

On Postmodern Feminist Legal Theory

Maxine Eichner*

Postmodernism has, in the past two decades, swept through the academy. While there is no agreement regarding what, exactly, postmodernism means,¹ it is clear that many of the principles associated with it

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¹ Scholars, even those generally considered amenable to postmodernism, disagree over what the term means and whether it is even a helpful designation. In John McGowan's words:

Everyone begins the discussion of postmodernism by asking what the word could possibly mean One of the reasons that *postmodernism* has been so slippery a term is that we don't know whether it names the kind of theorizing now rampant in the academy, the kind of architecture now cluttering our downtowns, and the kind of novels being written by Salman Rushdie, Gabriel García Márquez, and Angela Carter, or whether it names the social and historical matrix within which and because of which these particular cultural phenomena flourish.

JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS*, at ix-x (1991); see also Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism,"* in *FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE* 35, 35 (Seyla Benhabib et al. eds., 1995) ("The question of postmodernism is surely a question, for is there, after all, something called postmodernism?").

In this Article, I use the term to designate the shift in theory from an approach that focuses on the search for reality to an approach that focuses on culturally constructed social meanings. See Seyla Benhabib, *Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard*, in *FEMINISM/POSTMODERNISM* 107, 125 (Linda Nicholson ed., 1990) (noting the "paradigm shift in contemporary philosophy from consciousness to language, from the denotative to the performative, from the proposition to the speech-act"); NANCY FRASER, *False Antitheses: A Response to Seyla Benhabib and Judith Butler*, in *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 207 (1997) [hereinafter *JUSTICE INTERRUPTUS*]. As Fraser notes, defining postmodernism in this way includes, but is not limited to, poststructuralism. Although the distinction between postmodernism and poststructuralism is unclear, and is often considered more a matter of emphasis than substance, see PAULINE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES* 3 (1992); Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 877 n.210 (1990), I here consider poststructuralism to be a theoretical critique of modern social theory and philosophy and the concomitant development of alternative models of thought, writing, and subjectivity. That critique includes an attack on modern conceptions of knowledge as grounded in some universal truth, on the conception of the self as unified and autonomous, and on the Marxist and radical doctrines that consciousness depends on

have profoundly changed the ways that scholars in many disciplines approach the study of their fields. In disciplines such as English and comparative literature, postmodernism has become something of a new orthodoxy.² Derridean deconstruction and Foucauldian analysis permeate literary criticism and generate disputes over the literary canon, authorial presence, and intentionality.³ Postmodernism has also made substantial inroads in other areas of the academy, including anthropology, art history, history, philosophy, political theory, sociology, and even the philosophy of science.⁴

the material world. Postmodernism includes these poststructuralist positions, but also applies more broadly, including, for example, movements in art and architecture, sociohistorical theories of postmodernity, and analyses of current culture. See Bartlett, *supra*; see generally STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 20–28 (1991).

² E.g., Frederick Crews, *The End of the Poststructuralist Era*, in *THE EMPEROR REDRESSED: CRITIQUING CRITICAL THEORY* 45, 46 (Dwight Eddins ed., 1995) [hereinafter *THE EMPEROR REDRESSED*] (describing the “poststructuralist camp” as having a “monopoly” on current literary theory); Dwight Eddins, *Introduction*, in *THE EMPEROR REDRESSED*, *supra*, at 1 (“In only two decades th[e] poststructuralist enterprise has proceeded—if I may suborn its own terminology—from the ‘marginalized’ to the ‘hegemonic.’ . . . [P]oststructuralism [has] claim[ed], magisterially, the intellectual center of literary criticism.”).

Literature departments’ concentration on poststructuralist theory has been so great that a number of commentators have suggested it has eclipsed the study of literature. E.g., Ihab Hassan, *Confessions of a Reluctant Critic, or the Resistance to Literature*, 24 *NEW LITERARY HIST.* 1, 8 (1993) (“Students turn to [poststructuralist] theory like moths, their appetite for flames far greater than their appetite for poetry.”); *Panel Discussion*, in *THE EMPEROR REDRESSED*, *supra*, at 199, 203 (comments of John Searle) (“[W]hat ever happened to the study of literature? . . . I am always amazed that there seems to have been a decline of interest in the study of literature in university departments that are officially committed to the study of literature.”).

³ Scholarship that debates postmodern interpretations of the canon includes ROLAND BARTHES, *THE PLEASURE OF THE TEXT* (Richard Miller trans., 1975); Alastair Fowler, *Genre and the Literary Canon*, 11 *NEW LITERARY HIST.* 97 (1979); Wendell Harris, *Canonicity*, 106 *PMLA* 110 (1991). Works that address the issue of whether the author’s intentions are relevant to the meaning of her texts include CATHERINE BELSEY, *CRITICAL PRACTICE* 2–3 (1980), and Richard Levin, *The Current Polarization of Literary Studies*, in *THE EMPEROR REDRESSED*, *supra* note 2, at 62, 73. Articles considering whether authors can ever say what they mean include M.H. Abrams, *What is a Humanistic Criticism?*, in *THE EMPEROR REDRESSED*, *supra* note 2, at 13, 33, and J. Hillis Miller, *Stevens’ Rock and Criticism as Cure II*, 30 *GA. REV.* 330 (1976).

⁴ E.g., JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* (1988) (anthropology); Allan Hanson, *The Making of the Maori: Culture Invention and Its Logic*, 91 *AM. ANTHROPOLOGIST* 890 (1989) (anthropology); BRANDON TAYLOR, *MODERNISM, POST-MODERNISM, REALISM: A CRITICAL PERSPECTIVE FOR ART* (1987) (art history); David Harlan, *Intellectual History and the Return of Literature*, 94 *AM. HIST. REV.* 581 (June 1989) (history); David Hollinger, *The Return of the Prodigal: The Persistence of Historical Knowing*, 94 *AM. HIST. REV.* 610 (1989) (history); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (philosophy); David Marcus, *Postmodernist Bourgeois Liberalism*, 80 *J. PHIL.* 583 (1983) (philosophy); WILLIAM CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1991) (political theory); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989) (political theory); Zygmunt Bauman, *Is There a Postmodern Sociology?*, 5 *THEORY CULTURE AND SOC’Y* 217 (1988) (sociology); Steven Seidman, *The Tedium of General Theory*, 18 *CONTEMP. SOC.* 634 (1989) (sociology); Ian Hacking, *Philosophers of Experiment*, 2 *PROC. 1988 PHIL. SCI. ASS’N* 147 (Arthur Fine &

The impact of postmodernism has been particularly great in women's studies. Here, postmodernism has sparked debate over whether women's experience can ever ground feminist theory,⁵ how and whether to treat women's identity as significant,⁶ and whether feminist criticism can have any definable subject or object.⁷ In the subfield of feminist history, postmodern skepticism regarding gender has ignited a debate over whether gender is ever a useful category of historical analysis and whether feminist historians should read history for differences within gender categories.⁸ In literature departments, feminist literary theory has remained embroiled in postmodern debates about whether the signature of the author, i.e., whether a text was written by a person gendered male or female, matters for feminist critics.⁹ In the feminist subfields of many other disciplines, postmodern principles have become, if not *de rigueur*, then certainly the dominant position with which those writing outside this paradigm must grapple.¹⁰

Jarrett Leplin eds., 1989) (philosophy of science).

