AN ANALYSIS OF THE DOCTRINES AND GOALS OF FEMINIST LEGAL THEORY AND THEIR CONSTITUTIONAL IMPLICATIONS

Women Reading
To read is to empower
To empower is to write
To write is to influence
To influence is to change
To change is to live.[1]

INTRODUCTION

Women are seeking change; they (we) are seeking equality. But who defines equality? Is it possible that the search should not be for equality after all, but for power? Is there a difference between equality and power? These are questions that women must answer individually in order to achieve their desired goals. Feminist legal theory is the vehicle through which these decisions can be debated, and through which change can be accomplished in the law. The difficulty arises in attempting to apply feminist legal theory to the law when women define equality and power, and what they seek from each, in different ways.

The objective of this note is to give a voice to women's struggles for equality, struggles that have forced women either to settle for an equality based on male terms, or to proclaim and emphasize their differences. This note explores the evolution of these two doctrines and uses the issue of pregnancy in the workplace to illustrate the benefits and drawbacks of each compared to the other.[2] It then presents the dominance theory as an alternative to the two mainstream doctrines and applies this theory to the Vermont Abuse Prevention Act to show that equality is simply an inadequate means of addressing women's needs.[3]

Part I.A provides the reader with a historical background of the rise of feminist legal theory.[4] The history begins with an examination of women's submission to men by a patriarchal

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1. Power of Woman Series, Jane Evershed Card Collection, Minneapolis, MN.
2. *See infra* parts I-III.
3. *See infra* parts IV and V.
4. *See infra* part I.A.

society and the role of that patriarchy in creating the law.[5] Part I.A discusses how patriarchal law created separate economic and social spheres as well as protective legislation that rendered women helpless.[6] This part also illustrates how the assignment of women into these separate spheres perpetuates gender stereotypes.[7] Part I.B presents a summary of the constitutional standards used to analyze sex-based classifications.[8]

Part II presents two central doctrines of feminist legal theory. Part II.A focuses on the sameness doctrine, which advocates women's exact equality to men and their demand to be treated as such (i.e., as males) within society and the law.[9] Part II.A concludes with concerns about the shortcomings of this doctrine, specifically its inability to work within the system of male legal language and interpretation, and its less than inclusive nature.[10]

Part II.B examines the difference doctrine, another prevalent doctrine of feminist legal theory.[11] Feminists adhering to this approach emphasize the biological differences between men and women and request that society and the law acknowledge these differences without discriminating on the basis of them.[12] Finally, part II.B.2 questions women's ability to achieve equality within a male sphere; it questions whether women can achieve an equality unique from the male norm while being judged by a society based on that norm.[13]

Part III illustrates the tension between these two doctrines of feminist legal theory through an examination of the debate over pregnancy discrimination in the workplace.[14] Although each feminist doctrine seeks equality, each uses different methods and expects different outcomes.[15] This part presents the essence of the debate between the two doctrines through case law. "Sameness feminists" argue that pregnancy should be treated as a disability, not as the basis for sex discrimination; they believe

5. *Id.*
6. *Id.*
7. *Id.*
8. *See infra* part I.B.
9. *See infra* part II.A.1.
10. *See infra* part II.A.2.
11. *See infra* part II.B.
12. *Id.*
13. *See infra* part II.B.2.
14. *See infra* part III.
15. *Id.*

that women should receive no more "special" benefits for their "condition" than any other temporarily disabled employee.[16] In contrast, "difference feminists" argue that society should recognize the unique ability of women to bear children, and should support this role with a policy that provides special benefits to pregnant women.[17] In addition, feminists of difference believe that discrimination based on pregnancy is sex discrimination.[18]

Part IV presents Catharine MacKinnon's dominance theory as an alternative to the doctrines described in parts II and III.[19] MacKinnon dismisses the idea of seeking equality in relation to men, whether through sameness or difference.[20] She concentrates on women as distinct entities from men and presents the relationship between the genders as one of power versus powerlessness, not equality versus inequality.[21] MacKinnon argues that women can never achieve an equality referenced on men; instead, they must focus on developing the independent power of women in society.[22]

Part V contrasts these competing doctrines of feminist legal theory.[23] This part examines the Vermont Abuse Prevention Act from the perspective of each of these feminist legal theories.[24] This gender-neutral statute passes scrutiny under either the sameness or difference doctrine because, like these doctrines, it begins from a basis of equality rather than power. However, the article concludes that the Abuse Prevention Act is more harmful than helpful to women because it is based on the fallacy of equality.[25] In other words, women are powerless in relation to their male abusers, therefore, a gender-neutral Abuse Prevention Act fails to address the real problem. In the context of abuse, gender-neutrality fails women by inadequately serving their needs.[26]

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16. *Id.*
17. *Id.*
18. *Id.*
19. *See infra* part IV.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See infra* part V.
24. *See infra* part V.B.
25. *See infra* part V.
26. *Id.*

Instead, the author contends that an Abuse Prevention Act should be framed in the feminine in accordance with MacKinnon's dominance theory. A feminine-specific Abuse Prevention Act would reflect society's recognition of the overwhelming victimization of women, rather than men, by domestic violence. Further, such an Act would contribute to raising women's consciousness about their treatment within society.

I. BACKGROUND

A. The History Of Women's Subordination Under Patriarchy

Feminist legal theory, in all of its manifestations,[27] is a reaction to the gender inequality perpetuated by a patriarchal culture. Patriarchy is a "system of social relations in which men as a group have power over women as a group; it is a system that is characterized by relationships of domination and submission, superiority and inferiority, power and powerlessness, based on sex."[28]

Patriarchy and its "negative views"[29] of women date back to early Christian antifeminist attitudes[30] and Western philosophy.[31] The attributes of "reason and rationality"[32] were

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27. The definition of feminist legal theory and an explanation of its components are discussed, *infra* part I.B.

28. Diane Polan, *Toward a Theory of Law and Patriarchy, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294, 302 n.1 (David Kairys ed., 1982).

29. FIRST FEMINISTS: BRITISH WOMEN WRITERS 1578-1799, at 1 (Moira Ferguson ed., 1985).

30. Eve, the first woman, was created in the image of Adam, for the purpose of helping him. *Genesis* 2:18, 21-23 (King James). The disciple Paul indicated that while man is formed in the image of God, woman was simply formed in the image of man and is thus inferior. I *Corinthians* 11: 7-9 (King James).

31. Aristotle concluded that women were "less rational" than men. Patricia A. Cain, *Feminism and the Limits of Equality,* 24 GA. L. REV. 803, 813 (1990). Further, Aristotle "describes the female body as a deformity." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 23 (1988). He regards women as inferior beings whose reasoning capacity is defective. *Id.* at 23-24 (quoting ARISTOTLE, POLITICS 59 (Cambridge, Mass. 1959)). Immanuel Kant theorizes that while men are the "noble sex" with a duty to do what is right, women are the "beautiful sex" who may do what is right as a result not of moral agency but because it appears beautiful to them. Cain, *supra,* at 813. Kant further argued that "women are devoid of characteristics necessary for moral action because they act on feelings, not reason." Bender, *supra,* at 24. Hegel wrote that:

> The difference between men and women is like that between animals and plants. Men correspond to animals, while women correspond to plants because their

assigned to men, while "emotion and intuition (or instinct)"[33] were said to characterize women.

The subordination of women under Anglo-American common law reflects these early views.[34] The husband and wife were treated as "one and the husband was 'the one.'"[35] The wife lost the ability to control her own property or its assets.[36] She could not enter into contracts without her husband's consent;[37] make a will;[38] sue or be sued;[39] "enjoy legal control and custody of her children;"[40] or pursue a profession.[41] In short, the legal system placed women under the care and control of their husbands.[42]

> development is more placid. . . . [W]omen regulate their actions not by the demands of universality but by arbitrary inclinations and opinion. . . . The status of manhood, on the other hand, is attained only by the stress of thought and much technical exertion.

Bender, *supra*, at 24 (quoting Georg Hegel, *Philosophy of Right*, ADDITIONS 107, para. 166 (New York, 1967)). Arthur Schopenhauer classified women as "childish, frivolous and short-sighted." Cain, *supra*, at 813-14. He further concluded that woman is in "every respect backward, lacking in reason and reflection . . . a kind of middle step between the child and the man, who is the true human being. . . . [W]omen exist solely for the propagation of the race." Bender, *supra*, at 24.

32. Bender, *supra* note 31, at 23.

33. *Id.*

34. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 9-10 (1989).

35. Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 828 (1985).

36. Any property that was owned by the wife, including that acquired by the wife before her marriage or after, became the sole property of her husband. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 324 (2nd ed. 1988). The husband acquired what was referred to as *jure uxoris*, or an estate by marital right; he had the right to use and occupy his wife's land, and to spend rents and profits accruing therefrom despite any protest from her. *Id.* In the event of the wife's death, the husband acquired a life estate in her property, whereas, upon the death of the husband, the wife was entitled to a life estate in only one third of his property. June Carbone and Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 964 n.47 (1991) (citing H. CLARK, LAW OF DOMESTIC RELATIONS 288 (2d ed. 1987)).

37. Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution? in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69, 69 (D. Kelly Weisberg ed., 1982).

38. *Id.*

39. *Id.*

40. Minow, *supra* note 35, at 828.

41. *Id.*

42. *Id.* Interestingly, women occupied the same position as children; they were "under the jurisdiction of the paternal power." JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 125 (3d ed. 1992) (quoting Ruth Ginsburg, *Gender and the Constitution*, 44 CIN. L. REV. 1, 1-4 (1975)). "The same protective justification accompanied traditional legal disabilities applied to children and exempted them from responsible control of property,

A justification for this subjugation was expressed in a 1852 New York Herald editorial:

> How did women first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed. . . .[43]

The subordination of women to their husbands and the rise of a commercial economy created separate spheres which men and women were expected to occupy. Separate spheres meant that men and women existed separately with regard to nature, religion, and the law:[44]

> [N]ature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . [D]ivine ordinance, as well as . . . the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . . [I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of

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contractual relations, and criminal acts." Minow, *supra* note 35, at 829.

43. AREEN, *supra* note 42, at 135 (quoting Ginsburg, *supra* note 42, at 1-4). Although the subjugation of women in American society has been compared to that of African-Americans, some writers feel that there is no basis for an adequate comparison. For example, one author writes that race paternalism was "motivated by a desire for stability and economic necessity, not concern for the goodness of blacks" while the subjugation of women was "supposed to preserve the special strengths of women." DAVID L. KIRP ET AL., GENDER JUSTICE 44 (1986). Another author writes that "[r]acial discrimination has, on the whole, been perceived as degrading and disempowering. Gender discrimination has reflected a more complicated set of motives, including a desire to preserve privacy and protect women from the consequences of seemingly distinctive physical attributes." RHODE, *supra* note 34, at 89.

44. Minow, *supra* note 35, at 842-43.

> those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.[45]

Men occupied the public sphere as the wage earners and public representatives of the couple, while women were relegated to the private realm, that is, the home.[46]

As commercial and industrial work became more demanding, society began to view the home as the repository for "virtues and emotions that people believed were being banished from the world of commerce and industry."[47] The home was seen increasingly as a "'shelter for those moral and spiritual values which the commercial spirit . . . [was] threatening to destroy.'"[48] From this perspective, women, as central figures in the domestic sphere, emerged as "morally and spiritually superior."[49] Men increasingly tried to preserve women's morality by limiting their contact with "sordid commercial or political affairs."[50]

Men's desire to protect and retain moral purity in their homes (and in their women) led to several Supreme Court decisions upholding the separate spheres.[51] Two themes that are seen consistently through pre-1971 Supreme Court cases illustrate this desire.[52] First, that "[w]omen's subordinate place in a world

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45. Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring).

46. Minow, *supra* note 35, at 843.

47. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983).

48. *Id.* (quoting W. HOUGHTON, THE VICTORIAN FRAME OF MIND, 1830-1870, at 343 (1957)).

49. RHODE, *supra* note 34, at 11.

50. *Id.*

51. *See generally* Bradwell v. Illinois, 83 U.S. 130 (1872) (prohibiting women from applying as candidates for attorneys at bar due solely to their gender); Muller v. Oregon, 208 U.S. 412 (1908) (upholding legislative regulation of working hours for women based on the delicate nature of their gender); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a statute that excluded women from the bartending profession unless their husband or father owned the bar, as a protective measure); and Hoyt v. Florida, 368 U.S. 57 (1961) (prohibiting a woman from serving jury duty unless she chose to accept such a duty if she felt it was within her special responsibilities). Before 1971, the application of separate spheres virtually foreclosed the possibility that the courts could ever successfully apply an equality model to the sexes.

