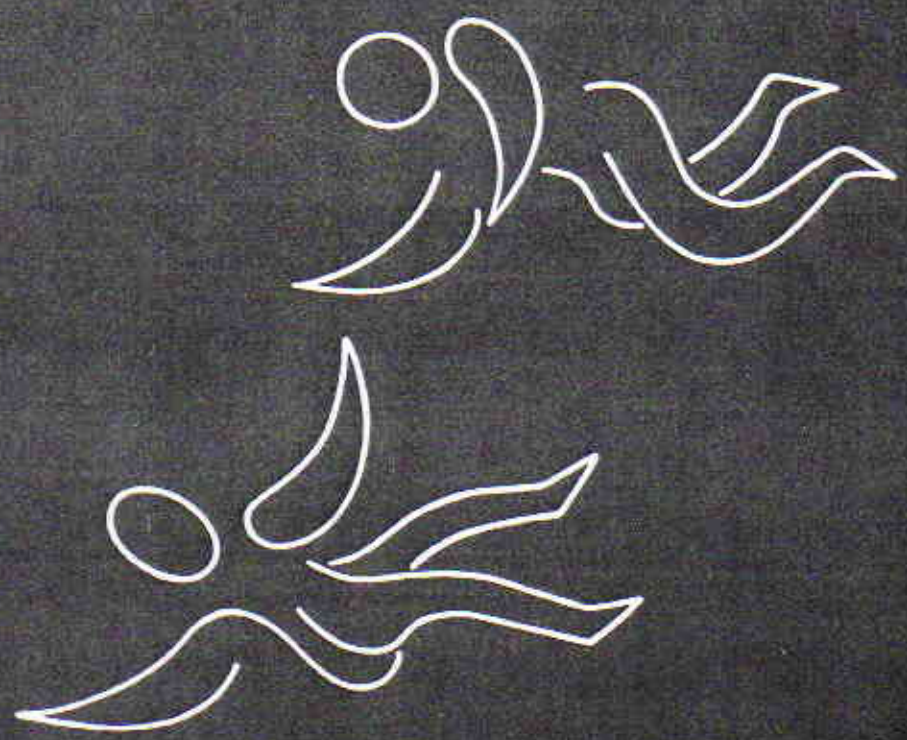


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BEYOND THE SOLITARY SELF:† VOICE, COMMUNITY, AND REPRODUCTIVE FREEDOM

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PROLOGUE: A PERSONAL PREDICATE TO THEORY

The body of this paper is an attempt to find hope in hope, even as we witness the moral bankruptcy and utter inefficacy of sole reliance on individual rights.¹ To halt our downward slide, we must reject the notion of the solitary self. We must recognize instead that we draw our meaning through our connection with others and that our communities in turn exist only through their synergistic relationship with us. In order to effect change in our communities, we must facilitate these dynamic, transformative relations by encouraging the interchange of diverse voices. First, however, the disempowered must be free to speak. While it is next to impossible to speak from a state of hopelessness, voice is fueled by hope. For most women, nothing provides more hope than regaining control over their own reproductive capabilities. By locating reproductive freedom in community, we can touch voice-enabling hope, amplify silenced voices, and

† Alexis de Tocqueville has warned that individualism may "throw [people back on themselves] alone. . . . shut up in the solitude of [their] own hearts[]." Alexis de Tocqueville, *Democracy in America*, Volume Two 508 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (1839).

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¹ Drucilla Cornell has similarly alleged that liberal society is in a state of moral disintegration. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 292-93 (1985).

About the Cover

The cover illustration was inspired by our desire to reflect cooperation, awareness, difference, and community that shape our purpose and process in creating the *Columbia Journal of Gender and Law*. It was drawn by Carol Quiete Mari Suzuki.

thus improve the functioning of communities.

To begin this essay at all, I first had to rekindle my own hope. Like many other advocates of reproductive freedom, I feel an almost overwhelming sense of frustration and despair.² Since 1980, when Ronald Reagan was elected President, the Department of Justice has continually intervened in litigation to ask the Supreme Court to overrule *Roe v. Wade*.³ The last Supreme Court decision that strongly affirmed *Roe* was in 1986,⁴ and with each subsequent decision, the Court has steadily chipped away at *Roe*'s foundations, all the while disingenuously pretending that it was leaving *Roe* intact.⁵

Soon after *Roe*, when the Supreme Court upheld restrictions on state and federally funded abortions, low-income women lost whatever right to reproductive freedom they once had.⁶ Then, as the Supreme Court upheld increasingly onerous parental notification provisions, young women gradually lost their ability to exercise their reproductive "rights."⁷ With the rights of the most marginalized women in society already stripped away, the

² I note that my sense of frustration undoubtedly cannot compare to that experienced by my more senior colleagues.

³ 410 U.S. 113 (1973), modified by Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). See Brief of the United States Department of Justice, Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 112 S. Ct. 2791 (1992); Brief of the United States Department of Justice, Hodgson v. Minnesota, 111 S. Ct. 2926 (1990); Brief of the United States Department of Justice, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

⁴ Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down various roadblocks to legal abortion, including mandatory anti-abortion information and reporting requirements).

⁵ See *infra* notes 7-22 and accompanying text.

⁶ See Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding Hyde Amendment, prohibiting Medicaid funding for abortions, and finding that states have no obligation to pay for those medically necessary abortions for which the Hyde Amendment prohibits funding). Poelker v. Doe, 432 U.S. 519, 521 (1977) (holding that cities need not provide publicly financed hospital services for nontherapeutic abortions, even when they do provide publicly funded services for childbirth); Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding state denial of funding for nontherapeutic abortions, even when the state does fund childbirth); Beal v. Doe, 432 U.S. 438, 446, 447 (1977) (holding that states are not required to provide nontherapeutic abortion services under federal Medicaid statute).

⁷ See Hodgson, 111 S. Ct. at 2944 (upholding 48-hour waiting period and notification of at least one parent before a minor may obtain an abortion); Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2983-84 (1990) (finding constitutional a statute making it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age); Bellotti v. Baird, 443 U.S. 622, 647-49 (1979) (conditioning a minor's access to abortion on the consent of either both of her parents or of a judge).

Court began attacking all women. In 1989, the Court upheld state-mandated viability testing requirements and a prohibition on nontherapeutic abortions in public facilities.⁸ And in 1991, the Court sanctioned federal restrictions on the abortion-related speech and activities of federally funded physicians.⁹

The most recent word from the Supreme Court was the most devastating—with the possible exception of the abortion-funding cases¹⁰—in recent years. After waxing eloquent about the importance of reproductive freedom in women's lives,¹¹ the plurality in *Planned Parenthood v. Casey*¹² proceeded to gut *Roe*. Explicitly overruling two of its earlier abortion decisions,¹³ the Court in *Casey* ruled that the state has an interest in fetal life throughout pregnancy.¹⁴ After viability, the state's latitude in advancing this interest is nearly boundless.¹⁵ Before viability, state abortion restrictions are subject only to the proviso that they not "unduly interfere" with women's right to choose abortion.¹⁶

⁸ Webster v. Reproductive Health Servs., 492 U.S. 490, 511, 519-20 (1989).

⁹ Rust v. Sullivan, 111 S. Ct. 1759, 1777 (1991). See also Planned Parenthood v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991); Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (en banc), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991).

¹⁰ Webster, 492 U.S. 490; Rust, 111 S. Ct. 1759.

¹¹ For the first time, the Court recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992) (citing Rosalind Pollack Petchesky, *Abortion and Woman's Choice* 109, 133 n.7 (rev. ed. 1990)).

¹² 112 S. Ct. 2791 (1992).

¹³ *Id.* at 2816 (overruling "those parts of *Thornburgh* [v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)] and *Akron* [Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)] which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn").

¹⁴ *Id.* at 2816, 2820.

¹⁵ Even before viability, states may impose "[l]egislations designed to foster the health of a woman seeking an abortion . . . if they do not constitute an undue burden." *Id.* at 2821.

¹⁶ *Id.* at 2820. What exactly constitutes an "undue burden" is unclear. The plurality in *Casey* explained only that "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (emphasis added). In applying this standard to the Pennsylvania law at issue, however, the Court examined only the purported effect of each provision, not the purpose. *Id.* at 2823 (finding that requiring the physician to provide the woman with materials describing the consequences of abortion to the fetus may promote the state's interest in childbirth over abortion but "cannot be considered a substantial obstacle to obtaining

Under this new analysis, *Roe's* trimester framework is history. No longer are women's interests ever necessarily superior to those of the fetus. No longer is reproductive freedom at any time a "fundamental right" subject to the strictest judicial scrutiny.¹⁷ Because the trimester framework and the pre-viability application of a strict scrutiny test were central to *Roe*, the case now survives only as "a storefront on a Western movie set, . . . a mere facade to give the illusion of reality."¹⁸ The fact that the Court has not yet uttered the magic word "overruled" does not mean that *Roe* is not lost.

