in which the law is open to women's visions and women's voices. Feminist jurisprudence offers a discourse that can liberate the law from its patriarchal bias and establish a conversation that can engage women and men alike in reflecting on how the law can move us toward justice for both women and men.

48. MacKinnon argues that the image of women as "ladies" creates barriers for women lawyers. C. MACKINNON, *supra* note 9, at 74-77.