52. Until 1971, the Supreme Court sanctioned the permissive subjugation of women to "protection" by men based on separate spheres. *See supra* note 51 and accompanying text. In 1971 the Court decided Reed v. Reed, 404 U.S. 71 (1971), which fostered the elimination of separate spheres. *See infra* notes 88-92 and accompanying text.

controlled by men is divinely ordained,"[53] and second, that "[d]ifferential treatment of the sexes is for the benefit of women."[54] In reality, the male effort to subordinate women, whether for moral purity, the protection of women, or as sanctioned by religion, resulted in two detrimental effects on women: the male view of women as "less rational (not fit for public life), . . . beautiful and weak (in need of male protection)" was sanctioned and perpetuated, as was the portrayal of women as "fit only for roles in the private sphere of home and family."[55] The consequence of such thought "reinforced the stereotypes that impeded women's advancement in commercial spheres and discouraged men's assumption of responsibilities in domestic spheres."[56]

In *Bradwell v. Illinois*,[57] the Supreme Court, relying on the idea of separate spheres, held that an otherwise qualified woman could be precluded from admission to the bar based solely on her gender.[58] Justice Bradley's concurring opinion[59] stated:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits [sic] it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . [A] married woman [is] incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.[60]

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53. Cain, *supra* note 31, at 816.

54. *Id.*

55. *Id.* at 817.

56. RHODE, *supra* note 34, at 38.

57. Bradwell v. Illinois, 83 U.S. 130 (1872).

58. *Id.* at 138-39.

59. The majority of the Court based their rejection of Bradwell's claim on the fact that the right to practice law was neither a privilege nor an immunity belonging to citizens of the United States. *Id.*; *see also* Minow, *supra* note 35, at 841. Therefore, the right is not covered under federal constitutional protection and the case should have been brought in state court. *Bradwell*, 83 U.S. at 139. Justice Bradley, on the other hand, based his concurrence on the social role of women. Minow, *supra* note 35, at 842-43.

60. *Bradwell*, 83 U.S. at 141.

The Court further condoned the male protectionism inherent in separate spheres in *Muller v. Oregon*.[61] The Court based its conclusion on the premise that women are less able to protect themselves than are men.[62] They concluded that the relegation of women to separate spheres could be based on their potential as child-bearers.[63] Women, the Court held, must subordinate their actions to the State's interest in protecting future procreation.[64] Therefore, the Court held it constitutional for women to be treated differently from men under the Federal Constitution.[65]

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . . The reason . . . rests in

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61. Muller v. Oregon, 208 U.S. 412 (1908).

62. Nancy S. Erickson, *Historical Background of "Protective" Labor Legislation: Muller v. Oregon*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 155, 155 (D. Kelly Weisberg ed., 1982) (analyzing the holding of *Muller v. Oregon*).

63. Specifically, the Supreme Court held that women's working hours, unlike those of men, could be restricted under the rationale of protecting public welfare (i.e., women as incubators for future generations) through the police power. "[S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *See Muller*, 208 U.S. at 422. The Court distinguished Lochner v. New York, 198 U.S. 45 (1904). In *Lochner*, the Court, in a situation almost identical to that in *Muller* but involving the hours of working men rather than women, found that a law

> providing that no laborer shall be required or permitted to work in a bakery more than [a specified amount of time] . . . was not as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such, was in conflict with, and void under, the Federal Constitution.

Muller, 208 U.S. at 418-19.

64. *Id.* at 421.

65. *Id.* at 423.

> the inherent difference between the two sexes, and in the different functions in life which they perform.[66]

The Supreme Court persisted in upholding legislation favoring separate spheres. In *Goesaert v. Cleary*[67] the Court affirmed legislation that refused to permit a woman to bartend unless a male member of her family owned the bar and could provide for her protection.[68] The Supreme Court agreed with the district court's perception of women's ability to bear responsibility as less than their male counterparts, and their need for protection greater: "[T]he presence of female waitresses does not constitute a serious social problem where a male bartender is in charge of the premises."[69] This decision reflects the protectionist legislation upheld by the Court in positioning women relative to their separate spheres.

The Supreme Court used separate spheres to justify its decisions as late as 1961. In *Hoyt v. Florida*[70] the Court upheld a Florida statute which provided that no woman shall be taken for jury service unless she volunteers.[71] The Court concluded that the statute was not unconstitutional because it was permissible for Florida to conclude that "a woman should be relieved from . . . jury service unless she herself determines that such service is consistent with her own special responsibilities" because women are "still regarded as the center of home and family life."[72]

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66. *Id.* at 422-23.

67. Goesaert v. Cleary, 335 U.S. 464 (1948).

68. *Id.* at 464.

69. Goesaert v. Cleary, 74 F. Supp. 735, 739 (1947). Interestingly, neither the District Court nor the Supreme Court found an equal protection problem in distinguishing between women who were allowed to work as barmaids because a male member of their family was present, and those that were not because there was no male relative present. *Goesaert*, 335 U.S. at 465. The Court found that the overwhelming need to prevent the "moral and social problems" that would arise if a woman worked there alone far outweighed the distinction made between the two classes of women. *Id.* at 466.

70. Hoyt v. Florida, 368 U.S. 57 (1961).

71. *Id.* at 62.

72. *Id.*

In reaction to this protectionist legislation sanctioned by the Court, women began to seek redress.[73] Feminist legal theory is one result of women seeking equality and respect.[74]

B. The Emergence Of Feminist Legal Theory

> Throughout the history of women's struggles, . . . analysts of the female condition have understood that prejudice predetermines and perpetuates institutions of inequality as much as institutions of inequality reflect and confirm prejudice.[75]

Feminist legal theory is concerned with the legal representation of women, both through the language of the law and its application. It is less a defined theory than it is a method of seeking the equality of men and women before the law.[76] Equality, for the purposes of this note, is defined as a method of ensuring that "women [get] what we need [but which we] are socially prevented from having on the basis of a condition of birth: a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity."[77] Much of the debate over feminist theory involves how this

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73. "[W]hat changed in the 1960s was not the extent of gender discrimination but consciousness of it." RHODE, *supra* note 34, at 55. Women increased their protests against separate spheres, and began to engage in consciousness-raising exercises because of their disparate treatment. *Id.* at 56. "By sharing experiences and providing mutual support, participants sought to understand their individual problems as part of broader societal patterns requiring broader collective responses." *Id.*

74. The reader should note the distinction between feminist legal theory as a culmination of women seeking equality and feminist legal theory as a vehicle by which this equality is sought. Feminist legal theory is the philosophy behind the movement for equality, rather than the operation of the movement.

75. Cain, *supra* note 31, at 811 (quoting Elisabeth Young-Bruehl, *The Education of Women as Philosophers*, 12 SIGNS 207 (1987)).

76. *See generally* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (analyzing the relationship between critical legal studies and feminist theory); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (considering the possibility that feminist method achieves its goals outside of traditional concepts of objectivity and neutrality); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19 (1991) (examining the theory behind feminist legal thought and its limited acceptance within the academic community); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (challenging the difference theory and its danger of feminist domesticity).

77. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

equality is to be characterized. That is, whether women should be treated as equal to men, thereby conforming to a norm often defined in reference to the male model, or whether women should move beyond the male-referenced comparison to demand a focus on women as distinct from men.[78]

Women seeking equality under feminist legal theory have subscribed to different views of exactly what equality means.[79] One group of legal theorists has embraced the "equal rights" approach.[80] This group is perhaps most well recognized by Christine Littleton's desire to work toward "sameness" between men and women.[81] A second group of feminists define equality as "difference;" true equality between men and women would recognize and accommodate the differences between them.[82]

To analyze legislation and court decisions from either doctrine of feminist legal theory requires an understanding of the courts' role in affirming or rejecting the inequality of women. Since 1971, the Supreme Court, with few exceptions,[83] has invalidated state and federal sex-based discriminatory statutes[84] based on the Equal Protection Clause of the Fourteenth Amendment.[85] The Court vacillated between appropriate degrees of scrutiny for sex-based classifications, and concluded in *Craig v. Boren*[86] that such classifications would be subject to an intermediate level of scrutiny.[87]

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78. *See infra*, parts II.A and II.B.

79. *Id.*

80. *See generally* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-85 (1987) (advocating equality as acceptance which provides that society value traditional female occupations and lifestyles the same as male counterparts).

81. *Id.* at 1292.

82. *Id.* at 1295.

83. The Supreme Court upheld gender based classifications in *Rostker v. Goldberg*, 453 U.S. 57 (1981) and *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). *See infra* part II.B.2.a-b; *see also* Christine K. Krackeler, Note, *Gender-Based Discrimination and the Supreme Court: A Time for Strict Scrutiny*, 47 ALB. L. REV. 908, 908 (1983) (reviewing the Supreme Court's standards for gender-based discrimination and concluding that the Court should enforce a strict scrutiny standard).

84. Krackeler, *supra* note 83, at 908.

85. The Fourteenth Amendment states, in relevant part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

86. Craig v. Boren, 429 U.S. 190 (1976).

87. Constitutionally, under the Equal Protection clause of the Fourteenth Amendment, the Court applies one of three standards of review to cases which classify people based on certain characteristics, such as race, gender, alienage, national origin and illegitimacy.

Reed v. Reed[88] was the first case in which the Court upheld claims of sex discrimination as a result of sex-based classifications.[89] In *Reed*, the Court applied the rational basis test to invalidate a classification favoring men over women, as estate administrators, based solely on their gender.[90] The language used by the Court in invalidating the statute sought a "fair and substantial relation" between the classification and its underlying objective.[91] By requiring more than simply a reasonable relation, the Court, although purporting to apply the deferential standard, actually raised the level of scrutiny.[92]

Two years later, in *Frontiero v. Richardson*, a plurality of the Court advocated the elevation of the standard of review for sex-based classifications from rational basis to strict scrutiny: "[C]lassifications based upon sex, like [those] based upon race, alienage, or national origin, are inherently suspect, and must

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Statutes that classify people based on race and national origin are subject to the most intense level of scrutiny. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 636-44, 656-93 (1991). In order to pass this strict scrutiny review, the statute must be justified by a compelling governmental interest and must be "necessary to the accomplishment of some permissible state objective." Loving v. Virginia, 388 U.S. 1, 11 (1967). The middle tier, or intermediate level of scrutiny, is applied to classifications based on gender. JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 249 (1991). The intermediate level requires that classifications by gender must serve "important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). A third level of scrutiny, the rational basis test, is the most deferential. The rational basis test is applied to all classifications other than those specifically mentioned above and asserts that a classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Cases based on gender discrimination decided by the Court before 1971 were subject only to the rational basis test. *See supra* note 51 and accompanying text. These decisions upheld state legislation "aimed primarily at protecting lower-class working women" and were "based on what are considered today to be debilitating stereotypical views of all women, regardless of class." HOFF, *supra*, at 192. This application of the rational basis test sanctioned legislation purposefully enacted to preserve women's spheres. *See also* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 153-54 (1982) (examining the standard of review in sex-based discrimination cases and the rationales behind such standards).

88. Reed v. Reed, 404 U.S. 71 (1971).

89. David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 36 n.8 (1984).

90. *Reed*, 404 U.S. at 76.

91. *Id.*

92. Krackeler, *supra* note 83, at 911.

therefore be subjected to strict judicial scrutiny."[93] Justice Brennan held that women had long been subjected to sex discrimination and, therefore, a "departure from 'traditional' rational basis analysis with respect to sex based classifications is clearly justified."[94] He concluded that statutory distinctions between the sexes were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[95]

Following *Frontiero*, the Court abandoned the use of strict scrutiny for sex-based classifications and adopted an intermediate standard to evaluate sex-based legislation; they have adhered to that "middle-tier level" scrutiny ever since.[96] The Court reasoned that their holding in *Frontiero* did not advocate the application of strict scrutiny to gender-based classifications, but a standard somewhere between that and rational basis "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[97]

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93. Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (invalidating a statute automatically granting a dependency allowance to wives of servicemen, but requiring husbands of servicewomen to prove not only that they are dependent on their wives, but also that they are dependent for over one half of their support). Justices Brennan, Douglas, White, and Marshall formed the plurality that based its application of strict scrutiny to gender classifications on three factors which it shared with classifications based on race, alienage, and national origin to which the Court had already applied strict scrutiny. First, that gender is an immutable characteristic. *Id.* at 686-87. Second, sex frequently bears no relation to ability to perform or contribute to society. *Id.* Finally, Congress itself had declared gender to be an invidious classification based on the Equal Rights Amendment. *Id.*

94. *Id.* at 684.