Demonstrating the toothlessness of the new "undue burden" test, the Court in *Casey* used it to uphold a panoply of pre-viability abortion restrictions, including the following: "informed parental consent" requiring a parent's in-person visit to a doctor's office;¹⁹ state-mandated counseling for all patients designed to discourage women from having abortions;²⁰ a twenty-four-hour waiting period;²¹ and clinic reporting requirements.²² As of this writing, numerous cases are pending across the country that demand an application and interpretation of the "undue burden" standard. Each of these cases will give the Court yet another opportunity to further

an abortion", at 2825 (finding 24-hour waiting period "a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden"), and at 2832 (finding that reporting requirements relate to the state's interest in "health" and do not pose "a substantial obstacle to a woman's choice").

Note that the "undue burden" test embraced in *Casey* is different from the one earlier proposed by Justice O'Connor. See *Akron I*, 462 U.S. at 453, 461-63 (O'Connor, J., dissenting) (finding an undue burden in abortion cases in "situations involving absolute obstacles or severe limitations on the abortion decision"); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (following the formulation set out in *Akron I*). Therefore, the *Casey* test should not be confused with the earlier formulations, which would have applied a strict scrutiny test where a burden is found to be "undue." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting).

¹⁷ This standard is directly contrary to *Roe*. See *Roe v. Wade*, 410 U.S. 113, 152-53, 155 (1973).

¹⁸ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in part, dissenting in part).

¹⁹ *Casey*, 112 S. Ct. at 2832.

²⁰ *Id.* at 2823.

²¹ *Id.* at 2825.

²² *Id.* at 2832. The only provision of the Pennsylvania law the Court did not uphold was a spousal notification provision. *Id.* at 2831. The Court in *Casey* remanded the case for a decision consistent with its findings. *Id.* at 2833. As of this writing, the plaintiffs are moving for new fact finding, arguing that they had not presented all of the evidence that is necessary for a complete examination under the new "undue burden" test.

whittle away whatever guarantee of reproductive freedom remains.²³

This collapse of *Roe* has led me to reassess individual rights as a tool for social change. It seems apparent that an overemphasis on individual rights contributed to the demise of *Roe*. Granted, the conservative political climate, combined with the enhanced politicization of the federal judiciary,²⁴ ensured *Roe's* ruin. But it was *Roe's* reliance on individual rights that made the opinion so vulnerable in the first place. The plurality in *Casey* gave lip service to the importance of reproductive freedom for enabling women to chart their own roles in society.²⁵ Why, then, did they fail to follow through with their observations? Perhaps because an individual rights analysis provides neither the proper tools for fully recognizing the centrality of reproductive freedom, nor an adequate means by which to ensure its survival.

The ultimate focus on the individual reflects an impoverished and imaginary vision of self—the solitary self. No theory based upon such a distorted view of society can withstand the test of time, at least not without great sacrifice, particularly the stunting of both individual and communal development. This Article is an attempt to develop a stronger grounding for reproductive freedom and other besieged "rights" by rejecting the solitary self.

In the first section of the Article, "The Present," I briefly review the

²³ The laws at issue in the pending cases can be classified into two categories: abortion bans and "roadblock laws" (laws making it more difficult to obtain abortions, but not banning them outright). The leading abortion-ban cases are: *Guam Society of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (invalidating statute under which abortions banned, except for ectopic pregnancies and abortions in cases where two independently practicing physicians determine that the pregnancy will endanger the life of the woman or "gravely impair" her health, no exceptions for rape, incest, or fetal defects), withdrawn, 1992 LEXIS 7599 (9th Cir. 1992), amended, 1992 LEXIS 13490 (9th Cir. 1992), cert. denied, 61 U.S.L.W. 3399 (1992); *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992) (dismissing with prejudice claims that Utah law banning abortions except to prevent "grave" damage to a woman's health or prevent "grave" fetal defects and in limited cases of rape and incest violates Utah constitution), summary judgment granted in part, claim dismissed, 794 F. Supp. 1537 (D. Utah 1992).

Leading "roadblock" cases include *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1991) (finding facially constitutional Mississippi Informed Consent to Abortion Act, mandating 24-hour waiting period and counseling on the benefits of childbirth and the risks of abortion), cert. denied, 61 U.S.L.W. 3418 (1992).

²⁴ See Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189, 191-94 (1988) (examining President Reagan's "enduring institutional legacy").

²⁵ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807, 2809 (1992) ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . .").

limitations of "rights-talk."²⁶ I then summarize the primary feminist responses, the main of which suffer to some degree from essentialism and thus reflect an impoverished view of the self. In the second part of this article, "The Future," I propose an alternative vision which emphasizes the individual's synergistic relationship with community. Although I draw from some strains of communitarian thought, I distinguish this approach from many communitarian claims by stressing the acceptance and promotion of diversity among and between individuals and communities, and, drawing largely from Critical Race Theorists, by adding the concept of voice as process. I explore this approach, which, for lack of better language, could be termed a "community/voice" approach, by (1) explaining the centrality of communities and voice in the context of the claims of cultural feminists, (2) examining the concept of "dysfunctioning" communities—communities in which the individual's relationship with community is blocked, and (3) setting forth some measures essential to ensuring that communities function properly. Finally, I apply the concept of community and voice to reproductive freedom.

Above all, I hope to demonstrate that instead of focusing on either the community or the individual, we must promote and protect the individual's relationship with her community. This relationship is a process, built on a dynamic interchange of voices. Voices can come only from a state of hopefulness.

From this, I draw hope.

THE PRESENT: THE SOLITARY SELF—THE LIMITS OF RIGHTS-TALK AND THE MAIN FEMINIST RESPONSES

At its core, so-called "traditional" liberalism²⁷ imagines all humans

²⁶ Mark Tushnet uses this phrase in his critique of rights. Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1370 (1984). See also Michael Perry's defense of "rights-talk," Michael J. Perry, Taking Neither Rights-Talk Nor the "Critique of Rights" Too Seriously, 62 Tex. L. Rev. 1405 (1984).

²⁷ "Traditional" liberalism admittedly is a characterization; yet, as developed herein, it is this characterization of liberalism that has been so influential in the formulation of individualism and in the development of rights-talk. Still, I do not mean to suggest that all liberal theorists advance an atomistic view of humankind. See, e.g., R.E. Ewin, Liberty, Community, and Justice 6-7 (1987) ("[I]ndividual liberty is itself a community notion and a community relationship, not something opposing the individual to the community."). See generally Bruce Ackerman, Social Justice in the Liberal State (1980); Ronald Dworkin, Taking Rights Seriously 81-130 (1977).

For a general defense of liberalism in the face of the so-called "atomistic critique," see Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171 (1992). I agree that not all works of

as primarily free-floating beings. Under ideal circumstances, we glide through the world alone, defining and advancing our separate agendas of needs and desires, none of which can be adjudged more or less legitimate than those held by others. Individuals' agendas may overlap, but such incidents are most likely coincidental, rather than due to predetermined or recognizable patterns.²⁸ In this manner, traditional liberalism trumpets (and, critics may assert, reifies) the notion of self-definition and autonomy. Indeed, according to this line of thought, a central measure of freedom is the ability to be master over one's own body, to define oneself, and to act autonomously.²⁹

Rights discourse flows from individualism, evincing an adversarial, individualistic perception of social interaction. Individuals are portrayed as "separate owners of their respective bundles of rights."³⁰ One goal of liberalism, then, is to grant people equal access to the same rights, to use as they see fit. "This notion of ownership delimits the boundaries of state authority from that of individual autonomy, the self from other."³¹ Although rights theorists disagree as to which values should be protected, they largely share a commitment to preserving private zones for autonomous choices, free from state intervention.³²

liberal theorists are incompatible with "non-atomistic" visions of society. Many feminist theorists have recognized this fact as they have, at times, unwittingly or unwittingly, drawn from non-atomistic liberal scholars in developing their own theories, asserting some notion of "responsibility," "care," or "connectiveness." Therefore, the connection between non-atomistic liberals and feminists (who are frequently liberal feminists) is developed, and not, as McClain contends, "unexplored common ground." *Id.* at 1175. Indeed, I am guilty of drawing from some liberal scholars in developing this Article, itself a critique of "crude" liberalism. However, McClain divides scholars into "liberals and feminists," *id.* at 1263, without any recognition that many liberals are feminists and many feminists are liberals (whether they choose to characterize themselves as such or not), and that radical feminists at times draw from untraditional liberals or liberal feminists (whether they admit it or not), and so on.