⁵ See, e.g., Judith Butler, *Feminism by Any Other Name*, DIFFERENCES, Summer-Fall 1994, at 27 (interview with Rosi Braidotti); Chandra Talpade Mohanty, *Feminist Encounters: Locating the Politics of Experience*, in DESTABILIZING THEORY: CONTEMPORARY FEMINIST DEBATES 74 (Michèle Barrett & Anne Phillips eds., 1992) [hereinafter DESTABILIZING THEORY]; Joan Scott, *Experience*, in FEMINISTS THEORIZE THE POLITICAL 22 (Judith Butler & Joan Scott eds., 1992).

⁶ See, e.g., Ann Snitow, *A Gender Diary*, in CONFLICTS IN FEMINISM 9 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 80, 133 (1988).

⁷ See, e.g., Peggy Kamuf, *Replacing Feminist Criticism*, in CONFLICTS IN FEMINISM, *supra* note 6, at 105; see generally Mohanty, *supra* note 5.

⁸ See, e.g., DENISE RILEY, "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY (1988); JOAN SCOTT, *Gender: A Useful Category of Historical Analysis*, in GENDER AND THE POLITICS OF HISTORY 28 (1988).

⁹ See, e.g., Peggy Kamuf, *Writing Like a Woman*, in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 284, 285–86 (Sally McConnell-Ginet et al. eds., 1980).

If the inaugural gesture of this feminist criticism is the reduction of the literary work to its signature and to the tautological assumption that the feminine "identity" is one which signs itself with a feminine name, then it will be able to produce only tautological statements of dubious value: women's writing is writing signed by women.

Id. The other side of the debate is illustrated in Nancy Miller, *The Text's Heroine: A Feminist Critic and Her Fictions*, in CONFLICTS IN FEMINISM, *supra* note 6, at 112, 118.

What matter who's speaking? I would answer it matters, for example, to women who have lost and still routinely lose their proper name in marriage, and whose signature—not merely their voice—has not been worth the paper it was written on; women for whom the signature—by virtue of its power in the world of circulation—[is] *not* immaterial.

Id.

¹⁰ E.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995) (political theory); Bonnie Honig, *Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity*, in FEMINISTS THEORIZE THE POLITICAL, *supra* note 5, at 215 (political theory); Katie King, *Producing Sex, Theory, and Culture: Gay/Straight*

Yet the postmodern impulse has been far more muted in the field of feminist legal theory than in other areas of feminist studies. This may be because of the difficulty of deriving a positive program from postmodern principles, which have been interpreted as primarily critical and deconstructive,¹¹ and largely framed on a metatheoretical rather than a political level.¹² Such framing comports poorly with feminist legal theory's focus on developing concrete, positive legal projects. Postmodernism may also have made fewer incursions into feminist legal theory than in other feminist fields because law, itself, is so closely associated with the vision of modernity against which postmodernists are reacting; those feminists who subscribe to postmodern tenets may, accordingly, avoid considering legal solutions.¹³

Remappings in Contemporary Feminism, in CONFLICTS IN FEMINISM, *supra* note 6, at 82 (queer theory); Helen Longino & Evelyn Hammonds, *Conflicts and Tensions in the Feminist Study of Gender and Science*, in CONFLICTS IN FEMINISM, *supra* note 6, at 164 (philosophy of science); Frances E. Mascia-Lees et al., *The Postmodernist Turn in Anthropology: Cautions from a Feminist Perspective*, in GENDER AND SCIENTIFIC AUTHORITY 48 (Barbara Laslett et al. eds., 1996) (anthropology).

¹¹ E.g., Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 418 (1988) ("Following Foucault and Derrida, an effective feminism could only be a wholly negative feminism, deconstructing everything and refusing to construct anything."); Michèle Barrett, *Words and Things: Materialism and Method in Contemporary Feminist Analysis*, in DESTABILIZING THEORY, *supra* note 5, at 201, 216 ("The many post-structuralist and post-modernist critiques of liberal and Marxist thought have decisively exposed the fundamental flaws of those earlier theories. Whether, however, they can promise a more useful alternative is a much more vexed question."); Martha Minow, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 HARV. L. REV. 1096, 1104 (1992) ("[P]ostmodernism risks a relativism that conflicts with feminist commitments to political engagement, and with a continuing ability to name, authoritatively, and to fight, effectively, what is oppressive.").

¹² I discuss this issue in more detail in Part III. Commentators have noted that the post-structuralist works most influential in the American academy, by Derrida, Foucault, and Barthes, have generally been removed from practical political concerns. Crews, *supra* note 2, at 45. Nancy Fraser presents an incisive and humorous account of the difficulty that Derrida's followers have had in determining the political implications of his work. Nancy Fraser, *The French Derrideans: Politicizing Deconstruction or Deconstructing the Political?*, in WORKING THROUGH DERRIDA 51 (Gary B. Madison ed., 1993). Fraser seeks to answer the questions that she says have bothered all those who have followed the progress of Derrida's work and its warm reception in the United States in literary theory departments: "Does deconstruction have any political implications? Does it have any political significance beyond the byzantine and incestuous struggles it has provoked in American academic literary criticism departments? Is it possible—and desirable—to articulate a deconstructive politics?" *Id.* at 51. She concludes that until deconstructionists are willing to leave the realm of the transcendental, which thus far they have been unwilling to do, the answer to that question is "no." *Id.* at 76.

¹³ Postmodernist writers, most prominently Foucault, have critiqued modernity's view of law as a progressive force for freedom and justice. E.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 222 (Alan Sheridan trans., 1977) ("The real, corporal disciplines constituted the foundation of the formal, juridical liberties. The contract may have been regarded as the ideal foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion."). Postmodern feminist theorists, including Wendy Brown, have criticized feminist legal projects on the ground that gender subordination in the modern liberal state is located "in the terms of liberal discourse that configure and organize liberal jurisprudence." BROWN, *supra* note 10, at

Postmodernism has, nevertheless, made some inroads into feminist legal theory as feminist legal scholars have increasingly adopted some of its concepts and concerns. For example, feminist legal scholars have sought to incorporate postmodern epistemologies, or theories of knowledge, into feminist legal projects.¹⁴ Scholars have adopted poststructuralist critiques of the concept of the unitary, autonomous self.¹⁵ Similarly, they have used the poststructuralist conception of discourse to challenge previous accounts of power in feminist legal scholarship.¹⁶ They have also adopted postmodern critiques of identity to contest the category of “women” as homogeneous.¹⁷ Finally, a few scholars have articulated plans for converting postmodern insights into positive feminist projects.¹⁸

This Article seeks to chart and evaluate the postmodern impulse as it has appeared in feminist legal theory, and to suggest ways that postmodern insights could more effectively further feminist legal theory’s normative commitment to end sexual oppression. While any attempt to tease out particular ideas from this body of feminist legal theory inevitably creates artificial divisions not present in the works themselves, I draw out three separate clusters of ideas that span these works for the purposes of discussion. For each cluster, I describe the relevant postmodern interventions in feminist legal theory and critically assess the strengths and weaknesses of these interventions.¹⁹

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¹⁴ E.g., ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 13 (1988); Tracy E. Higgins, “By Reason of Their Sex”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995); 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, 299.

¹⁵ E.g., Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).