95. *Id.*

96. This "heightened" standard requires that "classification by gender must serve important governmental objectives and must be substantially related to the achievement of [those] objectives." HOFF, *supra* note 87, at 249. *See also Craig*, 429 U.S. at 197 (striking down a statute that differentiated between the sale of certain alcohol to men and women based on drunk driving statistics of the two sexes). Applying the intermediate standard, the Court invalidated the statute holding that the relationship between the objective, traffic safety, and the means, the ban of certain alcohol to young male drivers, was too tenuous to meet the substantial relation test. *Id.*

It is interesting to note that the intermediate level of scrutiny, which the Court settled on to apply to gender classifications, is less stringent than that based on racial classifications. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (applying "rigid scrutiny" to a statute based on Japanese ancestry); Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to a miscegenation statute).

97. Mississippi University for Women v. Hogan, 458 U.S. 718, 725-26 (1982).

II. Doctrines of Feminist Legal Theory

A. The Sameness, Or Equal Rights, Approach To Equality

1. Definition of the Sameness Doctrine

One group of feminists claims "the best way to ensure that perceived differences between men and women were not used to disadvantage women [is] to refuse to recognize any difference as legally relevant."[98] This sentiment has been termed the liberal feminism, or sameness approach to equality.[99] The basic premise of sameness is to deny that there are any "significant natural differences" between men and women,[100] and to demand that the two sexes be considered "symmetrically located with regard to *any* issue, norm or rule."[101] The purpose of this theory is to show that "[d]istinctions on the basis of gender, especially those that deny women opportunities available to men, are presumptively unlawful."[102]

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98. Martha A. Fineman, Note, *Feminist Theory in Law: The Difference it Makes*, 2 COLUM. J. GENDER & L. 1, 5 (1992).

99. The use of the term liberal feminism stands for the proposition that "women are just as rational as men and that women should have equal opportunity with men to exercise their right to make rational, self-interested choices." Cain, *supra* note 31, at 829. Early liberal feminists include Mary Wollstonecraft (1759-1799). *Id.* The doctrine is also referred to by other terms by other feminists, such as Lanae Holbrook's use of the term "equality feminists." Lanae Holbrook, Note, *Justice Barkett's Feminist Jurisprudence*, 46 U. MIAMI L. REV. 1161, 1164 (1992). Catharine MacKinnon calls it the "difference" approach. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 832 (1988) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)). The use of either of these terms for our purposes would create additional, unneeded confusion. Littleton coined the term "symmetry" to refer to this doctrine. Littleton, *supra* note 80, at 1291. She further divides her symmetry theory into two subsections—assimilation and androgyny. *Id.* Assimilation is based on "the notion that women, given the chance, really are or could be just like men." *Id.* Androgyny states that "women and men are, or at least could be, very much like each other, but argues that equality requires institutions to pick some golden mean between the two and treat both sexes as androgynous persons would be treated." *Id.* For the sake of clarification, despite the many terms given to this doctrine, I will refer to it as the "sameness" doctrine.

100. Littleton, *supra* note 80, at 1291.

101. *Id.*

102. Sunstein, *supra* note 99, at 830. Note, however, that the application of the symmetry theory to litigation under equal protection analysis has worked to award males rights that previously were enjoyed only by females. *See infra* notes 119-128 and accompanying text.

One well known symbol of the sameness doctrine was the Equal Rights Amendment of 1972 ("ERA").[103] The role of the ERA was to improve women's legal status by banning gender-based classifications.[104] It was not meant to achieve a "unisex" society; rather the sameness sought was merely an assurance against the use of gender as a means of societal classification.[105] The ERA raised issues of "sexual differences, social roles, and feminist politics,"[106] and was meant to be a "symbol which, by dramatizing a need for equality, legitimizes that need, . . . unite[s] women, [and] raise[s] their consciousness."[107] Or, as one feminist scholar stated, the sameness encouraged by the ERA was meant to be "an eradication not of gender differentiation but of gender hierarchy."[108]

2. Limitations of the Sameness Doctrine

a. Legal Language Of Sameness

Despite the obvious goal of the sameness doctrine to achieve equality with men, it suffers from three shortcomings which may render it ineffective in reaching its goal. First, the doctrine does not account for the fact that legal language has been (and

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103. Equal Rights Amendment of 1972, Proposed Amendment to the U.S. Const., S.J. Res. 8-9, and H.J. Res. 208, 92nd Cong., 2nd Sess. (1972) [hereinafter ERA]. The ERA provided, in relevant part:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification.

Id.

104. RHODE, *supra* note 34, at 64.

105. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 175 (1979).

106. RHODE, *supra* note 34, at 64.

107. Deborah L. Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQ. J. 1, 7 (1983) (quoting Introduction, California Commission on the Status of Women).

108. *Id.* at 31. Another feminist, Catharine A. MacKinnon, viewed the Amendment as simply a way to achieve the constitutional strict scrutiny that had been denied to women by the Supreme Court in *Boren*, where the court applied only an intermediate level of scrutiny to sex-based classifications. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 217 (1989) (citing MacKinnon in an unpublished debate with Phyllis Schlafly).

continues to be) written and interpreted mainly by men.[109] Legal language is a "male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women."[110] Consequently, legal reasoning thus reflects the same male biases because "male-based perspectives, images, and experiences are often taken to be the norms in law."[111] Thus, for women to seek

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109. Lucinda M. Finley emphasizes the importance of understanding the role that language plays in "framing the way people think about the world." Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989). For instance, the fact that American society has modifiers for the word mother such as "working," "single," and "welfare," implies that "mother" standing alone signifies a member of the female sex who does not work in a job outside the home, and is supported by her husband. *Id.* This argument can also be applied to the word "minorities," which reinforces the erroneous perception in Western societies that white people are the norm in the world. *Id.* Therefore, the linkage of "woman" and "minority" suggests a group that is twice removed from the norm, that is, that woman signifies white and minority signifies men that are not white. *Id.*

110. *Id.* at 893.

111. *Id.* *See supra* notes 28-75 and accompanying text, discussing the evolution of patriarchy and its role in shaping society and law. As an example, negligence in tort law is based on the actions of the defendant relative to those of a reasonable *man*. The standard was derived in an effort to "establish a universally applicable measure for conduct." Bender, *supra* note 31, at 21. This universal application, however, is based on a definition stated in the Restatement of Torts as "that of a reasonable *man* under like circumstances." RESTATEMENT (SECOND) OF TORTS § 283 (1965) (emphasis added). What happens if a woman reacts in a situation in a reasonable way but not the same way that a man would? Further, courts have begun to apply a reasonable "person" standard, perhaps intending to cure the overt sexism of that of the reasonable man. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 174 n.5 (5th ed. 1984). Perhaps this result is more detrimental to women than the overt sexism of the reasonable man. By simply changing man to person, does the meaning change? As Bender states, "[T]he language of tort law was neutered, made 'politically correct,' and sensitized. Although tort law protected itself from allegations of sexism, it did not change its content and character." Bender, *supra* note 31, at 22.

Another example of the male norm in law is the way in which rape is defined. In order to rape, there must be penetration. MODEL PENAL CODE §§ 213.0, 213.1 (1980). This definition hinges on the male sexual perception—certainly women can be violated by forced penetration, but often they will suffer extreme emotional and/or physical pain before penetration. The law, in failing to recognize that women can be raped without penetration, reflects the male definition of sexual loss. That is, if men are prevented from achieving penetration, the sexual experience to them was unsuccessful, and therefore not rape. *See generally* CATHERINE A. MACKINNON, *supra* note 108, at 172-183 (discussing societal perceptions of rape as opposed to a woman's perspective).

Absence of consent is the second element of rape. MODEL PENAL CODE § 213.1 (1980). Susan Estrich argues that male standards are used to evaluate women's experience with rape, especially with consent. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1121-32 (1986). She criticizes the use of consent as presuming that women actually have the ability not to consent, that is, by requiring verbal as well as physical evidence of non-consent, the definition of rape fails to consider situations in which women are too afraid or unable to

equality through the sameness doctrine, they must not only compare themselves to a male norm, but conform to male thinking and interpretation.[112]

i. The Equal Rights Amendment

The conclusion, that to become equal women must conform to male thinking and interpretation, was relied on by many women who worked to defeat the ERA.[113] Women expressed apprehension that by requiring the suppression of sex-linked characteristics, the ERA would create an androgynous model to which all humans were to be compared.[114] They feared that the model, although purporting to integrate both masculine and feminine qualities, would actually foster the "development of a predominately male archetype."[115]

ii. The Problems with "Similarly Situated"

The equal protection guarantee of the Fourteenth Amendment is based on the concept that similarly situated people are to be treated similarly.[116] This requirement is interpreted by a male-dominated legal system to mean that protection is afforded to

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exhibit such a high threshold of protest. *See generally id.* at 1171-78 (factors used to produce rape convictions show lower conviction rate when prior relationship between victim and rapist, no corroborating evidence, or no evidence of resistance by victim). The failure of the law to protect women from rape is based in the patriarchal language of the law as well as its reasoning and interpretation. "The politics of rape reform needs to go beyond the goal of creating a 'refuge in which women's words are believed' to that of creating a language in which the full impact of the stories of victims are heard." Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 82 (1987) (quoting S. GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS 26 (1986)).

112. *See* Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim a "Different Voice"?* 15 HARV. WOMEN'S L.J. 37, 42 (1992). Equality as perpetuated by the Court "extends legal assistance to women only when they are able to demonstrate that they are like men. Although neutral in form, the equality guarantee [under sameness] is functionally male-biased." *Id.*

113. RHODE, *supra* note 34, at 314.

114. *Id.*

115. *Id.*

116. *See supra* note 87 and accompanying text.

women only when they are like men.[117] "Although neutral in form, the equality guarantee is functionally male-biased."[118]

In *Mississippi University for Women v. Hogan*,[119] the Court invalidated a statute denying admission of men to the nursing program at an all-women's school.[120] The Court first decided that women and men were similarly situated with respect to education.[121] A statute, therefore, preventing the admission of men to the nursing program must be subject to the intermediate scrutiny test.[122] The statute did not pass that test because the male exclusion policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[123]

In *Hogan*, the finding that men and women are similarly situated resulted in an interpretation of equality that is not responsive to women in the legal realm, or in "factors relating to workplace organization, cultural expectations, [and] family socialization."[124] *Hogan* clearly demonstrates that the equality doctrine "fails to redress the residue of a history of social and economic imbalances that handicap individual women seeking to improve their lives."[125] Sameness feminists would likely label the recognition of such differences as a threat to women's equality, and an attempt at "perpetuat[ing] subordinating stereotypes,"[126] thus outweighing the benefit of their separation from men.

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117. Frug, *supra* note 112, at 42; *see also* Wendy W. Williams, *supra* note 87, at 182-83, n.50.

118. Frug, *supra* note 112, at 42.

119. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

120. *Id.* at 722-23.

121. *Id.* at 729.

122. *Id.* at 730; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications based on gender are subject to intermediate scrutiny).

123. *Hogan*, 458 U.S. at 729.

124. Frug, *supra* note 112, at 40.

125. *Id.* at 42. For instance, many women feel that a single sex educational program can redress their traditional exclusion from and silence in social spheres by allowing women to "develop relatively free of the imposition of such disabling silence." Cole, *supra* note 89, at 86. In addition, single sex women's educational institutions can offer same sex positive role models, which are rare in co-educational settings, and can "recognize and affirm women's positive difference in a way that man-centered (i.e., co-educational and men-only) institutions cannot." *Id.* Men, on the other hand, do not require such an atmosphere, as they have not "been excluded or silenced, male role models are virtually omnipresent, and men's positive difference from women has been celebrated for centuries." *Id.*

126. Cole, *supra* note 89, at 86.

As this case demonstrates, the sameness theory fails to anticipate the strength of legal language itself. By demanding that women are to be treated like men, these feminists are inadvertently forcing women to be evaluated by criteria based on male norms. Thus, by considering themselves the same as men, women do not achieve equality as women, but as social males.[127] Frances Olsen also laments the merging of men and women into one social model, arguing that, instead of "shades of grey as an alternative to all black and all white, I envision reds and greens and blues."[128]

b. The Generic Woman

The second limitation of the sameness doctrine is that it presumes not only that all women are the same as all men, but that all women are the same as each other: "When white, straight, economically-privileged feminists name the commonality, and ignore differences, the result may be that all women are assimilated into a single class of white, straight, middle-class women."[129] Feminists who do not fit this description feel that a "unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[130] Differences among women affect the way they see themselves, as well as the way they view society, and their expectations of it.

For instance, Jacqueline Jones, a black feminist, points out "the interests of white middle-class and black women were qualitatively different."[131] Some black feminists have associated white feminists with students or housewives who were not forced to work, while the black woman's historical experience differs: "[T]he black woman is the white man's mule and the white woman is his dog."[132] For these reasons, Harris concludes that the sameness prong of feminist legal theory is in danger of

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127. Littleton, *supra* note 80, at 1302.