²⁸ See Charles Taylor, Atomism, in Powers, Possessions and Freedom: Essays in Honour of C.B. Macpherson 39-40 (Alkis Koutos ed., 1979); see also Morton J. Horwitz, Rights, 23 Harv. C.R.-C.L. L. Rev. 393, 399-400 (1988).

²⁹ In order to prevent social chaos, the individual agrees to give the state limited power to curtail freedom of action through laws. Isaiah Berlin, Two Concepts of Liberty, in Liberalism and Its Critics 15, 17 (Michael Sandel ed., 1987).

³⁰ Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387, 393 (1984).

³¹ Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. Rev. 589, 595 (1986) (summarizing Critical Legal Studies' critique of rights).

³² Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617, 628 (1990). Lawrence Friedman, for example, celebrates the right to autonomy and freedom through which "each person has the right to free development or the unfolding . . . of personality." Lawrence M. Friedman, The Republic of Choice: Law.

In this manner, rights-talk creates dichotomies, "such as individual and community or self and other, that divide the world into two morally exclusive spheres."³³ The world is further carved into the polarities of reason and desire, universal and particular, fact and value, is and ought.³⁴ In observing these dichotomies, at all times the state must act "neutrally," not favoring one group of rights holders over another,³⁵ and thus avoiding any appearance of corruption.

Reproductive freedom has been forced into the rubric of rights variously as the rights to "privacy,"³⁶ "bodily integrity,"³⁷ "autonomy,"³⁸ "intimate association,"³⁹ "full personhood,"⁴⁰ and "the interest in making certain kinds of important decisions."⁴¹ Because numerous

Authority and Culture 35 (1990) (quoting the basic law of the former German Federal Republic).

³³ Schneider, *supra* note 31, at 594.

³⁴ See generally Roberto Unger, *Knowledge and Politics* (1975); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151 (1985).

³⁵ Cf. Peller, *supra* note 34, at 1202-03. For a classic defense of the claim that law should be color-blind and sex-blind, see Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 24. Contra Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 Harv. L. Rev. 1, 21 (1976).

³⁶ *Roe v. Wade*, 410 U.S. 113 (1973) (first applying privacy to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (first articulating right to privacy). For an exhaustive discussion of how "privacy" may be framed, see Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980).

³⁷ See Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599, 614-17 (1986).

³⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (discussing contraception). See Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 Notre Dame L. Rev. 445, 446 (1983); Tom Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 236 (1977).

³⁹ See generally Kenneth Kurst, *The Frenkdom of Intimate Association*, 89 Yale L.J. 624 (1980).

⁴⁰ See Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 Phil. & Pub. Aff. 26, 39-44 (1976).

⁴¹ Whalen v. Roe, 429 U.S. 589, 599 (1977) (examining decisional autonomy in the context of privacy); see also Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decisions*, 64 Cal. L. Rev. 1447 (1976); Note, *Rethinking [M]otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 Harv. L. Rev. 1325, 1339-41 (1990). Reproductive freedom also has been framed as an issue of gender equality, see e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); as a matter of involuntary servitude, see Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480

commentators have debated the limitations of rights-talk elsewhere, I need only briefly summarize them here before I (again briefly) consider feminist legal scholars' responses.

A. The Limits of Rights Discourse

The concept of "rights," standing alone, holds only limited promise. First, rights create only an illusion of justice; merely "having a right" means very little in practice. The "choice" to effect rights is dependent on other factors, such as freedom from classism, racism, sexism, and heterosexism. Rights alone do little to ensure these freedoms, and, as reproductive freedom cases illustrate, it is all too easy to place conditions on rights. The right to reproductive freedom purportedly created by *Roe* was never truly granted to all women, since only women with the financial and social means could fully exercise that right. As Chief Justice Rehnquist noted in *Rust v. Sullivan*, whether reproductive freedom is conditioned on mere indigency is none of the state's business⁴²—at least, not under traditional rights discourse. The federal judiciary has continually accepted such a notion of negative rights.⁴³ For low-income women, then, the right to reproductive freedom is meaningless.

Second, rights pretend to an impossible universality⁴⁴ and, in doing so, slight real life. Perhaps these abstract truths were never intended to reflect the lived realities of any particular person. Yet, because rights are often reflective of reality neither in design nor in operation, they are especially incompetent at addressing the lives of outsiders—those who did not make the rules to begin with. By speaking in the imaginary language of rights-talk, we thus ignore lived realities. For example, we are forced to speak about "privacy" when a split between the public and the private rarely exists⁴⁵ and when what women want is frequently government intervention to improve their "private" lives; to expound "bodily integrity"

(1990); and as a matter of separation of church and state required by constitutional prohibitions against the establishment of religion. See Karen F.B. Gray, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 Ga. L. Rev. 399 (1990).

⁴² *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

⁴³ See, e.g., Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1464-71 (1991).

⁴⁴ For discussions on limitations inherent in "universalizing" approaches, see generally Martha Minow, *Beyond Universality*, 1989 U. Chi. Legal F. 115.

⁴⁵ See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1352 (1982).

when society continually places restrictions on women's bodies and when a woman's real concern may be her family, not her solitary body; to postulate "intimate association" when there wasn't anything "intimate" about the woman becoming pregnant in the first place; and to champion "decisional autonomy" when the woman doesn't have the economic means to make her decision count. Reified rights have little to do with our lives.

Even if rights are reframed to address women's lived realities, the "reframers" are inevitably insider women—the economically and educationally privileged, and usually the white and heterosexual women. No matter how genuine their concerns are, insider women alone cannot properly represent the concerns of outsiders.⁴⁶ This difficulty is illustrated by the feminist legal scholarship that reduces the concerns of outsiders to a footnote, an aberration, a difficult case.⁴⁷ Certainly, this criticism can be levied against all scholarship, not just rights scholarship. But the problem of exclusion may be particularly acute in rights scholarship, where part of the assignment is to create and give content to universal, purportedly neutral principles.⁴⁸

This brings us to the third difficulty with rights. Although they claim objectivity, rights advance the agenda of their creators, albeit under the guise of "perspective-lessness."⁴⁹ The holders of rights are duped into

⁴⁶ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. Chi. Legal F. 13, 67 (1989) ("Not only are women of color in fact overlooked, but their exclusion is reinforced when white women speak for and as women.")

⁴⁷ Angela Harris describes this reduction of the concerns of outsiders the "nuance theory":

By being sensitive to the notion that different women have different experiences, generalizations can be offered about "all women" while qualifying statements, often in footnotes, supplement[] the general account with the subtle nuances of experience that "different" women add to the mix. Nuance theory thus assumes the commonality of all women—differences are a matter of "context" or "magnitude"; that is, nuance.

Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 595 (1990).

⁴⁸ See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 Berkeley Women's L.J. 191, 205 (1989-90) ("[C]urrent feminist legal theory is deficient and impoverished because it has not paid sufficient attention to the real life experiences of women who do not speak the 'dominant discourse.'") See generally Denise Riley, *Am I That Name? Feminism and the Category of "Women" in History* (1988); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 Harv. Women's L.J. 115 (1989).

⁴⁹ This term is Kimberlé Crenshaw's, *Kimberlé Crenshaw, Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L.J. 1, 2-6 (1989). For discussions of the power of exploring ideological messages underlying legal doctrines,

thinking that the law is treating them in a neutral manner which is, by definition of traditional liberalism, "fair."⁵⁰ Actually, however, they are being handled in a manner calculated to suppress, limit, or at least guide their range of possibilities. There is a deliberate content to rights that serves the existing social structure, complete with power imbalances and economic inequities. As Mark Tushnet has observed, "the set of rights recognized in any particular society is coextensive with that society. The conditions of the society define exactly what kind of rights-talk makes sense, and the sort of rights-talk that makes sense in turn defines what the society is."⁵¹ For example, the concept of "choice" itself is gendered, and thus "the rhetoric of choice diverts attention from the constraints within which an individual's choice occurs onto the act of choice itself."⁵² Therefore, any strategies dependent upon the rhetoric of "choice" are inherently limited.

Fourth, as rights are inherently subjective, they cannot be applied without recourse to some higher sense of "fairness." One person's rights are inevitably balanced against another's. The right of a battered woman to be free from abuse might be weighed against the right of the battering husband to privacy in "his" home or his right to see "his" children.⁵³ In the context of reproductive freedom, the right of the woman to "bodily

see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Peller, *supra* note 34, at 1189-90; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984).