¹⁶ E.g., DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991) [hereinafter CORNELL, *BEYOND ACCOMMODATION*]; DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* (1995) [hereinafter CORNELL, *THE IMAGINARY DOMAIN*]; DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992) [hereinafter CORNELL, *THE PHILOSOPHY OF THE LIMIT*]; DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* 114–46 (1993) [hereinafter CORNELL, *TRANSFORMATIONS*]; EISENSTEIN, *supra* note 14; Drucilla Cornell, *Civil Disobedience and Deconstruction, in FEMINIST INTERPRETATIONS OF JACQUES DERRIDA* 149 (Nancy J. Holland ed., 1997); Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721 (1996).

¹⁷ E.g., MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992); Higgins, *supra* note 14; Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 302–03 (1992).

¹⁸ E.g., EISENSTEIN, *supra* note 14; Drucilla Cornell, *Gender, Sex, and Equivalent Rights, in FEMINISTS THEORIZE THE POLITICAL*, *supra* note 5, at 280 [hereinafter Cornell, *Gender, Sex*]; Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State*, 100 YALE L.J. 2247 (1991) (book review) [hereinafter Cornell, *Sexual Difference*]; DUNCAN KENNEDY, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination, in SEXY DRESSING ETC.* 126 (1993).

¹⁹ Since I focus specifically on postmodern feminist legal theory, I treat postmodern scholars outside legal theory only to the extent that description of their work is necessary

In Part I, I discuss feminist legal scholars' appropriation of postmodern conceptions of power and how these scholars have related these conceptions to gender hierarchy. Specifically, feminist legal scholars appropriating postmodern concepts have emphasized the importance of discursive practices—the linguistic codes and conceptual rules that fundamentally structure social phenomena—in constructing gender oppression.²⁰ In Part II, I consider the trend in feminist legal theory against generalizations based on gender, and the related drive toward a politics of diversity and multiplicity that has been spurred by postmodern insights. In Part III, I discuss the ways in which feminist legal theorists have sought to convert postmodern insights into positive feminist legal projects.

In each of these three areas, I argue that although postmodernism offers valuable insights, its application to date demonstrates corresponding weaknesses that undermine the goals of feminist legal theory. Specifically, postmodernist legal scholars have repeatedly failed to treat postmodern strivings for heterogeneity, multiplicity, and difference as ends that must be achieved through ongoing political and legal struggle. Instead, they have generally treated these goals as if they were either already achieved or, alternatively, as if they could be accomplished through theoretical fiat. As a result, postmodern feminist legal theory has failed to develop a rigorous analysis of what kind of legal systems and legal measures will best foster the reinterpretation of dominant discourses and the subversion of traditional gender identities they seek to promote.

In Part IV, I offer a constructive view of the way in which postmodernist insights could better further the goals of feminist legal theory, an approach that seeks to overcome the limitations of postmodern feminism to date. A reformulated postmodern feminist legal agenda, I argue, would take to heart the postmodern insight that individuals (“subjects,” in postmodern parlance) are formed within systems of social relations, and that gender hierarchy reproduces itself through the identities and desires formed within these systems. A postmodern feminist agenda would therefore seek to promote the concrete political and legal conditions that would both foster subjects' capacities to resist dominant gender discourses (including traditional notions of how women and men should “be”), and enable them to adopt more fluid notions of gender identity that are less linked to biological sex. At the same time, this agenda would seek to ensure the communication of dissident gender practices so that others would recognize that such practices are indeed possible. The goal would be to encourage resistance to dominant gender images in lived

to understand the legal theory under consideration. For this reason, key postmodern scholars such as Michel Foucault and Jacques Derrida receive only brief treatment here. Similarly, discussion of central figures in postmodern feminist theory, including Judith Butler and Nancy Fraser, is largely confined to footnotes.

²⁰ For a general discussion of the influence of postmodernism in attaining the ascendance of “words” over “things” in feminist theory, see Barrett, *supra* note 11, at 201.

reality rather than in abstract theory. Further, I argue that a postmodern feminist legal agenda should not automatically celebrate all women's differences as positive, as some strands of postmodernism have, but should affirm only those differences appropriate in a restructured world. Finally, this postmodern feminist agenda, unlike the agendas of those postmodern feminists who have asserted the primacy of the cultural over the material, should seek baseline equalities of material goods and opportunities in order to ensure that differences are not the product of oppression. In this regard, it would recognize that gender hierarchy is a complex mixture of cultural and material oppressions; feminist strategies must therefore focus on both types of oppression in order to dismantle this hierarchy.

My aim throughout this Article is to reflect critically on postmodernism and to take from it those elements that would increase the efficacy of feminist legal theory in terms of analytical rigor, explanatory promise, and movement toward ending sex oppression. In other words, I am writing from the position of a feminist rather than a postmodernist, and I am engaging with postmodernism to the extent that it can further the project of feminist legal theory.²¹

I. RETHINKING POWER, GENDER HIERARCHY, AND RESISTANCE

Perhaps the place in feminist legal theory where the effects of postmodernism have been most far-reaching is the conceptualization of power as "discourse." According to discourse theory, as developed by its two most famous masters, Jacques Derrida and Michel Foucault, what really matters in the workings of power is not material reality—who is physically stronger, who has more money, or who owns the factories—but the system of language, concepts, and ideas that circulate within a society. In this conception, "discourse" does not simply mirror a world that preexists it, but rather constructs the world by constructing meaning. The meanings produced by discursive systems shape the way we see the world, what is possible within it, and even the formation of our own identities.²² The concept of discourse therefore marks the intersection of language, knowledge, and power. Postmodern feminist legal theorists have taken poststructuralist concepts of power and developed them, radi-

²¹ There is, of course, no single, uncontested meaning of the terms "feminist" and "feminism." See Bartlett, *supra* note 1, at 833–35. I use the term "feminist" here to refer to positions that assert that power is divided along gender lines, take a critical attitude toward that power imbalance, and seek transformation of the world to remedy that imbalance. Cf. *id.* at 833.

²² The claim is not that material reality does not exist, but that it has no meaning except through discourse. An example often used to illustrate this proposition involves a football. The fact that the football is an object made of pigskin of a certain shape that is laced up does not give it the significance it has in our culture. Rather, it is our understandings about this object and the practice in which it is used that give the football its significance.

cally reconceiving how power works in constructing gender hierarchy and the possible ways in which such hierarchy can be undermined.

In this section, I critically assess postmodern feminist legal theorists' conceptions of power. To do so, I first describe the dominance conception of power that prevailed in feminist theory prior to the rise of postmodern conceptions, as well as the criticisms of the dominance position raised by postmodern and other feminists. Next, I discuss and assess two examples of postmodern feminist legal theories of power—one put forward by Drucilla Cornell²³ and the other by Steven Winter.²⁴ I focus on their work for two reasons. First, both provide the most developed explanations of feminist legal theories of power that explicitly describe themselves as “postmodern.” Second, these two authors rely on different postmodern resources to produce very different versions of the relationship among power, gender hierarchy, and resistance. Discussion of both, I hope, will illuminate the problems and possibilities of postmodern views of power.

Ultimately, I argue that both Cornell's and Winter's models fail to provide viable alternative theories of power for feminist theory. Cornell's model of power, I contend, in attributing both gender hierarchy and its fragility to the linguistic properties of discourse, fails to consider the subjects who either will or will not reinterpret dominant discourses, as well as the social and political conditions that will influence these subjects. Winter, although he focuses on the subversion of gender hierarchies as a matter of social practice, fails adequately to conceptualize barriers to the exercise of resistance. Both of these authors, as a result, tend to see resistance to the gender hierarchy as a given rather than as a political goal to be achieved. They thereby fail to think through the legal and political circumstances that will encourage subjects to resist gender hierarchy.