128. Olsen, *supra* note 47, at 1578.

129. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 206 (1989-1990).

130. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

131. JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY, FROM SLAVERY TO THE PRESENT 316 (1985).

132. *Id.*

"silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke."[133]

c. Inclusion of Only the Norm

The final limitation of the sameness doctrine is that it requires two clearly defined categories—male and female. This means that to claim protection under this doctrine a person must be "one sex, maintain the appearance (in clothing and effect) of that sex, and prefer sex with the 'opposite' sex. If a person has complied with the requirement that he or she be properly 'sexed,' the law will then provide partial protection against penalties for being of a sex."[134] For instance, one feminist laments the systemic exclusion of lesbian women from the feminist movement under sameness.[135] She quotes Adrienne Rich:

> Any theory or cultural/political creation that treats lesbian existence as a marginal or less "natural" phenomenon, as "mere sexual preference," or as the mirror image of either heterosexual or male homosexual relations, is profoundly weakened thereby. . . . Feminist research and theory that contributes to lesbian invisibility or marginality is actually working against the liberation and empowerment of woman as a group.[136]

B. The Difference, Or Relational, Approach To Equality

1. Definition Of The Difference Doctrine

Another group of feminists pursue equality through recognition of their differences from men. These women contend that the differences between men and women should not be

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133. Harris, *supra* note 130, at 585.

134. Cain, *supra* note 31, at 832 (quoting Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 105-06 n.16 (1989)).

135. Cain, *supra* note 129, at 197-205.

136. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 632, 647-48 (1980) (cited in Cain, *supra* note 129, at 208).

"ignored or eradicated."[137] Feminists of difference argue that because gender plays such a central role in society, "feminist legal theory *cannot* be gender-neutral, nor can it have as its goal equality in the traditional, formal legal sense of that word. Feminist theory *must* be women-centered, gendered by its very nature because it takes as its raw building material women's experiences."[138] One feminist, Martha A. Fineman, who subscribes to the difference doctrine, argues that equality can only be achieved by recognizing the biological, social, and cultural differences between men and women and reflecting these differences in the law.[139] Fineman asserts that the difference theory is necessary because "there is often a unique way [that rape, sexual harassment, pornography, and reproductive events] are typically lived or experienced by women as contrasted with men in our culture."[140]

Feminists of difference further argue that differences among women, such as race, sexual preference, and class, that shape women's experiences differently should be seen as factors in uniting women.[141] Fineman believes that the characteristics or cluster of characteristics that are "related to the gendered aspects of their lives . . . have social and legal significance and, therefore, give women a basis for cooperation and empathy across their differences."[142] She finds that these various aspects of women's

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137. Littleton, *supra* note 80, at 1295. Littleton uses the term "asymmetry" which she further divides into four subcategories: special rights, accommodation, acceptance, and empowerment. Special rights affirms that men and women do have biological differences that should be recognized. *Id.* Feminists agreeing with this approach argue that a symmetrical approach cannot achieve the equality they are seeking because it fails to take into consideration women's special needs. *Id.* Accommodationists argue that the characteristics that make women different from men, such as pregnancy, should be accommodated, while those differences manufactured by society should be abolished. *Id.* at 1296-97. The third approach is the one which Littleton follows—that of acceptance. Unlike accommodation, acceptance does not distinguish between biological and cultural differences, but instead argues that "eliminating the unequal consequences of sex differences is more important than debating whether such differences are 'real,' or even trying to eliminate them altogether." *Id.* at 1296. The last approach, empowerment, rejects the difference debate altogether and argues that societal construction has manufactured all inequality between the sexes. *Id.* at 1299-1300.

138. Fineman, *supra* note 98, at 15.

139. *Id.* at 12-13.

140. *Id.* at 15-16.

141. *Id.* at 4-5.

142. *Id.* at 22.

experiences should encourage them to form a united womanhood, rather than dividing them in the face of male definitions.[143]

Perhaps the most influential advocate of the difference doctrine is Carol Gilligan.[144] Gilligan contends that male viewpoints differ from those of females;[145] she believes there are cultural and biological differences between men and women which make it irrational to try to equalize them.[146]

To study these differences, Gilligan analyzed the moral judgments of two eleven-year-old children, one male and one female.[147] These children were asked to resolve the following moral dilemma: a man was confronted with deciding whether or not to steal a drug that he could not afford, but without which his wife would die.[148] The purpose of having the children solve the dilemma was to analyze their choices and their logic in arriving at them.[149]

Gilligan found the children's responses representative of what she terms women's "different voice."[150] The young girl saw the dilemma not as a conflict between law and property but in terms of the "effect that theft could have on the relationship between Heinz and his wife."[151] The young boy, on the other hand, saw the dilemma as a conflict between property and life, and chose the "logical priority of life" over the importance of property.[152]

The major difference Gilligan recognizes is that the male point of view "focuses narrowly on autonomy, on the separation between self and others."[153] "[M]en are depicted as abstract

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143. *Id.*

144. Joan C. Williams, *supra* note 76, at 802. Carol Gilligan is a developmental psychologist whose book, A DIFFERENT VOICE, *infra* note 145, portrays the cultural and biological difference between males and females.

145. CAROL GILLIGAN, A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25 (1982).

146. *Id.* at 1-2.

147. *Id.* at 25.

148. *Id.*

149. *Id.* at 26.

150. *Id.* at 25, 27-31.

151. *Id.* at 28; *see generally id.* at 24-63 (discussing details of her study.

152. *Id.* at 26.

153. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1382 (1986). *See generally* GILLIGAN, *supra* note 145, at 32 (male tendency to diffuse conflicts by viewing them as impersonal rather than personal).

thinkers, defined by individual achievement."[154] Gilligan finds that women, on the other hand, speak in a different voice than men; "[w]omen are portrayed as nurturers, defined by their relationships and focused on contextual thinking."[155] Gilligan concludes that women view life with an "ethic of care," as opposed to the male "ethic of rights."[156] Gilligan then projects women's different voice onto the rest of society, stating that women's different voice offers a transformation of society to one "based on the womanly values of responsibility, connection, selflessness, and caring, rather than on separation, autonomy, and hierarchy."[157]

2. Limitations of the Difference Doctrine

There are several problems raised in connection with Gilligan's theory and particularly its application to law. The first, ironically, is a concern that if society is trained to hear women's different voice, it will associate women with negative characteristics conceived in the separate spheres of the Victorian Era.[158] These concerns are reflected in two Supreme Court decisions.[159] In each case, the Court acknowledged women's difference from men, that is, that the two sexes were not similarly

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154. Joan C. Williams, *supra* note 76, at 802; *see generally* GILLIGAN, *supra* note 145, at 32 (discussing hierarchical ordering based on win/lose situations).

155. *See generally* GILLIGAN, *supra* note 145, at 167-68 (discussing women's interdependence as a focus of adult life).

156. Scales, *supra* note 153, at 1380-81. *See generally* GILLIGAN, *supra* note 145, at 26-27 (describing a male's reaction to a hypothetical in terms of concern for logic and the right choice).

157. Joan C. Williams, *supra* note 76, at 802-03; *see generally* GILLIGAN, *supra* note 145, at 19-21, 64-83 (Gilligan conducted interpretive exercises and compared responses between the genders concluding that women operated with a different motive than did males.).

158. *See supra* part I.A. According to Joan C. Williams, relational feminists refuse to acknowledge the negative traits assigned to women by the Victorian Era—that women were "more passive than men, less competent, more timid and naturally demure." Joan C. Williams, *supra* note 76, at 807. Williams refers to this concept as rehabilitating "domesticity's gender stereotypes." *Id.* at 809. Williams bases her criticism of Gilligan's theory on its complete rejection of women's possessive individualism. *Id.* at 810-813. She feels it will portray women as more concerned about other people than about themselves, which is ultimately self-defeating. *Id.*

159. Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

situated as to the sex-based classification in question.[160] Because the Court found the sexes in each case not similarly situated, they upheld sex-based classifications.[161]

a. *Rostker v. Goldberg*

In *Rostker*, women were exempted from draft registration under the Military Selective Service Act.[162] The Court held that the objective of Congress' exemption was to facilitate draft registration for combat ready troops;[163] because women were excluded from combat, they were "differently situated from men and could be treated differently in the registration system as well."[164] The Court concluded: "This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white . . . [draft];"[165] they found that the reasons articulated by Congress met the intermediate scrutiny test from *Craig*.[166] Justice Rehnquist emphasized the statute's progressive nature, indicating that because the Court found the sexes not similarly situated with respect to combat, the statute was not an "'accidental by-product of a traditional way of thinking about females.'"[167]

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160. Wendy W. Williams, *supra* note 87, at 182-83, n.50. *See Michael M.*, 450 U.S. at 471; *Rostker*, 453 U.S. at 75-78.

161. The actual reasons for upholding the statute probably had very little to do with the "administrative inconvenience" of registering women; *see supra* note 159.

162. *Rostker*, 453 U.S. at 59. The Court was interpreting the Military Selective Service Act, 50 U.S.C. App. §§ 451-56 (1981). Note that this Act as originally proposed by the President required registration of males and females. Congress, however, allocated funds only for registration of males. S. REP. NO. 789, 96th Cong., 2d Sess. 1, n.1 , 2 (1980).

163. *Rostker*, 453 U.S. at 59, 68.

164. RHODE, *supra* note 34, at 99. It is significant that although the majority's argument for an all male registration is based on men's eligibility for combat as opposed to women's ineligibility, the Court fails to address why portions of the male population who are ineligible for combat due to physical handicap or conscientious objector status are nevertheless required to register. *Id.*

165. *Rostker*, 453 U.S. at 78.

166. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

167. *Rostker*, 453 U.S. at 74 (citation omitted). The final exclusion of women was based on three particular concerns echoed in legislative hearings. First, registering women for combat would create sexually mixed troops, a risk unknown and considered dangerous. Wendy W. Williams, *supra* note 87, at 183 (quoting Department of Defense Authorization Act of 1981, S. REP. NO. 826, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 2646, 2647). Secondly, assigning women to combat could "'affect the national resolve at the time of mobilization.'" *Id.* Third, drafting women would "'place unprecedented strains on family

b. *Michael M. v. Superior Court of Sonoma County*

Michael M. v. Superior Court of Sonoma County[168] is the Court's first application of sex-based classifications in a criminal case.[169] In *Michael M.* the Court upheld the conviction of a seventeen-year-old male for having intercourse with a sixteen-year-old female.[170] The conviction was based on California's statutory rape law, which made intercourse illegal "with a female not the wife of the perpetrator, where the female is under the age of 18 years."[171] The statute was subjected to the intermediate scrutiny standard because it discriminated on the grounds of a sex-based classification.[172] It stated that only men were criminally liable for sexual intercourse with a female under the age of eighteen, but no liability was placed on the underage female or on women over eighteen who had intercourse with underage males.[173]

The Court held that the purpose of the statute was to prevent illegitimate pregnancies.[174] They then found that because men

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life.'" *Id.* Williams surmises that the actual reasons would read more like:

> (1) sexually mixed units would not be able to function—perhaps because of sex in the foxhole? (2) if women were assigned to combat, the nation might be reluctant to go to war, presumably because the specter of women fighting would deter a protective and chivalrous populace; and (3) the idea that mom could go into battle and dad keep the home fires burning is simply beyond the cultural pale.

Wendy W. Williams, *supra* note 87, at 185.

168. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

169. RHODE, *supra* note 34, at 101.

170. *Michael M.*, 450 U.S. at 466-67.

171. *Id.* at 466.

172. *Id.* at 468-69.

173. *Id.* at 466.