⁵⁰ For a recent discussion arguing on behalf of "government neutrality on matters affecting reproductive choices," see Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making Rights Real*, 402, 418-21 (1992) ("[G]overnment evenhandedness is the hallmark of this component of reproductive liberty."). I question the extent to which purported "evenhandedness" actually is evenhanded. In fact, as Pine and Law admit, "the Court has rejected equality-based challenges to laws restricting women's access to government benefits for abortion, pregnancy or abortion information, and specifically, has sanctioned government bias against the exercise of the right to abortion . . ." *Id.* at 421 (citations omitted).

⁵¹ Tushnet, *supra* note 26, at 1370.

⁵² Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. Rev. 1559, 1564 (1991). Curiously, although Williams seeks to challenge the rhetoric of choice and the norm of selflessness in the context of the work/family conflict, she does not do so in the abortion context. Instead, she would merely "adjust" choice rhetoric to focus on children's entitlement to nurturing, thus buying into the "rhetoric of domesticity" of women yearning to be good mothers." *Id.* at 1594. This "rhetoric of domesticity" fits neither all women nor all contexts that frame women's lives.

⁵³ Carol Smart, *Feminism and the Power of Law* 145 (1989).

integrity," "autonomy," or "privacy" may be weighed against the "right to life" of the fetus,⁵⁴ the right of the biological father to "his" children,⁵⁵ or even the right of some other third party to assert the interests of the fetus.⁵⁶ We may at times agree which rights trump, but rights discourse itself provides little guidance.⁵⁷

A related problem with rights discourse lies in its treatment of those who could assert conflicting rights. These parties are seen as adversaries, even when their interests may in fact be intertwined. By setting up a false, adversarial dichotomy, rights theory threatens to obscure reality and oversimplify complex power relations. As Carol Smart has observed:

[T]he acquisition of rights in a given area may create the impression that a power difference has been "resolved." Yet the exercise of power in, for example, the private sphere, may have little to do with legal rights. That women have the right to apply to the courts for injunctions to remove a man who is violent from the family home has not stopped the problem of domestic violence. This is not because women are ignorant of the law (although they may be), nor is it because the law is defective (although it undoubtedly is), rather it is because the legal right can treat the man and woman involved only as adversaries.⁵⁸

The woman may stay in her battering relationship because she is economically dependent on her husband and because she has nowhere else to go. Legal "rights" do not solve her problems. On the contrary, they create an

⁵⁴ Fetal rights theorists contend that once a woman "has chosen to lend her body to bring a child into the world," she may not take actions that could harm the fetus. See, e.g., John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 Va. L. Rev. 405, 456 (1983) (admitting that women should have a choice in the first trimester of pregnancy only). Others have advocated a balancing approach in which the woman's rights are weighed against those of the fetus. See, e.g., Deborah Madhoun, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 Harv. J.L. & Pub. Pol'y 19, 45-54 (1985); Note, *Parental Liability for Prenatal Injury*, 14 Colum. J.L. & Soc. Probs. 47, 77-80 (1978).

⁵⁵ See, e.g., *Doe v. Roe*, 551 N.Y.S.2d 75 (N.Y. App. 1990) (finding balance in favor of mother); *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), cert. denied, 492 U.S. 919 (1989) (finding balance in favor of mother); *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), aff'd, 526 N.E.2d 958 (Ind. 1988), cert. denied, 488 U.S. 955 (1988) (finding balance in favor of mother); *Lewis v. Lewis*, No. 111440 (Mich. Ct. App. filed Sept. 15, 1988), cert. denied, 488 U.S. 967 (1988) (finding balance in favor of mother).

⁵⁶ See, e.g., *In re Fry*, No. 80-135 (Cass City, Mich. P. Ct. filed Aug. 31, 1990); *In re Klein*, 145 A.D.2d 145 (N.Y. App. 1989).

⁵⁷ Karl Klase, *Rights as Praxis*, 40 *Telos* 123, 132 n.28 (1979); see also Adelaide Villamore, *The Left's Problems with Rights*, 9 *Legal Stud. F.* 39 (1985).

⁵⁸ Smart, *supra* note 53, at 144.

alluring illusion of a solution where none exists.⁵⁹

Similarly, the adversarial relationship posited by rights discourse does not adequately describe the pregnant, drug-addicted woman's relationship to her fetus. The health of both woman and fetus are intricately related and usually not in opposition.⁶⁰ That a woman continues to use drugs during pregnancy does not demonstrate a lack of concern for the fetus, but more likely the lack of social programs to address her needs.⁶¹ Reproductive freedom advocates must bring home this crucial point to the public. Yet the rights model, far from facilitating communication, only perpetuates the myth that woman and fetus are antagonists with competing rights.⁶²

In sum, rights discourse does little to address complex power arrangements that underlie our social context. On the contrary, rights, at least as presently envisioned, only divert attention from our lived realities and obscure the basis on which we are silenced and ignored. In the reproductive freedom context, rights, at most, are a second-best solution.⁶³ Granted, rights serve a purpose at times in guarding against majority tyranny, and this purpose is particularly important for those who find themselves outside the majority. Yet rights suffer several limitations, and we cannot take solace in rights alone.

B. Feminist Responses⁶⁴

In their responses to the limitations of rights discourse, feminist legal scholars have had great difficulty shaking the focus on the solitary self. The dominant strain in feminist theory has followed traditional liberalism and consistently championed women's rights as individuals. In determining how best to advance women's rights, debate has centered on whether

⁵⁹ See Olsen, *supra* note 30, at 391.

⁶⁰ See Martha Fineman, *Contexts and Comparisons*, 55 U. Chi. L. Rev. 1431, 1444 (1988); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale J.L. & Feminism 7 (1989); Note, *supra* note 41, at 1326.

⁶¹ Born Hooked: *Confronting the Impact of Perinatal Substance Abuse: Hearing Before the Select Committee on Children, Youth and Families*, 101st Cong., 1st Sess. 2 (1989) (opening statement of Congressman George Miller, Chairman Select Committee on Children, Youth and Families).

⁶² Joan Williams finds a way to work within the rhetoric of choice, by emphasizing that women in fact consider the well-being of current and existing children. See Williams, *supra* note 52, at 1584-96.

⁶³ See Frances Olsen, *Unraveling Compromise*, 103 Harv. L. Rev. 105, 110-17 (1989).

⁶⁴ This summary is in no way intended to be comprehensive. I have tried not to misrepresent the theories; they are all complex and merit more thorough analysis and criticism.

feminists should emphasize women's similarities to or differences from men. Those who stress similarities contend that women need only be granted equal access to the same rights as men.⁶⁵ Underlying much of this theory is the belief that "people are fundamentally alike, and that it is only through the historical accidents of social history, oppression, and privilege" that differences are produced, and that those differences are irrelevant to how the person should be treated by the law.⁶⁶ As Nancy Ehrenreich explains, this view is troubling:

One of the problems with this traditional American view of equality is that it fails to recognize the extent to which what a person *is* is a product of his or her various group memberships. Thus, the argument that those memberships are irrelevant, while at one level an appealing articulation of the concept of tolerance for diversity, at another level strips people of their very identity. . . . This conception of equality also prevents members of devalued groups from ever eliminating negative stereotypes, because their conduct is always seen as that of individuals and therefore as not undermining the validity of the group identification itself.⁶⁷

On the other hand, those feminists who recognize women's differences from men assert that women will not be equal unless their own particular needs are fulfilled.⁶⁸ To the extent that the "differences" approach departs from rights discourse and advances a broader vision of equality, it does so only with substantial difficulty. At the outset, it invites discrimination against women based on the differences it identifies. The "peculiarities" of the female have long been used to "imprison [woman] in her subjectivity, circumscribe her within the limits of her own nature."⁶⁹ There is no

⁶⁵ See, e.g., Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* (1988); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rev.* 175 (1982).

⁶⁶ Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177, 1232-33 n.202 (1990) (citations omitted).

⁶⁷ *Id.* (citations omitted).

⁶⁸ See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39, 41-42 (1985); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 70-95 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543 (1986). One claim of "difference" theorists—that women have an "ethic of care" and enhanced need for connectiveness—is discussed in greater detail herein, *infra* notes 132-48 and accompanying text.