A. *The Dominance Conception of Power*

Prior to the rise of poststructuralist accounts of power, the prevailing model of power in feminist theory was what I call the “dominance” model. This model was developed in the 1970s and 1980s, largely in the work of radical feminists. The dominance model was developed in response to the mainstream conception of power that existed in both political theory and popular thought during that time, which conceived of power as something that people or groups possess and can wield consciously for their own ends against others.²⁵ As Max Weber describes this

²³ E.g., CORNELL, *BEYOND ACCOMMODATION*, *supra* note 16, at 6–12, 119–64; CORNELL, *THE IMAGINARY DOMAIN*, *supra* note 16, at 21–27; CORNELL, *TRANSFORMATIONS*, *supra* note 16, at 97–146; Cornell, *Sexual Difference*, *supra* note 18.

²⁴ Winter, *supra* note 16.

²⁵ See, e.g., Robert A. Dahl, *The Concept of Power*, 2 *BEHAV. SCI.* 201, 202–03 (1957)

view, “we understand by ‘power’ the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action.”²⁶ Dominance in this model is sustained from above, as the less powerful are forced to comply with the edicts of those in power. Power’s effects, however, extend only to external obedience: it does not affect an individual’s interior wants and desires. Power in this way was seen as repressive, acting through prohibitions on what the individual may do and how she may act, while individuals were seen as having an autonomous, internal existence that precedes and remains aloof from power.

While liberal feminists generally accepted the mainstream model at the inception of second wave feminism in the 1960s and 1970s, radical feminists subsequently rejected it. The dominance conception they developed, which received its most theoretically sophisticated legal treatment in the work of Catharine MacKinnon in the 1980s,²⁷ adopted the mainstream model’s view that power is something possessed by some and wielded against others. It further stratified the lines of power, however. Under this model, men hold power and intentionally wield it against powerless women: “[M]en oppress women to the extent that they can because it is in their interest and to their advantage to do so.”²⁸

Male power, according to the dominance view, is univocal and completely totalizing, creating the world, including women, in its image. In contrast to the mainstream model, the dominance model jettisons the humanist notion that the powerless have selves that precede and exist apart from power. Instead, the dominance model conceives of women, their wants and needs, as completely constructed by patriarchal power.²⁹ According to MacKinnon, “In feminist terms, the fact that male power

(“A has power over B to the extent that he can get B to do something that B would not otherwise do.”). Jean Elshtain describes this traditional conception of power as “a form of compulsion exerted by the already (relatively) powerful upon one another within official political institutions designed to promote the aims and interests of competing groups. It is of, by, and for elites.” JEAN BETHKE ELSHTAIN, *The Power and Powerlessness of Women*, in *POWER TRIPS AND OTHER JOURNEYS: ESSAYS IN FEMINISM AS CIVIC DISCOURSE* 134, 136 (1990).

²⁶ 2 MAX WEBER, *ECONOMY & SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 926 (Guenther Roth & Claus Wittich eds., 1968); see also DENNIS H. WRONG, *POWER: ITS FORMS, BASES AND USES* 21 (1995) (stating that the dominant understanding of power is “the capacity to impose, or to threaten successfully to impose, penalties or deprivations for noncompliance”). I owe both these definitions and the conceptual clarification of this point to Marion Crain, who calls this dominant definition of power “power over” and seeks to replace it with an alternative feminist conception of power that she calls “power to.” See Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1825, 1851–52 (1992).

²⁷ MacKinnon presents this view of power most prominently in *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

²⁸ *Id.* at 260 n.65. Additionally, MacKinnon writes, “It is not only that men treat women badly, although often they do, but that it is their choice whether or not to do so.” *Id.* at 94.

²⁹ See *id.* at 110–11.

has power means that the interest of male sexuality constructs what sexuality as such means, including the standard way it is allowed to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones."³⁰ Women's differences from men, in this reading, are the result of male power: women are different from men because men desire them to be different and subordinate them to produce this effect.³¹

The dominance model made considerable gains for feminist theory by responding to the serious deficiencies in the mainstream view of power. The mainstream view, in holding that power operated externally on individuals, failed to link power with women's characteristics, aims, and desires, all of which it saw as preceding power. It therefore allowed opponents of feminism to argue that women's differences from men demonstrated that women either were "naturally" the weaker sex (an argument also phrased in terms of how women's delightfully feminine nature led them to gravitate to certain roles), or that women, themselves, were responsible for the choices that left them in second-class positions in society. The dominance model of power put forth by radical feminists effectively countered these arguments. Under it, the suffering of women could no longer be ascribed to women's nature or women's choices.³² In Susan Bordo's words, "the insistence that women are the *done to*, not the *doers*, here; that *men* and *their* desires bear the responsibility; and that female obedience to the dictates of [women's stereotypical roles] is better conceptualized as bondage than choice—was a crucial historical moment" for feminism.³³ At the same time, this position allowed feminists to deal with ways in which women were different from men without giving up the fight for equality.³⁴ In doing so, the dominance model opened up a complete range of issues for the feminist agenda—sexuality, abortion, domestic violence—that liberal feminism could not consider because it had largely emphasized women's similarities to men.

Despite these virtues, however, it has become increasingly clear that the dominance model of power is inadequate to address the complexity of the situation of men and women in contemporary Western society. Since the late 1980s, a number of critics, including many postmodern feminist legal theorists, have spelled out the problems with this model. They point out, first, that MacKinnon's oppressor/oppressed view of power fails to

³⁰ *Id.* at 129.

³¹ *See id.* at 128.

³² SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 22–23 (1993).

³³ *Id.*

³⁴ *See* Marilyn Frye, *Oppression*, in *THE POLITICS OF REALITY I* (1983) (rejecting viewing oppression as a system that makes decisions based on irrelevant differences between women and men, in favor of viewing oppression as a system that adopts social and economic structures that *create* and *enforce* distinctions between the sexes, dividing the species along lines of sex into dominators and the dominated).

take into account differences among women.³⁵ In MacKinnon's theory, all women are oppressed, and oppressed in the same way, without regard to differences in age, ethnicity, religion, geography, and a host of other factors. Yet, as a number of feminist theorists argue, gender is only one of a number of axes of power that exist in our society. Accordingly, different women are differentially situated with respect to power: while white women may experience oppression on account of their sex, they also share privilege on account of their race.³⁶ As Drucilla Cornell points out, the meaning of gender is "always modified."³⁷

Further, the dominance model totalizes the grasp of patriarchy and misses the myriad ways in which women, in actual fact, diverge from dominant images of the feminine.³⁸ One consequence of MacKinnon's monolithic view of power is that she cannot explain the emergence of a feminist viewpoint. In Drucilla Cornell's words, "[i]f women as a gender are defined as victims, as fuckees, as voiceless, and if, as MacKinnon argues, the feminist 'point of view' is an impossibility within our system of male dominance, then it would be impossible to provide the condition for repair."³⁹ Women, in other words, if they are truly the passive victims MacKinnon theorizes, could never become feminists capable of resisting male dictates. Further, even when women do conform to these images, for example in their role as children's caretakers, MacKinnon's theory cannot recognize the value of these activities.⁴⁰

The dominance model also overstates men's power, even while it ignores women's. Her account ignores the way in which men are themselves constructed within the system of gender hierarchy rather than its conscious creators for their own interests.⁴¹ In Steven Winter's words, "it

³⁵ E.g., CORNELL, TRANSFORMATIONS, *supra* note 16, at 130; Cornell, *Sexual Difference*, *supra* note 18, at 2263; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993).