174. Chief Justice Rehnquist's opinion reflects the Court's acceptance that men are "frequently the sexual aggressors, and that law ought to be able to take that reality into account." Wendy W. Williams, *supra* note 87, at 187. The Court held that the statute reflected the fact that "males alone can 'physiologically cause the result which the law properly seeks to avoid,'" and that the "gender classification was readily justified as a means of identifying offender and victim." *Michael M.*, 450 U.S. at 467. The statute's actual objective, then, reflects society's perceptions regarding the role of men and women in sexual intercourse. Society typically views men as the aggressor in intercourse, and thus, the more guilty of the parties. *See generally* Wendy W. Williams, *supra* note 87, at 185 n.58, 59 (discussing the potential correlation between male biological aggression and a dominant role in society). The Court perpetuates this perception by upholding a statute the purpose of which was indisputably to protect females who are "incapable of consenting to an act of sexual intercourse." *Michael M.*, 450 U.S. at 494 (Brennan, J., dissenting). In doing so, the majority is not only perpetuating typical gender stereotypes, but is hiding

and women are differently situated with respect to pregnancy, the statute's purpose in preventing pregnancy passed the intermediate scrutiny test.[175] They reasoned that females are deterred from intercourse by fear of pregnancy, but males, lacking that natural deterrent, require a criminal one.[176] Further, the Court found that a gender neutral statute, in which both males and females were criminally liable, would actually "unequalize" the sexes because requiring a woman to submit to criminal punishment for intercourse would discourage her from reporting male violations of the statute.[177]

Rostker and *Michael M.* demonstrate the dangers inherent in the difference theory in two ways. First, by "insisting upon our differences [from men] at these crucial junctures, [we are] promot[ing] and reinforc[ing] the us-them dichotomy that permits [judges] to resolve matters of great importance and complexity by the simplistic, reflexive assertion that men and women are 'simply not similarly situated.'"[178] Critics of the difference doctrine feel that the acknowledgement of this "different voice" will facilitate the relegation of women into separate spheres.[179] They fear that "speaking of an identifiable and different 'feminine' voice will revive a biological or sociological determinism that will be used to justify restricting women's options."[180] Second, decisions such as *Rostker* and *Michael M.* remove responsibility from the shoulders of women to participate as equal, even if different, members of society. For instance, the question should not be whether women should be forced to fight in wars, or whether women should automatically receive immunity from responsibility for consenting to sexual intercourse.[181] Rather, women should take the responsibility for deciding whether or not to fight, and whether or not to consent.[182]

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behind their "differences" in order to do so. *Id.* at 496.

175. *Michael M.*, 450 U.S. at 471-73.

176. *Id.* at 473.

177. *Id.* at 473-74.

178. Wendy W. Williams, *supra* note 87, at 190.

179. *Id.*

180. Bender, *supra* note 31, at 29 n.111.

181. Wendy W. Williams, *supra* note 87, at 190.

182. *Id.*

c. *Equal Employment Opportunity Commission v. Sears, Roebuck, & Co.*

Furthermore, Gilligan's relational theory fails as an adequate vehicle for equality because it measures the success of women based on their duty toward other people rather than toward themselves.[183] An example of the fruition of this concern is reflected in *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.*[184] In this case, Sears contended that women were underrepresented among its higher paying sales commission positions not because of any sexual discrimination, but rather, because women lacked interest in those positions.[185] Sears argued that women simply did not want to work the harder, commission-based jobs.[186] Sears used a relational feminist basis to support its argument that "women's focus on relationships at home and at work makes them choose to sacrifice worldly advancement in favor of a supportive work environment and limited hours that accommodate their devotion to family."[187]

The impact of this case rests in the Court's affirmation of the sex-based classification despite the plaintiff's use of Title VII of the Civil Rights Act of 1964.[188] Title VII was meant to prevent the use of gender stereotyping to uphold sex-based classifications.[189] In this case, however, "*Sears* establishe[d] a legal assumption that all women fit gender stereotypes and impose[d] on plaintiffs a burden to disprove that assumption as part of their prima facie case."[190] This is inappropriate under

183. *See supra* notes 153-58 and accompanying text.

184. Equal Employment Opportunity Comm'n v. Sears, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd.*, 839 F.2d 302 (7th Cir. 1988).

185. *Sears*, 839 F.2d at 320.

186. *Id.*

187. *Id.*

188. 42 U.S.C. §§ 2000e-10-17 (1988). Title VII makes it unlawful for an employer to discriminate against employees for any reason, including their gender, unless the employer can establish that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

189. Joan C. Williams, *supra* note 76, at 814.

190. *Id.* Generally, Title VII cases are based on the statistical proportion of women in a given job category compared to the proportion of women in the relevant job market. *Id.* Statistics are offered as direct proof that a group protected under Title VII suffers from a disparate impact under a facially neutral hiring policy. *Id.* Once the plaintiffs have established a prima facie case by showing such statistically disparate impact, the burden shifts to defendant to "articulate some nondiscriminatory reason for the disparity documented." *Id.* at 815. Under *Sears*, however, the court required an additional showing

Title VII because, as used in *Sears*, it allows the use of information about "*gender*, about women *as a group*."[191] Title VII is meant to protect women who do not fit within the traditional gender stereotypes.[192]

In support of their argument, Sears cited Gilligan's relational feminist study, concluding that "men and women have had different interests, goals and aspirations regarding work."[193] Sears portrayed men and women in much the same light as did Gilligan: women were "'humane and nurturing,' focused on relationships, and averse to capitalist virtues such as competition,"[194] while men were portrayed as "competitive and motivated by self-interest."[195]

The analysis used in *Sears* illustrates the dangers inherent in the relational feminist theory. The doctrine attempts to assign to women those positive characteristics which evolved from the Victorian Era—such as nurturing, caring and selflessness.[196] It fails to recognize, however, that society combines these positive attributes with negative ones, such as weakness, passivity, and an overriding interest in the family, to the detriment of the woman herself.[197]

III. Making An Example of Pregnancy

The dichotomies between the sameness and difference doctrines of women's equality are clearly illustrated by the treatment of pregnant women in the workplace.[198] Difference feminists, acknowledging the need for special treatment between the sexes with regard to pregnancy, risk relegating women back

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that men and women had equal interest in the sales job. *Sears*, 628 F. Supp. at 1305-15, 839 F.2d at 320-21. Therefore, the defendants had the "additional burden of establishing what percentage of women in the otherwise relevant labor market was truly 'interested' in the jobs at issue." Joan C. Williams, *supra* note 76, at 815.

191. Joan C. Williams, *supra* note 76, at 819.

192. *Id.*

193. *Id.* at 815.

194. *Id.*

195. *Id.*

196. *See supra* notes 155-157 and accompanying text.

197. *See supra* notes 45-75 and accompanying text.

198. The reader will note the distinction made here between child bearing and child rearing. This section pertains only to the physical condition of pregnancy, rather than to the multitude of issues of both difference and sameness regarding child rearing.

to their separate spheres or to a "mommy track" ideology.[199] On the other hand, sameness feminists, in an effort to "alter the workplace so as to keep it in step with increased participation by women," run into something of a roadblock with cases reflecting inequality based on pregnancy.[200] There is no doubt that a difference exists between males and females with regard to reproductive capability. Thus, feminists of both camps are confronted with difficulties in defining their position relative to pregnancy discrimination in the workplace.

Sameness feminists have chosen to analogize pregnancy to other disabilities arising from illness or injury.[201] Two Supreme Court cases reached conclusions commensurate with this ideology.[202] In both, the Court concluded that men and women should be treated equally with regard to disabilities and recognized that pregnancy was an "extra" disability for which "others" (i.e., men) should not have to pay extra.[203]

In *Geduldig v. Aiello*, four women challenged an otherwise comprehensive health plan under the equal protection clause.[204] The Court concluded that exclusion of normal pregnancies from the health care system was not sex discrimination as such, but a

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199. The "mommy track" has been defined as "a lower-pressure, flexible, or part-time approach to work." Barbara Ehrenreich and Deirdre English, *Blowing the Whistle on the Mommy Track*, MS., July/Aug. 1989, at 56, 56. As one woman wrote:

> [B]eing a woman of my generation really means making choices that few of us can live with. We have the "right" to choose to have a baby—but not to stay at home and watch her grow. We have the "right" to choose a career—but not to take time out to be a mother and know that the career will be waiting for us when we come back. Yes, indeed, we have won the right to choose—and for most of us the choices are black and white.

Kim Triedman, *A Mother's Dilemma*, MS., July/Aug. 1989, at 59, 63.

200. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1984-1985); [hereinafter *Equality's Riddle*]. *See also* Wendy W. Williams, *supra* note 87, at 191.

201. HOFF, *supra* note 87, at 297-98.

202. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

203. Wendy W. Williams, *supra* note 87, at 192; *see also* RHODE, *supra* note 34, at 118. Many employers dismissed pregnant workers once their pregnancy began to show, often refusing to reinstate them upon their return. Most state unemployment and insurance programs did not cover leave due to pregnancy, resulting in an estimated three quarters of the work force without pregnancy leave. *Id.* Such policies reinforced sexual stereotypes and locked women into low paying, unstable jobs without room for advancement. *Id.*

204. For a description of what was covered under the plan, see *Geduldig*, 417 U.S. at 486-88 (noting that the policy did cover pregnancies with abnormal complications but did not cover normal pregnancies).

classification based on a particular physical disability.[205] They did not see the issue as gender, but merely classified it as an exclusion of a particular physical condition: pregnancy.[206] As such, exclusion of normal pregnancies from coverage was subject to the same exclusion as any other disability the state deemed necessary.[207] The Court concluded that although only women can be pregnant, and for that reason this exclusion only applies to women, "it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*."[208]

The Supreme Court also held that pregnancy discrimination is not sex discrimination in *General Electric Co. v. Gilbert*.[209] The basic facts of *Gilbert* are similar to those of *Geduldig*, with one significant difference; while the *Geduldig* claim was based on an equal protection violation, *Gilbert* was brought as a violation of Title VII.[210] Success under a Title VII claim requires a showing that the employer's rule as to benefits has a disparate effect on women.[211] The Court reasoned that this health plan was facially nondiscriminatory because it covered the same categories for men as for women, and that "it is impossible to find any gender-based discriminatory effect . . . simply because women disabled as a result of pregnancy do not receive benefits."[212] This reasoning led to the Court's holding in *Gilbert*. The majority concluded that because women receive the same benefits as men, pregnancy (from which men are excluded) is an "*additional* risk."[213]

In both cases, the Court refused to characterize its decisions as based on gender discrimination.[214] The cases were decided

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205. *Id.* at 494-95.

206. ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 66 (1988).

207. *Geduldig*, 417 U.S. at 496-97 n.20.

208. *Id.* at 496 n.20. *See supra* notes 88-95 for discussions of *Reed* and *Frontiero*.

209. General Electric Co. v. Gilbert, 429 U.S. 125, 127-28 (1976).

210. *Gilbert*, 429 U.S. at 137. A prima facie violation of Title VII can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of a particular class. For a further discussion of the requirement of effect, see Washington v. Davis, 426 U.S. 229 (1976). *See supra* note 188 for a discussion of Title VII.

211. *Gilbert*, 429 U.S. at 137.

212. *Id.* at 138.

213. *Id.* at 139.

214. *Id.* at 140; *Geduldig*, 417 U.S. at 496.

based on distinctions between "pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[215] This reasoning illustrates a basic premise of the sameness doctrine. Pregnancy discrimination analysis is based on the vision of men as the norm to which women are compared.[216] Because women have a "condition" that does not affect men, it is considered an additional burden that will have to be carried by women on their own.[217]

In reaction to the aftermath of *Gilbert* and *Geduldig*, Congress passed an amendment to Title VII called the Pregnancy Discrimination Act ("PDA").[218] The purpose of the PDA was to classify discrimination based on pregnancy, childbirth, and related medical conditions as sex discrimination.[219] In this sense, the PDA required pregnancy to be treated under an equality model.[220]

The effect of the PDA was to equate pregnancy with any other gender classification by placing the burden of establishing "pregnancy's uniqueness in any given instance on the employer."[221] Pregnancy was to be treated no more or less favorably than any other temporary disability.[222] The sameness

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215. *Geduldig*, 417 U.S. at 497, n.20.

216. EISENSTEIN, *supra* note 206, at 68-69.

217. RHODE, *supra* note 34, at 119. The fact that men also have sex specific problems, such as vasectomies and prostatectomies, that *were* covered by the benefit package apparently did not disturb the majority of the Court. *Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting). Despite the Court's valiant efforts to ensure equality, they may be seen as favoring men over women in these cases, as the husbands of pregnant women could have children with no adverse effects on their employment. Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L. J. 1493, 1510 (1992).