⁶⁹ Simone de Beauvoir, *The Second Sex* xv (H.M. Parshley trans., 1953) (1953). Justice O'Connor recently voiced a similar concern, reminding a law school audience

reason to believe that this course of history will suddenly change. Indeed, the danger of a backlash under the difference approach is particularly great since "difference" theory accepts that women are in fact different from men without first examining whether the differences may be socially constructed. As a result, all differences appear to be grounded in biological inextinguishability, when in fact most are not.⁷⁰

Yet the greatest limitation of the difference approach is that, like rights discourse, it adopts universal notions that have little to do with most women's lives. Quite simply, we must first homogenize women to compare them to men. Additionally, to say "women are different from men" accepts that the male is the norm against which all should be measured,⁷¹ and in doing so "confound[s] feminine difference with the dominant masculinist gender stereotypes."⁷² In making this comparison, which is faulty to begin with, difference theorists suggest that all women differ from men in a similar manner—women are childbearers and caretakers; men are not.⁷³ Yet no universal Woman's experience exists, even within the scheme of caretaking and childbearing. To posit a "woman's difference" in this manner only renders invisible women who have traditionally been outsiders—that is, women of color,⁷⁴ low-income women,⁷⁵ and lesbians.⁷⁶

that the same "feminine" traits celebrated by difference feminists were earlier used by the courts in a long series of opinions restricting women's access to the public sphere. See Nat Hentoff, *Justice O'Connor and the Myth of the "True Woman"*, *Wash. Post*, Nov. 23, 1991, at 27.

⁷⁰ Janet L. Dolgin, *Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett*, 12 *Women's Rts. L. Rev.* 103, 112-13 (1990); see also Joan C. Williams, *Deconstructing Gender*, 87 *Mich. L. Rev.* 797, 800 n.11 (1989).

⁷¹ See Catharine A. MacKinnon, *Feminism Unmodified* 34 (1987).

⁷² Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 *Tex. L. Rev.* 109, 123 (1991). Schroeder terms this flaw in difference arguments the "Masculinist Definitions Misstep." She observes:

Different voice feminism bases its concept of gender differentiation on the universal human experience that women "assume primary responsibility for the physical care and psychological nurturance of young children." And yet this theory, developed by modern middle-class American white women, concludes that the *universal* ideal masculinity which results from this *universal* experience just happens to be the very modern, very American, very middle-class, and very white idea of the autonomous individual as imagined by classical liberal political theory.

Id. (citations omitted).

⁷³ See Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1, 13 (1988) ("[T]o cultural feminists, the important difference between men and women is that women raise children and men don't."); see also Jane Flax, *Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics*, in *Discovering Reality* 245, 245 (Sandra Harding & Merrill B. Himelka eds., 1983).

⁷⁴ See Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context*

Alternatives to rights discourse that accept the notion of a unitary woman only perpetuate the myth of formal equality. This fallacy, adopted in traditional equal protection jurisprudence, is one that feminist thinkers have long striven to avoid. By standardizing people into neat boxes,⁷⁶ equal protection jurisprudence has posed unique problems for women who do not fit into them. For example, under the various civil rights acts, women of color may argue that they have been discriminated against on the basis of sex, race, or sex plus race, but not as women of color as such.⁷⁸ Catharine MacKinnon recently summarized the dilemma as follows:

First the doctrine had apoplexy trying to decide if their inequality was sex or race. When it faced the fact that it is both at once, women of color were sometimes regarded as different twice over: from the male standard of race and the white standard of sex. This reveals a racism in the law of sex and a sexism in the law of race. White women meet the white male standard as white, if not male, and men of color meet the white male standard as

of a Black Feminist Ideology, 14 Signs 42, 43-46 (1988). Similarly, by analogizing racism with sexism, political movements have rendered women of color invisible as well. See bell hooks, *Feminist Theory: From Margin to Center* (1984); Gloria Joseph & Jill Lewis, *Common Differences: Conflicts in Black and White Feminist Perspectives* (1981); Margaret A. Simons, *Racism and Feminism: A Schism in the Sisterhood*, 5 *Feminist Stud.* 384 (1979); Althea Smith & Abigail Stewart, *Approaches to Studying Racism and Sexism in Black Women's Lives*, 39 *J. Soc. Issues* 1 (1983).

⁷⁶ By ignoring the intersection of classism with all other "isms," political movements have also rendered class interests invisible. See Ellen Willis, *Radical Feminism and Feminist Radicalism, in The 60's Without Apology* 110-11 (Sonya Sayres et al. eds., 1984). See generally Zillah R. Eisenstein, *Capitalist Patriarchy and the Case for Socialist Feminism* (1979).

⁷⁷ Lesbians have been largely ignored in most of the anti-essentialist discourse. For example, in reviewing the sameness/difference debate, Joan Williams uncritically observed that "the key thrust of anti-essentialism is to remind feminists of the existence of race" because of "[t]he importance of race in American life." Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 *Duke L.J.* 296, 316. Absent is any mention of the importance of heterosexism (or classism, or able-ism, or anything else) in the existence of American life. For discussions of the exclusion of lesbians from feminist thought, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); Cain, *supra* note 48, at 212-13; Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Assumption*, 12 *Women's Rts. L. Rep.* 39, 40-46 (1990); Ruthann Robson, *Lesbian Jurisprudence?*, 8 *Law & Ineq. J.* 443 (1990).

⁷⁸ Patricia Williams similarly speaks in terms of boxes. See Patricia Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* 130 (1991).

⁷⁹ See, e.g., *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 143 (E.D. Mo., 1976), *aff'd in part and rev'd in part*, 558 F.2d 480 (8th Cir. 1977); *Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979). *Contra Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983).

male, if not white. Although a good many women of color can meet any substantive standard around, women of color as such meet neither.⁷⁹

The relationships between different types of discrimination cannot be reduced to an additive analysis. Women of color experience discrimination uniquely as women of color, not somehow as the sum of their parts.⁸⁰ For example, "[p]ortraying African-American women as stereotypical mammites, matriarchs, welfare recipients, and hot mamas has been essential to Black women's oppression."⁸¹ White women do not face similar stereotypes. Nor do white women contend with the legacy of slavery,⁸² nor an economic exploitation that compounds sexism and classism with racism.⁸³ Further, as bell hooks pointedly observes, white women "do not walk out of [women's studies] classes into a void where they are still invisible, their history unknown, their reality denied."⁸⁴

⁷⁹ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1291 (1991) (citation omitted).

⁸⁰ Elizabeth Spelman refers to the need to reject an additive analysis in her essay, *Elizabeth V. Spelman, Theories of Race & Gender: The Erasure of Black Women*, 5 *Quest: A Feminist Quarterly* 36 (1982). She later expanded this analysis in Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 114 (1988) [hereinafter *Spelman, Inessential Woman*]. See also Harris, *supra* note 47, at 608-12; Barbara Smith, *Notes for Yet Another Paper on Black Feminism, or Will the Real Enemy Please Stand Up?* 5 *Conditions* 123, 123 (1979).

⁸¹ Patricia Hill Collins, *Black Feminist Thought* 67 (1990). Collins also observes that "[t]he status of African-American women as outsiders or strangers becomes the point from which other groups define their normality." *Id.* at 68.

⁸² See Barbara Omolade, *Black Women, Black Men, and Tawana Brawley—The Shared Condition*, 12 *Harv. Women's L.J.* 11, 12-14 (1989) (attributing the silencing of African-American women about sexual abuse to sexual exploitation under slavery). See generally *Black Women in White America: A Documentary History* (Gerda Lerner ed., 1973) (history of oppression of African-American women); Linda Brent, *Incidents in the Life of a Slave Girl* (L. Marie Child ed., 1972) (personal account of slavery as experienced by an African-American woman); Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (1984) (history of African-American women, including an account of the effect of slavery). Other women of color face their own history of oppression wrought by colonization, a history not shared with white women.

⁸³ See Diane K. Lewis, *A Response to Inequality: Black Women, Racism, and Sexism, in Black Women in America* 41 (Micheline R. Malson et al. eds., 1988) (comparing status of African-American women and white women by various indicators); *Shipping Through the Cracks: The Status of Black Women* (Margaret C. Simms & Julianne Malveaux eds., 1986); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place: Asserting Our Rights*, 24 *Harv. C.R.-C.L.L. Rev.* 9, 27-30 (1989) (illustrating how African-American women pressed into jobs most similar to the duties they performed as slaves); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 *Yale L.J.* 1457, 1461-63 (1989) (presenting history of pushing African-American women into the most difficult and dirtiest jobs).