³⁶ E.g., BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); SPELMAN, *supra* note 6; Crenshaw, *supra* note 35; Mahoney, *supra* note 35; Ann Russo, "We Cannot Live Without Our Lives": *White Women, Antiracism, and Feminism*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 297 (Chandra Mohanty et al. eds., 1991).

³⁷ CORNELL, TRANSFORMATIONS, *supra* note 16, at 130.

³⁸ CORNELL, BEYOND ACCOMMODATION, *supra* note 16, at 129-31; Cornell, *Sexual Difference*, *supra* note 18, at 2250.

³⁹ Cornell, *Sexual Difference*, *supra* note 18, at 2256. Cornell notes that MacKinnon indirectly concedes this difficulty when MacKinnon states that "[f]eminism criticizes this male totality without an account of women's capacity to do so or to imagine or realize a more whole truth." *Id.* at 2254 (quoting MACKINNON, *supra* note 27, at 115).

⁴⁰ See CORNELL, TRANSFORMATIONS, *supra* note 16, at 114; CORNELL, BEYOND ACCOMMODATION, *supra* note 16, at 153.

⁴¹ Winter, *supra* note 16, at 762-63, 790-91. Especially in her later work, MacKinnon clearly recognizes that not all men are similarly placed with respect to being perpetrators of the system of sexual hierarchy. For example, in the amicus curiae brief she wrote in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), MacKinnon disputes the contention that "[m]asculinity is . . . uniform, gender making all men sufficiently equal to

should follow from [MacKinnon's] analysis that men, too, are subjected to the regulation and control of this system of gender relations (although, obviously, in very different ways). MacKinnon, however, balks at this conclusion. Thus, for example, she gives short shrift to 'the phenomena of "compulsive masculinity."'"⁴²

Finally, the dominance account of power fails to recognize the multiplicity of meanings in current gender practices.⁴³ For example, there is no single, acceptable notion of how women in our society should behave, but rather there are a welter of different, sometimes contradictory notions that emerge from a multitude of sites. While many of these are disempowering, certainly some are empowering. As Nancy Fraser states,

we live in a time of intense contestation concerning gender, sexuality, and sexual difference. Far from being monolithically patriarchal, the interpretation of these terms is at every point subject to dispute. . . . We need an approach that can analyze the current cultural politics of gender in all its complexity and heterogeneity.⁴⁴

The dominance model, with its black-and-white conception of power, is not up to this task.

B. Poststructuralist Models of Power

In place of the dominance view of power, postmodern legal theorists, most notably Drucilla Cornell and Steven Winter, seek to substitute a version of power premised on the poststructuralist notion of discourse. Broadly speaking, this notion of discourse links power to shared patterns of language and thought that, by constructing the way in which subjects see the world, construct social reality. Specific poststructuralist accounts of how discourse operates to perpetuate inequalities of power differ widely, however. In drawing on widely disparate strands of poststructuralism, Drucilla Cornell and Steven Winter produce very different accounts of power and power's relation to gender hierarchy.

one another that no man can be in a significant position of powerlessness relative to another man." Brief of Amici Curiae National Organization on Male Sexual Victimization, Inc. et al. at 9, *Oncle* (No. 96-568). Still, MacKinnon does not confront the ways in which those who wield power are molded by this system.

⁴² Winter, *supra* note 16, at 787.

⁴³ Mary Joe Frug makes this point when she argues that what it means to be a prostitute is essentially contested. FRUG, *supra* note 17, at 131-41. Drucilla Cornell makes a similar argument about pornography. CORNELL, *THE IMAGINARY DOMAIN*, *supra* note 16, at 159-63.

⁴⁴ FRASER, *supra* note 1, at 234.

1. *Drucilla Cornell—Using Lacan and Derrida to Rewrite the Feminine*

a. *Cornell's Conception of Power and Resistance*

Rather than accepting the totalizing model of women's subordination presented by MacKinnon, Cornell portrays the relation between women's oppression and power in terms of a version of discourse theory derived from Jacques Lacan and Jacques Derrida, two influential poststructuralist thinkers. Lacan, a French psychoanalyst who emerged as a controversial intellectual figure after the Second World War, sought to reinterpret Freud's work in the light of linguistic theory. His resulting work, which stresses the relationships among language, identity, and desire, has served as a springboard for much of poststructuralist thought.

According to Lacan, sex, sexuality, and gender identity are not biologically predetermined by pre-social nature or libidinal drives, as Freud suggested. Instead, they are constituted through language and linguistic processes—that is, discursively constructed. Lacan argues that gender identity arises when an infant, recognizing himself or herself as separate from the mother, seeks to find the symbolic means of recovering the maternal relation. For the infant, this becomes a quest for the phallus, which stands for the lost symbiotic connection rather than any part of the physical body. In patriarchal cultures, however, the phallus is equated with the penis, which the mother lacks. Consequently, the child comes to see the mother as the castrated "Other." In this way, the child's gender identity is based on the cultural significance attributed to his or her recognition that the mother—and "Woman"—is devalued because she lacks a penis.⁴⁵

For Cornell, Lacan's account of gender identity serves several useful functions.⁴⁶ First, in contrast to Freud, Lacan conceives of male superiority as discursively rather than biologically constituted, and therefore in principle not immutable. Second, Lacan recognizes that gender identity is based on a fiction—the fantasy identification that having a penis entails the power attributed to the phallus.⁴⁷ Third, because the assumption of gender identity involves fantasy, in reality "there can be no perfect identification of oneself with one's gender."⁴⁸

According to Cornell, however, Lacan fails to appreciate the revolutionary impact of his own insight that gender hierarchy is built on discourse rather than biology. For Lacan, although gender identity is discursively constructed, it is so firmly embedded in patriarchal dominance that

⁴⁵ See Cornell, *Gender, Sex*, *supra* note 18, at 284–85. See generally ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* 50–81 (1990).

⁴⁶ Cornell, *Gender, Sex*, *supra* note 18, at 285.

⁴⁷ See *id.*

⁴⁸ *Id.*

gender hierarchy is basically unavoidable.⁴⁹ As Elizabeth Grosz phrases this criticism,

[Lacan] *does* shift the ground of our understanding of patriarchal power relations and their social reproduction. It is not men *per se* who cause women's oppression, but rather the socio-economic and linguistic structure Yet in his formulation of this structure as an inevitable law, patriarchal dominance is not so much challenged as displaced, from biology to the equally unchangeable, socio-linguistic law of the father.⁵⁰

Enter Derrida, the French philosopher best known for his theories of textuality and writing, especially his conception of "deconstruction."⁵¹ Like Lacan, Derrida recognizes that gender is discursively constituted, but, according to Cornell, he develops a more useful conclusion from that insight than does Lacan. For Derrida, discourse does not have a stable meaning because it has no fixed link to some stable referent, or object whose meaning is definite. Instead, language itself consists of signifiers that endlessly refer one to another without closure. In Cornell's words, "Derrida shows us again and again, [that] this linguistic code cannot be frozen because of the slippage of meaning inherent in the performative aspect of language."⁵²

The recognition of the inherent slippage in language, for Cornell, yields new possibilities for radically undermining gender hierarchy. Because gender is a discursive construct, constructed by and in language, it can never have a stable meaning.⁵³ Further, there is no reality to gender beyond language. Lived sexuality can therefore never perfectly match the imposed construct of gender identity,⁵⁴ and this slippage between the lived and the discursive holds out "[t]he possibility of celebrating women's 'sex' and sexuality."⁵⁵ It represents an opportunity for feminists

⁴⁹ See *id.* at 285–86.