218. Pregnancy Discrimination Act of 1977, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1988)).

219. Wendy W. Williams, *supra* note 87, at 193; *see supra* note 188 for a discussion of the general purposes of Title VII. Subsection (k) provides in relevant 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 [same] . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

220. Wendy W. Williams, *supra* note 200, at 348.

221. Wendy W. Williams, *supra* note 87, at 193.

222. *Id.*

encouraged by the PDA was designed to "discourage employers . . . from creating or maintaining rules that force people to structure their family relationships upon traditional sex-based lines and from refusing to respond to pregnancy as within the normal range of events which temporarily affect workers."[223]

The PDA exemplifies the sameness doctrine by recognizing that pregnancy does not have a "unique impact on ability to work . . . [and] it is a disability similar to any other."[224] The PDA recognizes that there is a similarity in position between pregnant workers and other disabled workers: "All workers have a right to similar protections, for all share similar concerns, including an interest in job security and protection from the fear of losing a job when an illness or pregnancy requires leave time."[225] Consequently, "if an employer has a no-leave policy, or a limited duration leave policy which is inadequate for the needs of pregnant employees or seriously ill or injured employees, the pregnant women are no more deserving of job guarantees and benefits than other similarly situated workers."[226] Sameness feminists recognize that any discrepancy between pregnancy leave and leave for any other temporary disability would "perpetuate protectionist and paternalistic stereotypes about women's unique and separate reproductive role."[227]

Difference feminists disagree with the equation of pregnancy to other temporary disabilities; they contend that because "pregnancy is a unique sex-based condition, failure to positively accommodate it in the workplace discriminates against women by conditioning their ability to choose to continue working upon their choice to have a child."[228]

The reaction to the PDA under the difference theory is more clearly demonstrated in *California Federal Savings & Loan*

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223. Wendy W. Williams, *supra* note 200, at 353-54.

224. Melissa Feinberg, *After California Federal Savings & Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 144, 145 (1989).

225. *Id.*; *see generally* Wendy W. Williams, *supra* note 200, at 352-57 (discussing equal treatment of pregnancy and other disabilities and concluding that women benefit from equal treatment because it discourages employers from enforcing traditional sex-based family roles).

226. Feinberg, *supra* note 224, at 145; *see generally* Wendy W. Williams, *supra* note 200, at 371 (pregnancy as a purely physical event should not be the basis for termination or forced leave any more than any other nondisabling condition).

227. Feinberg, *supra* note 224, at 145.

228. *Id.* at 146.

Association v. Guerra.[229] In that case, the plaintiff, Lillian Garland, a pregnant woman who worked as a receptionist at California Federal, attempted to return to her job after taking a pregnancy leave.[230] When her employer refused to reinstate her, she sued under the California Fair Employment and Housing Act ("CFEHA").[231] Under that law, the employer was required to give a pregnant employee up to four months unpaid leave, with guaranteed job reinstatement in her original job or its equivalent.[232] California Federal then sued on the basis that this requirement violated the provisions of the PDA, which requires that pregnant workers receive only the same benefits as any other employee.[233]

The Supreme Court held for respondent Garland. The Court reasoned that the PDA's purpose was to construct "a floor beneath which pregnancy discrimination benefits may not drop — not a ceiling above which they may not rise."[234] The Supreme Court affirmed the finding of the Court of Appeals that because the CFEHA "furthers the goal of equal employment opportunities for women . . . 'Title VII [will] not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII.'"[235] The Supreme Court based its reasoning on the importance of taking pregnancy into account in

229. California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

230. *Guerra*, 479 U.S. at 278.

231. California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12966 (West 1980 & Supp. 1987) [hereinafter CFEHA]. Section 12945(b)(2) provides, in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification . . .
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided the period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

232. *Id. See generally* Littleton, supra note 80, at 1298-99 (proposing alternative view that focus should be on equal exercise of procreative rights rather than on pregnancy).

233. *See supra* note 231.

234. *Guerra*, 479 U.S. at 285 (quoting *Guerra*, 758 F.2d at 396). The PDA was intended to provide relief for women experiencing discrimination on the basis of their pregnancy. *Id.*

235. *Id.* at 280 (quoting *Guerra*, 758 F.2d at 395).

sex discrimination decisions in order to "allow women, as well as men, to have families without losing their jobs."[236]

The *Guerra* decision represents a victory for difference feminists who believe that "pregnancy is a problem that men don't have, an extra source of work place disability. . . . [W]omen workers cannot adequately be protected if pregnancy is not taken into account in special ways."[237] Ann Scales argues that a woman's unique "procreative abilities should be taken specially into account, but not in a degrading way."[238] Rather, acknowledging the needs of pregnant women is to "treat women as equals by respecting the female gender and by ceasing to impose upon women a bifurcated existence; . . . it is to restore to women the opportunity to live a continuous life, integrated with respect to career and procreation just as are the lives of men."[239]

The sameness and difference doctrines are both vehicles by which women seek equality with men. These doctrines focus on man as the norm on which the standard of equality is based. Equality, though, is a power issue.

> Men have and have had the power to set the standards in law and in our ideology and have used that power to subordinate women. They have framed the terms of our debates, established our language, named our concepts, and served as the norm. Only after intense struggle by women have they deigned to let some of us (if we play by their rules) join their game—and they call this "equality."[240]

Because the sameness and difference doctrines are confined within these limitations, women should seek an alternative solution.

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236. *Id.* at 289.

237. Wendy W. Williams, *supra* note 200, at 195.

238. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 436 (1981).

239. *Id.*

240. Bender, *supra* note 31, at 20.

IV. AN ALTERNATIVE TO THE MAINSTREAM: POWER RATHER THAN EQUALITY

An alternative to the two conventional doctrines of feminist legal theory is the dominance theory propounded by Catharine MacKinnon.[241] This theory stresses the control that one group (men) has over another (women).[242] Dominance does not view gender inequality in terms of the societal differentiation of the two conventional theories but specifically in terms of women's social subordination to men:[243] "[T]he problem is not that those similarly situated have been treated differently; it is instead that one group has dominated the other."[244] It questions equality based on the distribution of power between men and women.[245]

MacKinnon focuses specifically on behavior that society has become conditioned to accept as normal based on gender stereotypes—including sexual harassment, prostitution, reproductive freedom or the lack thereof, rape, and pornography.[246] She views these conditioned behaviors as sexual inequality, and thus, sexual discrimination.[247] In her

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241. MACKINNON, *supra* note 77, at 40.

242. *Id.* at 40.

243. Sunstein, *supra* note 99, at 828.

244. *Id.*

245. MACKINNON, *supra* note 77, at 40. Mackinnon argues that by addressing the power structure relative to men and women, the dominance theory directly addresses issues which have extreme importance to women, but which are ignored by both the sameness and difference doctrines. These include battery, and sexual assault, "material desperation through being relegated to categories of jobs that pay nil," prostitution, and pornography. *Id.* at 41. These issues play little or no role under sameness or difference theories because they, for the most part, happen only to women. *Id.* For this reason, they are "considered *not* to raise sex equality issues," and are therefore not addressed. *Id.*

246. *Id.* at 5; *see generally* pages 1-17 (discussing the nature of gender inequality).

247. Sunstein, *supra* note 99, at 828. MacKinnon's most controversial example of the condoned dominance by men over women is pornography, which she views as sexual discrimination. MACKINNON, *supra* note 77, at 139. Pornography is sexual discrimination because it is an institution of sexual inequality:

> Pornography is a practice of discrimination on the basis of sex, on one level because of its role in creating and maintaining sex as a basis for discrimination. It harms many women one at a time and helps keep all women in an inferior status by defining our subordination as our sexuality and equating that with our gender. It is also sex discrimination because its victims, including men, are selected for victimization on the basis of their gender. But for their sex, they would not be so treated.

Id. at 178. MacKinnon concludes that pornography is a form of sexual discrimination because of its basis in power and powerlessness, because it eroticizes the domination of man over women, and because it sexualizes inequality. *Id.* MacKinnon is careful to

explanation of the theory, MacKinnon likens gender relations to those of historical racial exclusion, concluding that although these exclusions have been accepted as natural, they are actually "socially constructed, alterable, and unjust."[248]

MacKinnon argues that the need for the dominance theory, or any alternative to the sameness/difference dichotomy, arose simply due to the inadequacy of those theories in addressing men's subordination of women.[249] She specifically criticizes both theories for their reliance on distinguishing themselves or equating themselves, with a male model:

> Concealed [in each doctrine] is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.[250]

Further, MacKinnon also offers several arguments for the inefficiency of the doctrines to individually achieve an equality that is truly equal. With regard to sameness, she sees an inherent flaw in the basis of the theory, arguing that because "sex . . . presupposes difference, [and equality presupposes sameness, there is an inherent] contradiction in terms, something

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distinguish between obscenity and pornography, and explain why only the latter should be cured by a remedy in sexual discrimination. Obscenity, she says, is a "moral idea, an idea about judgments of good and bad. Pornography, by contrast, is a political practice, a practice of power and powerlessness." *Id.* at 175. She further reveals the actual harm potentially done by pornography:

> Sex forced on real women so that it can be sold at a profit and forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed . . . the coercion that is visible and the coercion that has become invisible. . . .

Id. MacKinnon sees obscenity fostering much less harm than pornography. *Id.*

248. Sunstein, *supra* note 99, at 830.

249. *Id.* at 830-32.

250. MACKINNON, *supra* note 77, at 34.

of an oxymoron."[251] Second, she questions the sameness doctrine's ultimate goal of sexual equality.[252] MacKinnon argues that by demanding equality through sameness women are achieving the exact opposite result; the "sameness standard has mostly gotten men the benefit of those few things women have historically had."[253] Third, MacKinnon rejects the sameness approach as based on an equality defined under current and historical legal discourse.[254] Legal discourse, she contends, has been male dominated for so long that it "completely ignores the reality of women's lives."[255] For that reason, the sameness doctrine approach focuses on "public-sphere" issues, such as pregnancy discrimination, rather than "focusing on those long-silenced parts of female experience such as rape and other forms of sexual assault."[256]

In addition, MacKinnon details the impossibility of achieving equality through the difference doctrine.[257] First, she argues that the difference approach "adopts the point of view of male supremacy on the status of the sexes. . . . By treating the status quo as the 'standard' it invisibly and uncritically accepts the arrangements under male supremacy. In this sense, the difference approach is masculinist."[258]

Second, MacKinnon believes that by using men as the baseline from which to measure difference, the difference theory

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251. *Id.* at 33.

252. MACKINNON, *supra* note 108, at 216.

253. MACKINNON, *supra* note 77, at 35. For instance, MacKinnon points out that under a sameness view of equality, the rules of custody and divorce have been altered to give men an equal chance at child custody and alimony. *Id.* This presents a problem for women; because the sameness doctrine refuses to take gender into account, "men often look like better 'parents' under gender-neutral rules like level of income . . . because men make more money." *Id.* In other words, women may be prevented from receiving full custody or alimony because they earn less than men, therefore the male appears to be the better parent. The fact that males make more money than females, due to societal constraints against females, cannot be taken into consideration by the court under the sameness doctrine. Id.

254. MACKINNON, *supra* note 108, at 218-19.

255. Cain, *supra* note 31, at 834; *See generally* MACKINNON, *supra* note 108, at 216-17 (arguing that law is structured from a male viewpoint).

256. Cain, *supra* note 31, at 834.

257. *See generally* MACKINNON, *supra* note 77, at 32-45 (equality through difference is impossible because it is based on a male norm).

258. *Id.* at 42-43. The dominance approach, on the other hand, is feminist because it "sees the inequalities of the social world from the standpoint of the subordination of women to men." *Id.* at 43.

is based on a false universalization which is detrimental to women.[259] For instance, the difference approach accommodates women's reproductive capacity as a "special benefit"; women need this "special benefit" only because the basis from which they are defined is male.[260] She thus criticizes this approach as sustaining the "preexisting legal and social disabilities brought about by past discrimination and women's reproductive roles."[261]

Third, she contends that the difference approach embraces women's needs for relationships and connectedness,[262] chaining them to these stereotypes.[263] MacKinnon states:

> Differences are inequality's post hoc excuse, its conclusory artifact, its outcome presented as its origin, the damage that is pointed to as the justification for doing the damage after the damage has been done. . . . [A] discourse of gender difference serves as ideology to neutralize, rationalize, and cover disparities of power, even as it appears to criticize them. . . . [264]

She argues that the difference approach fails to see gender inequality as a form of subordination of women by men.[265] She concludes:

> If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals. This is what the difference approach thinks. . . . But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy,

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259. *See generally* MACKINNON, *supra* note 77, at 37 (forcing women to show that they are men in "every relevant aspect").

260. *Id.* at 36-38.

261. Sunstein, *supra* note 99, at 832.

262. *Id.* at 828-29. *See supra* note 158 and accompanying text.

263. MACKINNON, *supra* note 77, at 38-39.

264. *Id.* at 8.

265. *Id.* at 42.

which is not at all abstract and is anything but a mistake.[266]

V. A COMPARISON OF THE THEORIES

This section compares the mainstream theories and the dominance theory. It argues that by focusing on equality rather than the power imbalance, the sameness and difference doctrines are inadequate means of achieving the goals of feminist legal theory. To illustrate the disparate results of the ultimate goals of sameness/difference versus dominance, this section examines the details and theoretical underpinnings of Vermont's Abuse Prevention Act.