⁸⁴ bell hooks, *Talking Back: Thinking Feminist, Thinking Black* 149 (1989); see

Nevertheless, just as no single "woman's experience" can be identified, no single "African-American woman's standpoint" can be located that will express all dimensions of all African-American women's experiences.⁸⁵ Yet speaking in terms of any generalized group, such as "African-American women" or "women" or "lesbians," permits self-identification and fosters a collective identity that enhances dialogue for at least some members of the group.⁸⁶ For women who have been particularly silenced, such an opportunity for self-identification and collective identity can be particularly powerful.⁸⁷

As Elizabeth Spelman observes, this conflict is "the paradox at the heart of feminism. Any attempt to talk about all women in terms of something we have in common undermines attempts to talk about the differences among us, and vice versa."⁸⁸ All identifiable groups may face this paradox.⁸⁹ The degree to which differences undermine a group's attempts to talk about commonalities, however, depends upon the extent to which voices within the group have been silenced in the past. The paradox is particularly acute for women today because many white women, wittingly or unwittingly, have continually claimed to speak for all women, perpetua-

also Maxine Baca Zinn et al., *The Cost of Exclusionary Practices in Women's Studies, in Making Face, Making Soul (Haciendo Caras): Creative and Critical Perspectives by Women of Color* 29 (Gloria Anzaldúa ed., 1990).

⁸⁵ Harris, supra note 47, at 608-09. African-American scholars are not immune from the trap of essentialism. See, e.g., Collins, supra note 81, at 30-33 (arguing for "rearticulating a Black women's standpoint"); Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* 90-93 (1989) (examining use of essentialism in writings of African-American literary critics); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1782-83 (1989) (positing that Mari Matsuda and others engage in essentialism).

⁸⁶ Collins, supra note 81, at 31-32; see also Combahee River Collective, *A Black Feminist Statement, in This Bridge Called My Back: Writings by Radical Women of Color* 13, 21 (Cherríe Moraga & Gloria Anzaldúa eds., 1981) (discussing the political realization that comes from the seemingly personal experiences of African-American women's lives).

⁸⁷ See Pamela J. Sraith, *We Are Not Sisters: African American Women and the Freedom to Associate and Disassociate*, 66 Tul. L. Rev. 1467, 1492 (1992) ("[I]f African-American women do not gather together to discuss and address their own problems, excluded from the watching eye of society at large, they will remain chained by the conspiracy of silence."); see also Combahee River Collective, supra note 86, at 21.

⁸⁸ Spelman, *Inessential Woman*, supra note 80, at 3.

⁸⁹ For an exploration of difference dividing "the black community," see Regina Austin, *"The Black Community": Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992). Austin notes that "[t]hrough the ubiquitous experience of racism provides the basis for group solidarity, differences of gender, class, geography, and political affiliations keep blacks apart." *Id.* at 1817.

ting "white solipsism" and effectively silencing women of color.⁹⁰ The question then, as Elizabeth Spelman and Martha Minow have observed, is, "Who will define the agenda for the women's movement?"

Some white and middle-class women may feel that a focus on the myriad of contexts of women's lives in America dislodges their agenda for women's rights and disables their ability to organize a movement. But if the movement depends upon submerging some women's interests to the interests of those with more access to the leadership ranks, then the problem is not the focus on context but the conflict between privilege and democracy.⁹¹

Some commentators have attempted to avoid this dilemma by focusing, not on difference, but on "the difference difference makes."⁹² This approach, exemplified in MacKinnon's writing, has been termed the "dominance" approach. Like the difference approach, the dominance approach recognizes that women are in fact different from men. Rather than claiming that women share the same unique needs, however, it emphasizes that women need to be freed from the practices that subordinate them.⁹³ In addition, this approach recognizes that abstract rights historically are biased because they have been created and are enforced by men. The goal then is to move away from a rights analysis, toward a framework attacking women's subordination more directly.

But try as it may, the dominance approach, particularly as articulated by MacKinnon, also tends to universalize women, and does little to resolve the conflict between lack of privilege and participation. Granted, MacKinnon does at times explicitly or implicitly recognize the particular flavor of oppression faced by women of color.⁹⁴ Although the concept of

⁹⁰ See Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, and Gynephobia*, in *On Lies, Secrets, and Silence* 275, 299 (1979) (defining white solipsism as the tendency to "think, imagine, and speak as if whiteness described the world").

⁹¹ Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1634 (1990).

⁹² Rhode, supra note 32, at 625 (citing Deborah Rhode, *Justice and Gender* 81-111 (1989)).

⁹³ See Catharine A. MacKinnon, *Toward a Feminist Theory of State* (1989); MacKinnon, supra note 71; see also bell hooks, *Am I a Woman?: Black Women and Feminism* 194 (1981) ("To me feminism is not simply a struggle to end male chauvinism or a movement to ensure that women will have equal rights with men; it is a commitment to eradicating the ideology of domination that permeates Western culture on various levels.").

While MacKinnon calls such an approach a "dominance" approach, see MacKinnon, supra note 71, at 213-34, other feminist scholars have termed their similar approaches the "anti-subjugation" approach. See, e.g., Ruth Collier, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986).

⁹⁴ See, e.g., Andrea Dworkin & Catharine A. MacKinnon, *Pornography and Civil*

experiences. Although the dominance model avoids many of the pitfalls of rights discourse, it too falls short. Our goal, as Deborah Rhode has observed, should be to discover "understandings that can resonate with women's shared experience without losing touch with our diversity."¹⁰⁰ The problem lies in finding a way to unleash diverse voices without focusing solely on the individual. It is to this task that I now turn.

THE FUTURE: COMMUNITY AND VOICE—TOWARD A STRONGER VISION FOR REPRODUCTIVE FREEDOM

Any alternative approach to reproductive freedom, however framed, must both address the difficulties inherent in rights and equality theories and draw from their strengths. Accordingly, a checklist for the ideal alternative would include the following goals:

- a) recognizing that women as a "class" are harmed by denial of reproductive freedom, but are harmed in different ways, since no unitary "Woman" exists;
- b) promoting the hearing of different voices within the group of women, while fostering "communication across those differences";¹⁰¹
- c) recognizing the conflict between privilege and participation and enhancing the hearing of diverse voices within all communities, while safeguarding against the tyranny of the majority within those communities;
- d) addressing access problems by including an affirmative element, yet maintaining negative protection against government actions; and
- e) in doing all of the above, drawing attention to the real impact of reproductive freedom on women's lives.

An alternative that works toward these goals considers one's dynamic relationship with communities, rather than the existence of an atomistic individual, as the locus of values and needs in society. While the individual cannot be forgotten, a new approach to reproductive freedom would acknowledge the centrality of communities, and thus would more accurately

¹⁰⁰ Rhode, *supra* note 32, at 626.

¹⁰¹ This phrase is Iris Marion Young's. Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *Feminist and Political Theory* 117, 125 (Cass R. Sunstein ed., 1990).

experience "as a woman"⁹⁶ is not in and of itself essentialist, it threatens to obscure the very different historical and political contexts in which such experiences arise. Indeed, when MacKinnon claims that we can never discover women's real voices until they are free from male dominance, she is criticized for continually speaking of women in unitary terms of "woman's 'distinctive contribution,' of standards that are 'not ours,' of empowering women 'on our own terms,' and of what we 'really want.' These references all suggest a reality beyond social construct that women will discover once freed from the bonds of oppression."⁹⁶

Furthermore, MacKinnon apparently demands that women's "real voices" be in agreement with her; discordant voices are ignorant or traitorous.⁹⁷ As Angela Harris has observed, "MacKinnon is quick to insist that there is only one 'true,' 'unmodified' feminism: that which analyzes women *as women*, not as subsets of some other group and not as gender-neutral beings."⁹⁸ MacKinnon rejects the notion that many types of feminism exist, searching instead for the only true feminism, one which comes from consciousness raising—"a feminism unqualified by preexisting modifiers."⁹⁹ In its search for a True Feminist Theory, the dominance approach, like the difference approach, standardizes women and neglects the conflict between lack of privilege and participation.

This brief summary of feminist responses to rights discourse serves to highlight the main problem with alternative approaches—acceptance of universal truths and, in particular, the homogenization of women's

Rights: A New Day for Women's Equality 11 (1988) ("It is especially important to understand that *Black* includes Black women and that *women* includes Black women."); see also e. christi cunningham, *Unmaddening: A Response to Angela Harris*, 4 Yale J.L. & Feminism 155, 160-63 (1991) (pointing to MacKinnon's discussion about "how the way the boat feels to us may depend on whether we are Black or Native American or white or Asian or Latina").

⁹⁶ See Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 Yale J.L. & Feminism 13, 21 (1991).