⁵⁰ GROSZ, *supra* note 45, at 144–45.

⁵¹ Unfortunately, the term "deconstruction," like the terms "postmodern" and "post-structuralist," defies easy definition. Derrida did not help to clarify the definition when he specifically denied that deconstruction is "a 'method,' a 'technique' or a species of 'critique.'" CHRISTOPHER NORRIS, DERRIDA 18 (1987). Christopher Norris provides one of the best definitions of the term; he describes deconstruction as the dismantling of conceptual oppositions and the taking apart of hierarchical systems of thought in order to reinscribe them within a different order of signification. Put another way, "deconstruction is the vigilant seeking-out of those 'aporias,' blindspots or moments of self-contradiction where a text involuntarily betrays the tension between rhetoric and logic, between what it manifestly *means to say* and what it is nonetheless *constrained to mean.*" *Id.* at 19.

⁵² Cornell, *Gender, Sex, supra* note 18, at 286.

⁵³ *Id.* ("Woman cannot just be reduced to the lack of the phallus because the metaphors through which she is represented produce an always-shifting reality.")

⁵⁴ *Id.*; Cornell, *Sexual Difference, supra* note 18, at 2250.

⁵⁵ Cornell, *Sexual Difference, supra* note 18, at 2250; Cornell, *Gender, Sex, supra* note 18, at 286–87.

to “re-metaphorize” or “rewrite the feminine—in affirmation, as a positioning, as a performance.”⁵⁶ By the same token, male domination, which is also a discursive construction, “can never be fully protected from slippage and reinterpretation.”⁵⁷ The possibility of this reinterpretation, for Cornell, “keeps open the space for Derrida’s ‘new choreography of sexual difference,’” in which gender is no longer reduced to two, one valued and the other degraded.⁵⁸ Deconstruction therefore allows “the woman with style” to “play with her own sex in and through the effects of castration.”⁵⁹

b. Assessing Cornell’s Theory

Drucilla Cornell’s discourse theory has the virtue of recognizing that women are more complex than either the dominant images of women in contemporary society or the dominance view of power allows. Her discursive account of the formation of gender hierarchy is also promising in its recognition that the meanings of gender and sex are contestable and open to reinterpretation. Yet despite these qualities, Cornell’s version of discourse theory is ultimately of limited use to feminist legal theory. First, in drawing on Lacan’s work, Cornell provides an account of gender identity that is removed from particular societies and their practices.⁶⁰

⁵⁶ CORNELL, BEYOND ACCOMMODATION, *supra* note 16, at 19. According to Cornell,

“feminine being” cannot be separated from the metaphors in and through which it is figured. Metaphor as transference and analogy always implies both the like and the not like. . . . Metaphor, in turn, allows both for expansion of meaning and for reinterpretation. . . . Therefore, the realization of “feminine being” as metaphor is what allows us to reinterpret and, more importantly, to affirm the feminine as other, and irreducibly other, to any of the definitions imposed by patriarchy.

Cornell, *Sexual Difference*, *supra* note 18, at 2265. Cornell locates this rewriting or “re-metaphorization” of women somewhere between where women are now and where we would want women to be:

[T]he metaphorization of the feminine in feminine writing . . . has a “utopian” dimension in that such figures are irreducible to “their” vision of us or, indeed, to any one vision or representation. We should not, in other words, displace focus from the utopian “future” to the “present.” . . . Yet, in spite of the utopian dimension, the attempt at re-metaphorization does, of course, involve at least the preliminary location of the feminine, even if metaphoric transference also implies the relation of the “is” to the “not yet.”

CORNELL, BEYOND ACCOMMODATION, *supra*, at 167.

⁵⁷ Cornell, *Sexual Difference*, *supra* note 18, at 2264.

⁵⁸ Cornell, *Gender, Sex*, *supra* note 18, at 287 (paraphrasing Jacques Derrida & Christie V. McDonald, *Choreographies*, in *THE EAR OF THE OTHER: OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION* 163, 163–85 (Christie V. McDonald ed., Peggy Kamuf trans., 1985)).

⁵⁹ CORNELL, BEYOND ACCOMMODATION, *supra* note 16, at 83, 105.

⁶⁰ Cf. NANCY FRASER, *Structuralism or Pragmatics? On Discourse Theory and Feminist Politics*, in *JUSTICE INTERRUPTUS*, *supra* note 1, at 151 (criticizing discourse theories

For Lacan, all societies in which gender hierarchy exists equate the phallus with the penis and devalorize women.⁶¹ The analysis does not help focus on which particular practices contribute to this devalorization—indeed such practices are irrelevant in this theory since devalorization is set for the child early in childhood, and set by fantasy.⁶² Cornell's account therefore does not enable feminist legal theory to set an agenda for practice.

Further, although Cornell critiques MacKinnon's theory for not being able to take into account cross-cutting axes of power and identities, her own use of Lacan raises the same problem. Her theory separates all men into the category of the possessors of the phallus, which is equated with the penis, and all women into the category of the devalorized Other. The premise that the position of women will be roughly the same both across and within cultures, and across lines of class and ethnicity simply because they are perceived to lack the phallus is problematic in a feminism that seeks to recognize cultural specificity and differences among women.⁶³

Similar problems arise when Cornell raises the possibility that women can re-signify the feminine to remedy their devalorization, particularly when one considers giving any specific content to the "feminine." Which feminine should be rethought, given that, as Cornell acknowledges, the feminine is always modified by other axes of power? Shouldn't a feminism committed to respecting differences attend to differences at this basic level? Rather than articulating the more nuanced understanding of power needed to describe and change women's condition in contemporary society, Cornell's use of Lacan's very dualistic theory oversimplifies the analysis of power and identity needed for current feminist theory.

Cornell's use of Derrida to remedy Lacan's failings is equally problematic. First, in relying on Derrida for the concept of the open-texture of language that is capable of ready remetaphorization, Cornell ignores the

developed from the Lacanian model).

⁶¹ Indeed, Diana Fuss points out that Lacan's use of the phallus as a metaphor is so closely associated with the penis that the distinction "between these two terms cannot be rigidly sustained." DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE, & DIFFERENCE* 8 (1989). In Mary Ann Doane's words, "There is a sense in which all attempts to deny the relation between the phallus and the penis are feints, veils, illusions. The phallus, as signifier, may no longer *be* the penis, but any effort to conceptualize its function is inseparable from an imagining of the body." Mary Ann Doane, *Woman's State: Filming the Female Body*, 17 *OCTOBER* 24, 28 (1981).

It should also be noted that Cornell's use of Lacan's theory of gender identity depends on the validity of his theory of the symbolic order, an issue on which current research has cast considerable doubt. See, e.g., Beatrice Beebe & Frank M. Lachman, *Mother-Infant Mutual Influence and Precursors of Psychic Structure*, in *FRONTIERS IN SELF PSYCHOLOGY, PROGRESS IN SELF PSYCHOLOGY* 3 (Arnold Goldberg ed., 1988), cited in FRASER, *supra* note 60, at 169 n.27.