A. *The Abuse Prevention Act*

Vermont's 1980 Abuse Prevention Act[267] was implemented as a device to curb staggering statistics on domestic abuse. In 1993, "every one of the six women murdered in Vermont appears to have died at the hands of an intimate partner or family member."[268] This number reflects an increase of thirty-six percent over the figures from 1978 to 1987, when *only* sixty-four percent of murdered women were killed by their male spouses, lovers, ex-spouses, or ex-lovers.[269]

The Act's purpose was specifically meant to allay the "barriers to effective judicial relief for abused women . . . and improve their access to judicial remedies."[270] The Act was also meant to verify that women do not have to sustain physical injury to be victims of domestic violence: "Under Vermont law abuse or battering also takes place when a woman is threatened with violence, when a man tries to hurt her (even if he doesn't succeed), and when she

266. *Id.*

267. VT. STAT. ANN. tit. 15, §§ 1101-1109 (1989). The Act was drafted by John P. Wesley at the request of the Vermont Low Income Advocacy Council. John P. Wesley, *Breaking the Vicious Circle: The Lawyer's Role*, 6 VT. L. REV. 363, 374 n.36 (1981). *See* Appendix for full text of the Act.

268. JERI MARTINEZ, GOVERNOR'S COMMISSION ON WOMEN, 1993 ANNUAL REPORT ON VERMONT'S DOMESTIC VIOLENCE PROGRAM 3 (1994) (emphasis removed).

269. VERMONT SUPREME COURT & VT. BAR ASSOCIATION, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM at 4 (1991) [hereinafter GENDER BIAS TASK FORCE].

270. Wesley, *supra* note 267, at 374.

is being mentally abused in a way that makes her fear for her safety."[271] Since its passage, there have been several amendments to the Act which, at least facially, demonstrate a sensitivity to the plight of women affected by domestic abuse. The legislature has made the Act's language gender neutral,[272] redefined and clarified terms in order to include more women,[273] and added a provision that allows a request for relief from a family member not living in the household.[274]

To illustrate the distinction between the equality sought by both sameness and difference, and the power sought by dominance, the following section will examine the gender neutrality of the Act and its consequences.

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271. THE GOVERNOR'S COMMISSION ON WOMEN, THE LEGAL RIGHTS OF WOMEN IN VERMONT 34 (1991).

272. VT. STAT. ANN. tit. 15, §§ 1101-1109 (1989).

273. VT. STAT. ANN. tit. 15, § 1101(2) (Supp. 1993). *See* Appendix for full text. A 1991 amendment to the Act revised section 1101's definition of "family and household members," which described who may bring an action for relief from abuse. VT. STAT. ANN. tit. 15, § 1101(2) (Supp. 1993). Prior to this amendment, "family and household members" included "spouses or former spouses, persons of the opposite sex living together as spouses now or in the past, or person sixty years of age or older living in the same household and related by blood or marriage." VT. STAT. ANN. tit. 15, § 1101(2) (1985). That term was revised to include as "household members" "persons living together or sharing occupancy and persons who have lived together in a sexual relationship." VT STAT. ANN. tit. 15 § 1101(2) (Supp. 1993). This revision reflected the legislature's recognition that domestic abuse occurs not only between members of the opposite sex living in matrimony, but also between unmarried and homosexual couples living together. For instance, "[a]mong 104 self-identified lesbians aged 22 to 52 years old, 39 (37.5%) reported past or present abusive lesbian relationships." Jeri Martinez, *Statistics on Violence Against Women*, June 27, 1994 at 3 (copy on file with author).

274. VT STAT. ANN. tit. 15, § 1103(a) (Supp. 1994). Before the amendment, § 1103(a) read, in part:

> § 1103 Requests For Relief
>
> (a) Any family or household member may seek relief from abuse by a person who is living or has lived in the plaintiff's household on behalf of him or herself or his or her children by filing a complaint under this chapter requesting an order or orders. . . .

The 1994 amendment added the words "another family or household member or" preceding the words "by a person." VT. STAT. ANN. tit. 15, § 1103(a) (Supp. 1994). The significance of this revision is that a relief from abuse order can now be obtained against *any* family member without requiring that family member live or have lived in the requestor's household. This should afford the woman protection from siblings, cousins, and other family members that may continue the abuse on behalf of the initial abuser.

B. Analysis of the Act Under the Sameness and Difference Doctrines

Both sameness and difference feminists would probably argue that the Act promotes equality; it is likely that advocates of both doctrines would argue that the statute's gender neutrality is positive. Sameness feminists would contend that because it does not single out women as needing extra protection, it refrains from fostering the gender stereotypes feared in *Hogan*.[275] In addition, a gender-neutral domestic abuse Act may have gained the support of the sameness/ERA proponents, who would argue that the best way to avoid sex-based discrimination is to eliminate sex-based classifications.[276]

Difference feminists would probably agree with the sameness feminists that specifically targeting women as victims of abuse is not necessary because equality is reached through neutrality. Difference feminists may view such a distinction as perpetuating stereotypes of women as powerless and promoting the image of women as too weak to take responsibility for themselves by leaving an abusive relationship.

Further, difference feminists would probably argue that the 1991 and 1994 amended versions of the Act more subtly address specific concerns of women.[277] For example, they might argue that because the Act specifically defines "abuse" as "attempting to cause or causing physical harm," and "placing another in fear of imminent serious physical harm,"[278] it is theoretically sufficient to cover emotional, psychological, or sexual abuse leading to fear of the physical act itself.[279] Further, because women are much more likely than men to experience emotional, psychological, or sexual abuse in a relationship, the Act accounts for their experiences.[280]

Consequently, feminists of each doctrine would accept the gender-neutrality of the Act based on their own interpretation of

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275. *See supra* notes 119-28 and accompanying text.

276. *See supra* notes 113-115 and accompanying text.

277. *See infra* notes 279-80 and accompanying text.

278. VT. STAT. ANN. tit. 15, § 1101(1)(A)(B).

279. *See generally* LENORE E. WALKER, TERRIFYING LOVE (1989) *and* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) (addressing the syndrome through which women submit to emotional, psychological, and physical harm by husbands or male partners).

280. Wesley, *supra* note 267, at 366-69.

equality. Proponents of the dominance theory, however, would find a gender-neutral Abuse Prevention Act unacceptable.[281] Equal treatment under the law, such as gender-neutral statutes, is only effective if women and men begin on equal footing. As one feminist wrote in regard to the Supreme Court's invalidation of the statute in *Hogan*:

> [T]he Constitutional equality guarantee can break down economic, employment, and educational barriers that explicitly prevent either sex from acquiring the benefits available to the other in society. . . . [H]istorically such barriers have disproportionately been erected against women, not men, so that extending the benefits of liberation even-handedly to men as well as women seems *un*even. Or ironic. Or a reason to be suspicious.[282]

It is apparent from available statistics that women and men are not on equal footing with regard to domestic abuse; the power is weighted on the side of men.[283] For instance, in 1981, the National Clearinghouse on Domestic Violence reported that "[a]n estimated 3 to 4 million American women are battered each year by their husbands."[284] Catharine MacKinnon stated in a 1983 speech that "between [sixty] percent and [seventy] percent of murdered women have been killed by a husband, lover, or ex-lover."[285] In 1985, it was estimated that "[e]very [twelve]

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281. The author acknowledges that the Abuse Prevention Act was meant to cover not only abuse by men against women, but also abuse between homosexual couples, by women against men, and by caregivers against the elderly and mentally and/or physically handicapped. Because the statistics report an overwhelming incidence of violence against women, that is the focus of the following discussions in relation to the Act.

282. Frug, *supra* note 112, at 40.

283. This power imbalance, specifically with regard to domestic violence, is perpetuated in society by institutions such as pornography. MACKINNON, *supra* note 77, at 172-175. MacKinnon states that "[m]en treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way." *Id.* at 172. Mari Matsuda stated that "[e]nding gender-specific violence is a prerequisite to gender equality. If you believe . . . that violence against women is intertwined with the production of pornography, then the struggle against pornography is part of the struggle for equality." *Pornography: Does Women's Equality Depend on What We Do About It?*, MS. Jan./Feb. 1994, at 42.

284. Martinez, *supra* note 273 (*quoting* Stark, E., *Wife Abuse in the Medical Setting*, National Clearinghouse on Domestic Violence, Washington, D.C., 1981).

285. MACKINNON, *supra* note 77, at 52.

seconds, a woman in the U.S. is beaten—[the equivalent of] 300 per hour, 7,200 each day."[286] Two years later, an author wrote that "a woman's chances of being assaulted at home by her partner are greater than that of a police officer being assaulted on the job."[287]

In addition to the overwhelming number of female victims of domestic abuse, women are subject to another aspect of the power imbalance through the language of the statute and the traditional means of interpreting such legal language. Judges' application of the statute to particular instances of domestic abuse is influenced by their "background expectancies, understanding of situations, concepts of what is appropriate and inappropriate behavior, and what certain persons, individuals and genders may be expected to tolerate and endure."[288] An Act framed in gender-neutral terms allows judges to interpret the meaning of the Act with a traditional patriarchical prejudice:[289] "If the law [is] defined largely by men, and if its definitions, which are presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?"[290] An Abuse Act termed without feminine specificity allows an interpretation through "men's understanding of women, women's nature, women's capacities, and women's experiences—women refracted through the male eye—rather than women's own definitions. . . ."[291]

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286. MARTINEZ, *supra* note 268, at 3.

287. Martinez, *supra* note 273 (quoting A. BROWNE, WHEN BATTERED WOMEN KILL, 1987).

288. Susan S. M. Edwards, *A Socio-legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 186, 196 (1985).

289. This includes both male and female judges. Although judges in Vermont are receiving an increasing amount of education about domestic abuse, they may still operate with a traditional bias without even being aware of it.

290. Finley, *supra* note 109, at 886-87.

291. *Id.* at 894. In fact, it is possible that the equal protection of a woman is violated by an abuse statute not framed in the feminine, because through "persistent use of male gender . . . a woman's conduct . . . [is] measured against that of a reasonable male finding himself in the same circumstances." Edwards, *supra* note 288, at 196.

Critics of such a statute would argue against it because of its sex-based classifications.[292] When asked about the possibility of a feminine statute, a Vermont Family Court judge replied that a statute framed in terms other than masculine or gender-neutral would violate equal protection.[293]

The author believes a statute such as the Abuse Prevention Act, framed in the feminine, would withstand an equal protection challenge. To do so, the statute would have to pass an intermediate scrutiny test;[294] it must be found to serve important governmental objectives, and must be substantially related to those objectives.[295]

There are two important governmental objectives to be served by a feminine-specific Abuse Prevention Act; each would empower women both psychologically and legally, thus remedying the power imbalance. The first objective would be to substantiate the statistics indicating that women are the overwhelming victims of

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292. I would argue that this is not so; the statute would still be responsive to those situations in which a man suffers domestic abuse. The Gender Bias Task Force Report indicates that during the period from 1978 to 1987, five men were killed at the hands of their female spouses, lovers, ex-spouses, or ex-lovers. GENDER BIAS TASK FORCE, *supra* note 269, at 4. It is important to note that two of the five killings were committed by women who had been abused by these men, and were thus considered to be acts of self-defense and not murder. *Id.* To compare these rates to the number of women killed by abusive partners during the same period, see MARTINEZ, *supra* note 268.

293. Interview with Judge X, Vermont Family Court (1994) (notes on file with author). In accordance with his/her request, the identity of this judge will remain anonymous.

294. *See supra* note 87 and accompanying text.

295. *Id.* The objective of the legislature in passing the Act, according to the Act's author, was to remove barriers to effective judicial relief for victims of domestic abuse. Other gender-specific classifications have passed the intermediate scrutiny test based on their relation to the legislature's objective. See *supra* notes 163-183 and accompanying text. In *Rostker*, the Court upheld a statute which refused to allow women to register for the draft and in *Michael M.* the Court upheld a statutory rape law. *Id.* The connection between the objective and the end in both of these cases is rather tenuous. In *Rostker*, the stated objective was to promote administrative convenience by not allowing women to register for the draft if they were unable to serve in combat. See *supra* notes 166-170 and accompanying text. The means to this objective could have been achieved in much narrower terms, and were questioned in the dissenting opinions. *Id.* In *Michael M.*, the supposed objective was the prevention of illegitimate pregnancies: the means used to achieve this goal was a sex-specific classification focusing on the actions of the male rather than the female. See *supra* notes 171-180 and accompanying text.