⁹⁷ Katharine T. Bartlett, *MacKinnon's Feminism: Power, on Whose Terms?*, 75 Cal. L. Rev. 1559, 1566 (1987) (book review) (citations omitted).

⁹⁸ For example, MacKinnon has called women who disagree with her about the proper approach to pornography "elitist[]" and non-feminists, full of "thundering ignorance about the way women are treated." See MacKinnon, *supra* note 71, at 205.

⁹⁹ Harris, *supra* note 47, at 59 (citing MacKinnon, *supra* note 71, at 32, 45). But see cunningham, *supra* note 94, at 159 (disagreeing with Harris and defending MacKinnon).

¹⁰⁰ See MacKinnon, *supra* note 71, at 15-16. MacKinnon's assertion is contrary to the recognition, now standard in most women's studies classes, that many types of feminism exist. See, e.g., Zillah R. Eisenstein, *The Radical Future of Liberal Feminism* (1981) (exploring feminist theories and positing a liberal feminism inherently radical and not purely liberal); Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (1989) (identifying several branches of feminist thought).

reflect both the development and ordering of values and needs in our society—acknowledging our “agendas,” as well as the actual construction of personal identity. Such a focus on relationship with communities would amplify the voices of the disempowered and encourage communities to listen to their constituents who reside—in Mari Matsuda’s terms—“at the bottom.”¹⁰² Concurrently, such a focus would also demand that communities listen to other communities that have been relegated to a position “at the bottom.”

This focus on relationship with communities acknowledges and respects difference head on, while simultaneously providing space for collective action, thus lending power and substance to what Regina Austin and others have termed a “politics of identification”:

a politics . . . which works with and through difference, which is able to build those forms of solidarity and identification which make common struggle and resistance possible but without suppressing the real heterogeneity of interests and identities, and which can effectively draw the political boundary lines without which political contestation is impossible, without fixing those boundaries for eternity.¹⁰³

The construction of identity is an act of will, not a passive endeavor.¹⁰⁴ As explained more fully below, this approach empowers individuals to construct their identities through free and full interaction with communities of their choosing;¹⁰⁵ enables communities to begin to address all constitu-

¹⁰² Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987) (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

¹⁰³ Austin, *supra* note 89, at 1775 (quoting Stuart Hall, *New Ethnicities*, in *Black Film*, British Cinema 27-28 (Lisa Appignanesi ed., 1988)).

¹⁰⁴ See, e.g., Harris, *supra* note 47, at 612-13 (“recognizing that wholeness of the self and commonality with others are acts of will and creativity, rather than of passive discovery”).

¹⁰⁵ See Smith, *supra* note 87, at 1490-95 (presenting the benefits of free and full association for African-American women). Note that because our jurisprudence is dominated by “rights-talk,” a conflict is posed between the “right” of individuals and groups to associate and the “right” of other individuals and groups to disassociate. While this dilemma can be resolved within the framework of rights analysis, see *id.* at 1496-1514; see also William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 102-05 (1986), it largely dissolves under either an anti-subjugation approach, which asks which solution most empowers a subjugated group, or the community/voice approach advanced here, which seeks to expand the dynamic process of community and voice by encouraging speech from individuals and communities who reside “at the bottom.” Under both the anti-subjugation approach and the community/voice approach, political or cultural groups that limit participation to

ents’ concerns and to fashion elements of justice which will adequately reflect their needs; and thus provides hope for turning “dysfunctioning communities”—communities in which the individual relationship with community is blocked—into functioning communities.¹⁰⁶

This alternative is grounded in two theories: communitarian thought and the concept of “voice” developed by Critical Race Theorists. “[C]ommunitarian philosophy as a whole [has always been] a perilous ally for feminist theory. . . . [Many] communities have harbored social roles and structures which have been highly oppressive for women”¹⁰⁷ In recognition of this peril, I modify what could be termed “crude” communitarian thinking¹⁰⁸ in two crucial respects. First, I assert that the central

African-American women (or men, or other people of color, or lesbians, or gay men, or differently-abled people, etc.) would not only be permitted but, in fact, encouraged. At the same time, I suggest that neither the anti-subjugation nor the community/voice approach would alter the gains that have been made for women, people of color, and religious groups in obtaining entrance to all-white-male clubs. In contrast, application of rights analysis might not reach the same result. See Marie A. Failing, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt’s View of the Supreme Court’s Dilemma*, 49 U. Pitt. L. Rev. 143, 182-85 (1987) (discussing Hannah Arendt’s analysis of school desegregation cases). A detailed application of the community/voice approach is left to another day, yet I add this explanation now to address at least partially the concerns of my present law students, who fear that an emphasis on community would allow dominant communities to exclude them.

¹⁰⁶ The definition of functioning community is my own. See *infra* at notes 158-66 and accompanying text. It is by definition a “circular” proposition. As explained further herein, relationship with community is a synergistic process: communities and individuals develop through full interaction between and among each other. Such a concept does not lend itself to the question, “O.K., which comes first, community or individual development?” The answer, in the abstract at least, is, “I don’t know.”

¹⁰⁷ Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in *Feminism and Political Theory*, *supra* note 101, at 145.

¹⁰⁸ “Crude” communitarianism is an over-simplification of all that could be termed “communitarian.” As Jeanne Schroeder has recognized, “there are probably as many different concepts of community and theories of what would be communitarianism as there are philosophers and jurisprudes.” Schroeder, *supra* note 72, at 129 n.45. Indeed, many commentators conflate varied and at times conflicting schools of communitarian thought. In an effort to sort out this mess, Stephen Gardbaum identifies three distinct communitarian claims: (1) antiatomism—“that the picture of the free-individual is false”; (2) strong communitarianism—“that we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life”; and (3) metaethical communitarianism—“that ‘political discourse [proceeds] within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings.’” Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 Mich. L. Rev. 685, 691 (1992) (quoting Michael J. Sandel, *Introduction*, in *Liberalism and Its Critics* 5, 10 (Michael J. Sandel ed., 1984) [hereinafter *Sandel, Critics*]). For other recent overviews of communitarian thought in constitutional theory, see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1, 6 (1989) (dividing scholars into

focus should be on an individual's relationship with community, not on community alone, and thus do not advocate complete abandonment of counter-majoritarian protections. In particular, in light of the political and historical context in which we live, protections may be necessary to facilitate minority participation in communities.¹⁰⁹ Second, I incorporate the concept of "voice" into communitarian analysis, thus facilitating the inclusion of those "at the bottom" in the creation and definition of community.

In doing so, I attempt to harmonize certain communitarian claims with one interpretation of "relationalism"—the recognition that "even though we are defined as human only in relation to each other and are dependent on each other, it is a form of violence and violation if we force our own subjectivity on the other and do not listen to the other's call to recognize his moment of independent subjectivity."¹¹⁰ Jeanne Schroeder succinctly explains the difference between relationalism and "crude" communitarianism as follows:

Communitarianism . . . tends to see the community as an entity in and of itself, having existence and significance superior to the interactions of the individual members constituting the community. In crude individualism, the abstract individual is prior

"the new republicans" and "the interpretivists"; James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 *Ind. L. Rev.* 1, 18-21 (1990) (dividing communitarian thought into discussion of "big" and "small" communities).

A diverse array of significant communitarian-influenced (but not necessarily "communitarian") works include the following: Alasdair MacIntyre, *After Virtue* (2d ed. 1984); Michael J. Sandel, *Liberalism and the Limits of Justice* (1982) [hereinafter Sandel, *Liberalism*]; Mark Tushnet, *Red, White, and Blue—A Critical Analysis of Constitutional Law* (1988); Drucilla Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 *Cardozo L. Rev.* 989 (1987); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4 (1986); Cass R. Sunstein, *Interest Groups In American Public Law*, 38 *Stan. L. Rev.* 29 (1985). See generally Symposium, *The Republican Civic Tradition*, 97 *Yale L.J.* 1493 (1988) (including articles by Michelman and Sunstein and comments by several others); Symposium, *Law and Community*, 84 *Mich. L. Rev.* 1373 (1986).

¹⁰⁹ See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *Harv. C.R.-C.L. L. Rev.* 401, 403 (1987) [hereinafter Williams, *Alchemical Notes*] ("CLS has a good deal of powerful theory-magic of its own to offer; but I think it has failed to make its words and un-words tangible, reachable and applicable to those in this society who need its powerful assistance most."); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 *Law & Ineq. J.* 103, 128 (1987) [hereinafter Williams, *Taking Rights Aggressively*] (emphasizing responsibility of minority legal scholars to utilize Critical Legal Studies methodology to "transform the conditions oppressing our . . . peoples").