⁶² FRASER, *supra* note 60, at 158.

⁶³ See FUSS, *supra* note 61, at 10; see also FRASER, *supra* note 60, at 163.

bulk of Derrida's work. Although Derrida contends that words have no fixed meaning beyond themselves, his point is directed against correspondence theories of language—theories of language in which the text conveys to the reader some clear reality existing beyond the text. For Derrida, such theories perpetuate the myth of what he calls “the metaphysics of presence,” because words themselves can never serve as full representations of what they are intended to signify. That words are not firmly anchored to “the real,” though, does not mean that they are not anchored at all, and are open to endless re-signification. Instead, Derrida repeatedly shows that language is constrained by historical, social, and psychological factors.⁶⁴ While these constraints will invariably involve suppressed contradictions, these contradictions stem from submerged tensions that exist in Western thought and are always already present in the text. As a result of these tensions, language may be ambiguous, and may point in contradictory directions, but it is not endlessly malleable, as Cornell suggests.

Thus, contrary to Cornell's interpretation, Derridean deconstruction does not seek to develop whatever new meanings the reader might desire, but instead seeks to reveal those differences already suppressed by language and the always-present tension in texts.⁶⁵ While Derrida often argues that the logic of a text points to a meaning beyond the author's intention and what might be considered the most obvious meaning of the text, his arguments for these submerged meanings rest on specific histori-

⁶⁴ See, e.g., JACQUES DERRIDA, *Cogito and the History of Madness*, in WRITING AND DIFFERENCE 31 (Alan Bass trans., 1978). For example, Derrida critiques Foucault's claim in *Madness and Civilization*, to write a “history not of psychiatry” from within the bounds of Western rational thought, but “of madness itself, in its most vibrant state, before being captured by knowledge.” *Id.* at 34 (quoting MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (Richard Howard trans., 1965)). Derrida argues that Foucault errs in believing that he can use language to write outside the Western discourse of reason without being co-opted by the discourse of reason. Such co-optation is, according to Derrida,

inherent in the essence and very project of all language in general; and even in the language of those who are apparently the maddest; and even and above all in the language of those who, by their praise of madness, by their complicity with it, measure their own strength against the greatest possible proximity to madness.

Id. at 54–55. In other words, language, for Derrida, cannot be molded to conform to the intent of the author; instead, the drives of Western metaphysics embodied within it will, invariably, be embodied in the text, regardless of the writer's intent to the contrary. And, indeed, Derrida shows that Foucault translates madness in his work into a perfectly intelligible, reasoned argument about madness. See generally MCGOWAN, *supra* note 1, at 26; NORRIS, *supra* note 51, at 20–27, 138–41.

⁶⁵ See, e.g., JACQUES DERRIDA, *Plato's Pharmacy*, in DISSEMINATION 61 (Barbara Johnson trans., 1981) [hereinafter DERRIDA, *Plato's Pharmacy*] (reading Plato's *The Phaedrus* to reveal the text's failure to achieve what its arguments and Western metaphysics seek: the priority of speech and presence over writing); see also JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Spivak trans., 1976) [hereinafter DERRIDA, *OF GRAMMATOLOGY*] (revealing suppression of writing in favor of speech within Western “logocentric” thought).

cal and linguistic rationales.⁶⁶ Although there are a few instances in which Derrida suggests that language can produce inexhaustible novelties,⁶⁷ far more often Derrida recognizes, in the words of Christopher Norris, that “language is marked through and through by referential . . . assumptions, and there is no way of simply breaking their hold by a kind of deconstructionist fiat.”⁶⁸ The view that deconstruction allows playful reworkings of an author’s text such that it can mean anything the reader desires has far less to do with Derrida than with the fate of deconstruction in literature departments in the United States—a fate with which Derrida has expressed discomfort.⁶⁹

The implications of Derrida’s work are therefore far less conducive to loosening the hold of gender hierarchy than Cornell’s explication suggests. For Derrida, deconstruction can illuminate the already-present tensions that exist in Western metaphysics and the language in which they

⁶⁶ For example, in his discussion of Plato’s dialogue, *The Phaedrus*, Derrida argues that the logic of Plato’s use of the word “pharmakon” refers to the Greek word “pharmakos,” a term never mentioned in Plato’s text. See DERRIDA, *Plato’s Pharmacy*, *supra* note 65, at 128–30. Yet Derrida’s point is precisely *not* that any word can be substituted for any other, or that language can mean anything that the reader chooses. Instead, Derrida justifies his invocation of the word *pharmakon* based on an extremely careful reading of Plato’s text, albeit one that focuses on its linguistic anomalies as well as on specific historical rationales: “[P]rovided the articulations are rigorously and prudently recognized, one should simply be able to untangle the hidden forces of attraction linking a present word with an absent word in the text of Plato.” *Id.* at 130.

⁶⁷ See, e.g., JACQUES DERRIDA, *Structure, Sign, and Play*, in WRITING AND DIFFERENCE, *supra* note 64, at 278, 292 (suggesting the possibility of “the joyous affirmation of the play of the world and of the innocence of becoming, the affirmation of a world of signs without fault, without truth, and without origin which is offered to an active interpretation.”). But see NORRIS, *supra* note 51, at 138–41 (arguing that *Structure, Sign, and Play* has been badly misread in literature departments to wrongly “signal[] an end to that repressive regime that has so far governed the practice of interpretation”).

John McGowan argues that the view of deconstruction as endorsing free-wheeling and open-ended interpretation resulted from the fact that *Structure, Sign, and Play* was the first English translation of any of Derrida’s work made widely available, and Derrida’s word “*jeu*” was mistranslated as “freeplay.” MCGOWAN, *supra* note 1, at 26 n.22; DERRIDA, *supra*, at 278. (The translator of this work substituted the word “play” for “freeplay” in later editions.) Derrida was later to say of the incident:

I never spoke of “complete freeplay or undecidability.” I am certain that the “American critics of [my] work” can find nothing in my texts which corresponds to that . . . This notion of “freeplay” is an inadequate translation of the lexical network connected to the word *jeu*, which I used in my first texts, but sparingly and in a highly defined manner.

JACQUES DERRIDA, *Afterword: Toward an Ethic of Discussion*, in LIMITED INC. 111, 115–16 (1988), cited in MCGOWAN, *supra* note 1, at 26 n.22.

⁶⁸ NORRIS, *supra* note 51, at 54.

⁶⁹ Derrida calls “deconstruction” a “word whose fortunes have disagreeably surprised me.” NORRIS, *supra* note 51, at 13 (quoting Jacques Derrida, *The Time of a Thesis: Punctuations*, in PHILOSOPHY IN FRANCE TODAY 37, 44 (Alan Montefiore ed., 1982)); see also Imre Salusinszky, *Jacques Derrida on the University: An Interview*, 19 SOUTHERN REV. 3 (1986).

are embodied.⁷⁰ Yet deconstruction cannot break the hold of Western metaphysics' suppressive drives.⁷¹ To the contrary, Derrida's work demonstrates the way in which attempts to escape the drive toward unity are always recuperated within that tradition.⁷² In Derrida's words, "the simple practice of language ceaselessly reinstates the new terrain on the oldest ground," "thereby inhabiting more naively and more strictly than ever the inside one declares one has deserted."⁷³ In this view, "woman" cannot, by the act of deconstruction, be reconceptualized outside the bounds of its historical determinants.⁷⁴

The implications for feminist legal theory stemming from Cornell's use of Derrida are even more troubling than her overly optimistic reading of his work. Cornell's decision to rest the incompleteness of gender hierarchy on the inherent slippage of language is a startling choice for a feminist theorist. Rather than locating the possibility for ending gender oppression in the agency and resistance of women or political organization, Cornell locates it in properties integral to language as a system. This choice causes a number of problems for feminist legal theory.