If sex-specific statutes such as those in *Rostker* and *Michael M.* were upheld by the Court despite the tenuous connection between objective and means, then a feminine-specific statute aimed at addressing the problem of domestic abuse should be upheld as well. Such a statute would be based on accepted statistical analysis of the number of women battered versus the number of men. There is a clear correlation between the ill sought to be addressed and the means by which to do so.

domestic abuse and demonstrate that society is no longer willing to deny that such abuse exists. Such feminine specificity would better promote the drafter's intent that the Act destroy the "barriers to effective judicial relief."[296] If a woman can see that a statute specifically recognizes the abuse she is experiencing, she may be more encouraged to take action to prevent a further harm.

The second objective would be to recognize that in relation to a gender-neutral statute "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[297] This means that whether a woman experiences "fear of imminent physical harm" is based on the standard of a reasonable person, not specifically a reasonable woman. The danger in such a standard is clear: "The language . . . [has been] neutered, made 'politically correct,' and sensitized. . . . [However] it did not change its content and character."[298] As MacKinnon wrote, "the attempt to be objective and neutral avoids owning up to the fact that women do have a specific point of view on these events."[299]

Under the dominance theory, the Abuse Prevention Act would reflect the overwhelming victimization of women by their male partners, thus exposing the power imbalance. Without such feminine-specific language, the Act strives for an equality that is misplaced and potentially renders it ineffectual.

C. Examples of Potential Power Imbalance Abuses Under a Gender-Neutral Abuse Prevention Statute

The following narratives are intended to illustrate the potential dangers domestic abuse victims, seeking relief from abuse orders, might face under a gender-neutral statute. Each is the story of actual events which happened to women before seeking an abuse order.[300] Although the women in the narratives were not physically harmed by their husband or boyfriend, they were put in reasonable fear for their physical

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296. *See supra* note 270 and accompanying text.

297. Fineman, *supra* note 98, at 17.

298. Bender, *supra* note 31, at 22.

299. MACKINNON, *supra* note 77, at 86.

300. For the purposes of this note, I will call these women Christy and Mindy. These are not their real names, nor are their stories meant to encompass the experiences of anyone with these names.

safety and that of their children. Receiving an abuse order in either situation, however, depends on whether the presiding judge, either male or female, can view the harm from the woman's perspective; and whether the judge can see that fear of physical harm occurs without raised fists, threats to kill or dismember, or physical harm to pets or children.

CHRISTY. Separated from her husband, Christy now lives alone with two young children in a relatively rural area. She has filed for divorce, but the proceedings are moving slowly. Shortly after the separation, she begins to receive telephone hang-ups and obscene messages from voices she recognizes as her husband and his co-workers. She attempts to change and unlist her telephone number, but a call to the phone company reveals that the account is in her husband's name, and cannot be disconnected without his permission. Instead, the company suggests she spend over fifty dollars (her husband is not helping to support their children in any way) to have them install call trace on the telephone. She does so, and the trace service shows the calls coming from his place of business. She is unable to prove it is her husband placing the calls, and the case is dismissed by the police.

Shortly thereafter, her husband begins driving by the house, sometimes honking or revving the car's engine. He then begins parking his car at the foot of the driveway, which she can clearly see from the house.[301] Several times she is unable to leave the house in her car because she fears a confrontation with him. He leaves piles of cigarette butts and empty liquor bottles at the foot of the driveway. They often appear in the morning, so she knows he has been there at night. The locks on the house have been changed, at her own expense, but he knows there is no alarm system.

A few days later, he parks the car, strategically placed for her to see as she leaves work. This time he has taken what appears to be a hammer and dented the entire surface of the car. The next week, per court order in relation to the divorce, he returns an inflatable boat to her for the children to use. The boat has been slashed by a knife in several places.

Christy interprets the accumulation of these acts as a threat to the physical safety of both herself and her children. She is in fear of her life. In addition, as the acts are escalating in violence,

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301. She continues to make the payments on this car, as it is the better of the two cars they own and she hopes to receive it in the divorce.

she fears the harm is imminent. It is clear to her that she is in danger of "imminent physical harm."

MINDY. Mindy has been in a relationship with her boyfriend for several years. They share an apartment and have several children together. When the couple is together, Mindy is rarely permitted to talk. Her boyfriend speaks for her as she sits quietly. If she wants to say something, she speaks directly to him. Even when asked a direct question, Mindy looks to her boyfriend. If she receives an affirmative signal from him, she will answer quietly with her eyes cast downward. If he does not approve of the question, he will answer. There is no evidence of prior physical abuse, that is, no one has ever documented her bruises, cuts, or broken bones. After several years, Mindy wants out of the relationship. In order to leave the house alone, she tells him she is taking the children over to a babysitter so that he and Mindy can spend some time alone. He approves. Mindy does not return.

Her boyfriend is seen running throughout the town, searching for Mindy. He refuses to feed her pets hoping that their starvation or death will bring her back out of desperation. He rides the only town bus on its entire circuit for days, waiting for her to board. It is also clear to Mindy that she is in fear of "imminent physical harm."

Christy and Mindy are justified to fear imminent serious physical harm. They are harassed, terrified, and emotionally and psychologically abused. Their fears are real to them, and statistics indicate the physical abuse will likely begin soon. Under the gender-neutral Act, however, whether each is granted a Relief from Abuse Order depends on whether the judge presiding defines fear in the same way these women do.

CONCLUSION

Women's struggle for equality has been the subject of debate for decades. The law has consistently treated women as objects to be bought, to be protected, and to be cared for, perceptions fostered through male-defined legal language and its consequent interpretation. In reaction to this male-based system, feminist legal theory developed the sameness and difference doctrines. Through these doctrines, feminist scholars have debated the pros and cons of forcing the law to treat women exactly as it treats men, as opposed to recognizing and accommodating some basic

differences between the genders. Both of these doctrines, however, focus on the ultimate goal of equality.

The dominance theory, arising out of deficiencies in the sameness and difference doctrines, argues that women should seek power rather than equality in the law and society. The dominance theory asserts that if women are less protected in our society because of the power imbalance, then society should find a legal remedy that is responsive to their needs. The danger inherent in seeking equality rather than power is demonstrated through the provisions of a gender-neutral Abuse Prevention Act. The Act illustrates how equality can be as detrimental to women as outright discrimination. Its gender-neutrality fails to take into consideration the unique experiences of women, as interpreted by women, rather than by men who have traditionally defined and interpreted the law.

Opponents of such power balancing would probably encourage constitutional challenges to feminine-specific statutes as sex-based classifications. Such a statute should pass appropriate constitutional scrutiny. A feminine statute would serve the important governmental objective of equalization of power and would be substantially related to that goal. The statute, and others like it, would seek to demolish the power that men retain over women in law and society.

Each soft crystal, every gentle spectrum;
woman with snow
lust and spirit
facing the sky.
Just making angels.[302]

Anne-Marie Leath Storey

302. Vicky Parra, Student, Vermont Law School.

APPENDIX

THE VERMONT ABUSE PREVENTION ACT[303]

§ 1101. Definitions

The following words as used in this chapter shall have the following meanings:

(1) "Abuse" means the occurrence of one or more of the following acts between family or household members:

(A) attempting to cause or causing physical harm;

(B) placing another in fear of imminent serious physical harm;

(C) abuse to children as defined in Chapter 14 of Title 33.

(2) "Family or household members" means spouses or former spouses, persons of the opposite sex living as spouses now or in the past, or person sixty years of age or older living in the same household and related by blood or marriage.

§ 1102. Jurisdiction

Proceedings under this chapter may be commenced in either the district court or the superior court of the county in which the plaintiff resides. If the plaintiff has left the residence or household to avoid abuse, the plaintiff shall have the option to bring an action in the county of the previous residence or household or the county of the new residence or household.

§ 1103. Requests for Relief

(a) any family or household member may seek relief from abuse by a person who is living or has lived in the plaintiff's household on behalf of him or herself or his or her children by filing a complaint under this chapter requesting an order or orders which include the following:

(1) an order that the defendant refrain from abusing the plaintiff, his or her children or both and from interfering with their personal liberty;

303. VT. STAT. ANN. tit. 15, § 1101-1109 (Supp. 1985).

(2) an order that the defendant immediately vacate the household, and the plaintiff be awarded sole possession of a residence;

(3) an award of temporary custody of a minor.

(b) Except as provided in section 1104 of this title, the court shall grant relief only after notice to the defendant and a hearing. Relief shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff, the children or both from abuse. The court may modify its order at any subsequent time upon motion by either party and a showing of substantial change in circumstances.

(c) No filing fee shall be required.

(d) If the court makes an order relating to custody, the order may, if requested, include visitation rights, unless the court finds that visitation will result in abuse, in which case the order shall specify conditions under which visitation may be exercised so as to prevent further abuse.

§ 1104. Emergency Relief

(a) In accordance with the rules of civil procedure, temporary orders under this chapter may be issued ex parte, without notice to defendant, upon motion and findings by the court that defendant has abused plaintiff, his or her children or both. Relief under this section shall be limited as follows:

(1) upon a finding that there is an immediate danger of further abuse, an order may be granted requiring the defendant

(A) to refrain from abusing the plaintiff, his or her children or both and

(B) to refrain from interfering with the plaintiff's personal liberty, the personal liberty of the plaintiff's children, or both;

(2) upon a finding that the plaintiff, his or her children or both have been forced from the household and will be without shelter unless the defendant is ordered to vacate the premises, the court may order the defendant to vacate immediately the household and may order sole possession of the premises to the plaintiff;

(3) upon a finding that there is immediate danger of physical or emotional harm to minor children, the court may

award temporary custody of these minor children to the plaintiff or to other persons.

(b) Every order issued under this section shall contain the name of the court, the names of the parties, the date of the petition, the date and time of the order and shall be signed by the judge. Every order issued under this section shall state upon its face a date, time and place when the defendant may appear to petition the court for modification or discharge of the order. This opportunity to contest shall be scheduled as soon as reasonably possible, which in no event shall be more than 10 days from the date of issuance of the order. At such hearings, the plaintiff shall have the burden of proving abuse by a preponderance of the evidence. If the court finds that the plaintiff has met his or her burden, it shall continue the order in effect and make such other as it deems necessary to protect the plaintiff.

(c) Form complaints and form orders shall be provided by the court administrator and shall be maintained by the clerks of the courts.

(d) Every order issued under this chapter shall bear the following language: "VIOLATION OF THIS ORDER MAY BE PROSECUTED AS CRIMINAL CONTEMPT PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH."

§ 1105. Service

A complaint or ex parte temporary order issued under this chapter shall be served in accordance with the rules of civil procedure and may be served by any municipal or state police officer if so ordered by the court. The person making service shall file a return of service with the court stating the date, time and place at which the order was delivered personally to the defendant.

§ 1106. Procedure

(a) Except as otherwise specified in this chapter, proceedings commenced under this chapter shall be in accordance with the rules of civil procedure and shall be in addition to any other available civil or criminal remedies.

(b) The court administrator shall establish procedures to insure access to relief after regular court hours, or on weekends and holidays. The court administrator is authorized to contract

with public or private agencies to assist plaintiffs to seek relief and to gain access to district and superior judges. Law enforcement agencies shall assist in carrying out the intent of this section.

§ 1107. Filing orders with law enforcement personnel

Police departments, sheriff's departments and state police district offices shall establish procedures for filing orders issued under this chapter and for making their personnel aware of the existence and contents of such orders.

§ 1108. Enforcement

(a) Law enforcement officers are authorized to enforce orders issued under this chapter. Enforcement may include, but is not limited to:

(1) making an arrest in accordance with the provisions of V.R.Cr.P. 3;

(2) assisting the recipient of an order granting sole possession of the residence to obtain sole possession of the residence if the defendant refuses to leave;

(3) assisting the recipient of an order granting sole custody of children to obtain sole custody of children if the defendant refuses to release them.

(b) In addition to the provision of subsection (a) of this section, violation of an order issued under this chapter may be prosecuted as a criminal contempt under Rule 42 of Vermont Rules of Criminal Procedure. The prosecution for criminal contempt may be initiated by the state's attorney in district or superior court in the unit or county in which the violation occurred. The maximum penalty which may be imposed under this subsection shall be a fine of $1,000.00 or imprisonment for six months, or both. A sentence of imprisonment upon conviction for criminal contempt may be stayed in the discretion of the court pending the expiration of the time allowed for filing notice of appeal or pending appeal if any appeal is taken. After two years have passed from conviction under this subsection, the court may on motion of the defendant expunge the record of the criminal proceeding and conviction unless the defendant has been convicted of a felony or misdemeanor involving moral turpitude or

a violation of a domestic abuse order after such initial adjudication.

§ 1109. Appeals

An order of the court issued under section 1103 of this title shall be treated as a final order for the purposes of appeal. Appeal may be taken by either party to the supreme court under the Vermont Rules of Appellate Procedure and the appeal shall be determined forthwith.