¹¹⁰ Schroeder, *supra* note 72, at 129.

to the community. In crude communitarianism, the abstract community is prior to the individual, who is defined by her status in the community. In relationalism, the individual and the community are seen to be indispensable to each other—the same yet different.¹¹¹

While relationalism, as defined above, is contrary to "crude" communitarianism, it is in line with the claims of two other branches of communitarian thought: (1) that the community is a causal factor in the constitution of personal identity ("antiatomism"); and (2) that values can rarely, if ever, be grounded in universal terms, but rather should be tied to the contexts and traditions of particular communities.¹¹² The goal of this vision of communities is not to divine a social consensus.¹¹³ On the contrary, this vision of community explicitly rejects universal truths, accepts difference within and between communities,¹¹⁴ and encourages community as a critical, dialogic enterprise.¹¹⁵ By doing so, it actively

¹¹¹ *Id.* at 129-30.

¹¹² I draw these two categories from those identified by Garberbaum as "antiatomism" and "metaethical communitarianism." See Garberbaum, *supra* note 108, at 692. My first claim fits well within Garberbaum's category of "antiatomism"; my second claim lies within his category of "metaethical communitarianism."

¹¹³ The notion that social consensus will emerge from reasoned deliberation by rationally thinking individuals is a main tenet of civic republicanism. Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 *Yale L.J.* 1609, 1610 (1988). Bell and Bansal are aptly skeptical of such a proposition, noting that "[f]or centuries in this country, however, blacks have served as the group whose experiences and private needs have been suppressed in order to promote the 'common good' of whites." *Id.* at 1610-11. See also Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *Yale L.J.* 1713, 1714 (1988) ("reject[ing] any quest for agreement upon a single common good, and locat[ing] social interaction and value formation principally in settings other than citizenship").

¹¹⁴ To the extent that I stress recognition of differences, I disagree vehemently with James Torke's declaration that "[a] difference community' is an oxymoron." Torke, *supra* note 108, at 33. While some communities do emphasize sameness rather than difference, differences exist within nearly all communities, and it is precisely these differences which must be recognized. I also disagree with Torke's assertion that "most of the very goods we seek in community" can be found only in an exclusive, intolerant community. *Id.* at 32. See Iris Marion Young, *The Ideal of Community and the Politics of Difference*, 12 *Soc. Theory & Prac.* 1, 22 (1986) (envisioning an "unoppressive city . . . defined as openness to unassimilated otherness").

¹¹⁵ For developed theories of a dialogic community (which are similar to yet very different from my own), see generally Drucilla Cornell, *The "Postmodern" Challenge to the Ideal of Community*, in *The Philosophy of the Limit* 39, 41 (1992) (drawing from Theodore W. Adorno & Jacques Derrida and "speculat[ing] on the dream of communicative freedom"); Richard Rorty, *Consequences of Pragmatism* (Essays: 1972-1980) 195 (1982) (emphasizing "the utility of narrative and vocabularies rather than the objectivity of laws and theories"); Cornell, *supra* note 108 (earlier article on the same theme as *The "Postmodern" Challenge to the Ideal of Community*). By

guards against the specter of "crude" communitarianism—"the hell of idealistic totalitarian bureaucratic oppression."¹⁶

To further guard against the "dark side" of community, I modify "crude" communitarianism further by adding the concept of "voice," a notion of synergistic interaction between individuals and communities—a concept explained in full below. Drawing particularly from the work of Critical Race Scholars,¹⁷ I emphasize the importance of voice for the

stressing differences, and thus elevating the cultural setting of dialogue to a place of considerable significance, my vision of community contrasts sharply with the notion of the dialogic community as an ideal speech situation. See Torke, *supra* note 108, at 20 (discussing various views of dialogic communities). As Torke notes, "[p]urified discourse requires a thoroughgoing conformity." *Id.* at 23. By encouraging discourse "polluted" by diversity of cultural context, I strive to avoid such conformity.

¹⁶ Ian R. Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 *Nw. U. L. Rev.* 900, 924 n.87 (1985) (noting that every "successful" idealistic revolution since 1789 has fallen prey to such oppression, and refusing to exempt Critical Legal Studies' vision of equality from that danger); see also Friedman, *supra* note 107, at 149 (noting that "[m]any communities are characterized by practices of exclusion and suppression of nongroup members" and that "the practices and traditions of numerous communities are exploitative and oppressive toward many of their own"); Torke, *supra* note 108, at 22-28 (detailing the "voices of community"); Young, *supra* note 114, at 12-13 (acknowledging that "striving for mutual identification and shared understanding among those who seek to foster a radical and progressive politics . . . can and has led to denying or suppressing differences within political groups or movements").

¹⁷ Scholars who have written articles employing the methodology of Critical Race Theory, or who have been identified as doing so by others, include the following: Williams, *supra* note 77; Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987); Regina Austin, *Sapphire Bound*, 1989 *Wis. L. Rev.* 539; Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 *Harv. L. Rev.* 1864 (1990); Paulene M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *Duke L.J.* 365; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 *Harv. L. Rev.* 1331 (1988); Harlon Dalton, *AIDS in Blackface*, *Duodalus*, Summer 1989, at 205; Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 *Va. L. Rev.* 95 (1990); Richard Delgado, *Storytelling for Oppositonists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1989); Harris, *supra* note 47; Alex M. Johnson, *The New Voice of Color*, 100 *Yale L.J.* 2007 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987); Mari J. Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *Yale L.J.* 1329 (1991); Matsuda, *supra* note 102; Judy Seales-Trent, *Commonalities: On Being Black and White, Different and Same*, 2 *Yale J.L. & Feminism* 305 (1990); Gerald Torres & Kathryn Milan, *Translating *Konowito* by Precedent and Evidence: The Mashpee Indian Case*, 1990 *Duke L.J.* 625; Williams, *Alchemical Notes*, *supra* note 109.

An emphasis on voice is also prevalent in feminist theory, what could be termed an emerging gay and lesbian theory, and other scholarship which is critical of universalism and which emphasizes the importance of context. See, e.g., Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* 206-10 (1989)

functioning of communities and develop the notion of voice as process. Thus, instead of substituting community values for "women's rights," and rather than blindly accepting the existing power structures operating within communities, I seek to use the individual's relationship with community to challenge constructs designed to pacify and exclude. In doing so, I hope to locate and support the empowerment of all women, including those silenced "at the bottom."

Yet the conflict between privilege and participation remains.¹⁸ The dialogic possibilities of the community have been grossly impaired, as existing power constructs and social conditions render many of those "at the bottom" hopeless and disabled, denied full participation. It is those "at the bottom" who face the greatest obstacles to entry to and existence in communities of their own choosing.¹⁹ Accordingly, I also seek to contribute to the discussion of voice by identifying certain "enabling/excluding" elements for unleashing voice and bringing about full participation.²⁰

(stressing importance of inquiry into context within philosophy); Kathryn Abrams, *Hearing the Call of Stories*, 79 *Cal. L. Rev.* 971 (1991) (examination and defense of feminist narrative scholarship); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 *Nova L. Rev.* 355 (1989) (drawing from personal experiences in examining law on reproduction); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997 (1985) (examining meaning of contract doctrine in context); Susan Estrich, *Rape*, 95 *Yale L.J.* 1087 (1986) (drawing from personal experience in her analysis); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. Miami L. Rev.* 511 (1992) (discussing the importance of storytelling in gay advocacy); Minow & Spelman, *supra* note 91 (exploring importance of "context" and responding to objections to its use); Gary Peller, *Race Consciousness*, 1990 *Duke L.J.* 758 (comparing integrationist with nationalist approaches and discussing importance of race consciousness); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1749 (1990) (discussing importance of women's stories in understanding and applying Title VII); Symposium, *Storytelling*, 87 *Mich. L. Rev.* 2073 (1989) (collection of articles emphasizing storytelling).

¹⁸ Minow & Spelman, *supra* note 91, at 1634 (identifying a "conflict between privilege and democracy").

¹⁹ Marilyn Friedman suggests that "chosen communities" are most valuable for helping us define ourselves.

It is likely that chosen communities, lesbian communities, for example, attract us in the first place because they appeal to features of ourselves which, though perhaps merely found or discovered, were inadequately or ambivalently sustained by our unchosen families, neighborhoods, schools, or churches. Thus, unchosen communities are sometimes communities which we can, and should, leave, searching elsewhere for the resources to help us discern who we really are.

Friedman, *supra* note 107, at 157.

²⁰ While these elements, which I term "enabling/excluding," seem akin to rights,