First, in focusing on the inherent slippage in language as the force of instability in the gender hierarchy, Cornell produces a discourse theory that aestheticizes politics.⁷⁵ Cornell is correct that language, and therefore gender identity, "can never be fully protected from slippage and re-

⁷⁰ See MCGOWAN, *supra* note 1, at 104.

I think it is useful to think of Derrida, at least part of the time, as aiming toward unsettling the machine (the system) of philosophy by introducing just a bit too much play in some of its concepts, a strategy that involves not separating the concept from the system as a whole and also not opening up some huge, unlimited space in which the part can spin off aimlessly out of control.

Id.

⁷¹ As Derrida concedes, "I do not feel inspired by any sort of hope which would permit me to presume that my work of deconstruction has a prophetic function." Jacques Derrida, *Deconstruction and the Other: Interview with Richard Kearney*, in *STATES OF MIND: DIALOGUES WITH CONTEMPORARY CONTINENTAL THINKERS* 156, 169 (Richard Kearney ed., 1995); see also MCGOWAN, *supra* note 1, at 119 ("Derridean play opens up a space that is recognizably tragic, since, at the very best, it registers a protest against a certain order without being able to effect the transformation of that order:").

⁷² See DERRIDA, *supra* note 64.

⁷³ JACQUES DERRIDA, *The Ends of Man*, in *MARGINS OF PHILOSOPHY* 109, 135 (Alan Bass trans., 1982).

⁷⁴ For Derrida, the claim to write outside the Western tradition is self-deluding. In Derrida's words, one cannot simply "decide to change terrain, in a discontinuous and irruptive fashion, by brutally placing oneself outside, and by affirming an absolute break and difference." *Id.*; see also DERRIDA, *supra* note 64, at 53-55.

⁷⁵ See FRASER, *supra* note 60, at 155-57. Susan Bordo hypothesizes that this genre of French theorizing gives us a theory of modernism at the state of its exhaustion, a modernism of playful transgression, and *jouissance*, minus any hope for the redemption of modern life through culture. See SUSAN BORDO, "Material Girl": *The Effacements of Postmodern Culture*, in *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY*, *supra* note 32, at 245, 260.

interpretation.”⁷⁶ However, as Susan Bordo points out, the “subversion of cultural assumptions . . . is not something that happens *in* a text or *to* a text. It is an event that takes place (or doesn’t) in the reading of the text.”⁷⁷ The extent to which this reinterpretation actually happens is a social, political, and historical process. Cornell seems to forget this. Although, as Cornell recognizes, the gender binary is a discursive formation and therefore can be reinterpreted, it is a formation that has structured human lives at the most basic level. While there can therefore be creative re-readings of this binary, replacing the dominant meanings with such re-readings takes more than imagination—it takes arduous political and social work. Cornell’s version of discourse theory provides an account of how the feminist viewpoint can emerge as a linguistic matter, yet she ignores how it can emerge as a legal, social, and political matter. Under what conditions would women and men be most likely to reinterpret the meaning of gender and the feminine?⁷⁸ What strategies in the battle over the discursive meaning of “women” should be attempted? What laws would best facilitate these endeavors? In focusing solely on language as a symbolic system, Cornell never permits us to ask these concrete questions.⁷⁹

Cornell’s view that the fact of linguistic slippage also promises the *possibility* of undermining gender hierarchy causes her to understate women’s actual subordination and to overstate women’s actual divergence from stereotyped descriptions. While there will always be some slippage produced by the inherent instability of language, the extent of that slippage cannot be determined in the abstract apart from actual social practice. Viewed from this perspective, while MacKinnon clearly paints too dark a picture in conceiving of women solely in terms of their subordinate position in society, Cornell likely paints too bright a picture

⁷⁶ Cornell, *Sexual Difference*, *supra* note 18, at 2264.

⁷⁷ SUSAN BORDO, *Postmodern Subjects, Postmodern Bodies, Postmodern Resistance*, in *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY*, *supra* note 32, at 277, 292.

⁷⁸ Cornell’s later work, particularly *At the Heart of Freedom* and *The Imaginary Domain*, does begin to focus on the conditions needed to effect this reinterpretation. In these works, Cornell seeks to ensure that individuals can develop free from dualistic gender structures. In doing this, however, Cornell moves away from relying on Lacan, Derrida, and other postmodern sources, and moves toward relying on the consummately modern authority of Kant and Rawls. At the same time, she seems to drop postmodern insights of the social construction of personality in favor of an increasingly liberal-modern conception of individuals as autonomous seekers of their own ends. See DRUCILLA CORNELL, *AT THE HEART OF FREEDOM* 8 (1998) (“The imaginary domain is the space of the ‘as if’ in which we imagine who we might be if we made ourselves our own end and claimed ourselves as our own person.”); see also DRUCILLA CORNELL, *THE IMAGINARY DOMAIN* (1995). Because this Article seeks to explore the advantages and disadvantages of the postmodern for feminist legal theory, I do not consider Cornell’s later work here.

⁷⁹ Cf. FRASER, *supra* note 60, at 154 (arguing that a “conception of discourse for feminist theorizing” that sheds light on “the process by which the sociocultural hegemony of dominant groups is achieved and contested” would be “a great aid to feminist practice”).

in celebrating women's differences from men. The correct question for both is, how often and to what extent, in actual practice, do women subvert dominant sex roles? The answer to that question is clearly a difficult one, and certainly not one that can be answered with celebration without further investigation.⁸⁰

The focus on the inherent slippage of language as the vehicle for subverting gender hierarchy produces a peculiar blind spot in Cornell's theory. Specifically, Cornell pays little attention to the subjects through whom language operates.⁸¹ In doing this, Cornell misses a primary advantage provided by the move from dominance conceptions of power to discourse theory: the opportunity to develop better accounts of the development of agency and identity.⁸² This gap in Cornell's theory causes her to oscillate between two poles. At the first pole, she adopts an antihumanist view of the world in which women have no agency, and linguistic structure replaces social psychology. Here, language and discourse control, and their own logic and dynamic offer the only hope for eroding gender hierarchy. At this pole, Cornell tells us that Derrida's allegorization of Lacan's supposed truth of Woman

returns us to the performative power of language in which Woman is presented. Woman "is" only in language, which means that her "reality" can never be separated from the metaphors and fictions in which she is presented. Derrida's allegory of the feminine . . . allows for the affirmation of Woman, and not just as the truth of lack or the absence of truth—a misinterpretation of deconstruction frequently evidenced in feminist theory—but as the possibility of restylization that cannot be obliterated by the current framework in which she is given meaning.⁸³

⁸⁰ My own view is that although some slippage happens, a significant portion of women's identities do, in women's lived reality, conform to conventional gender roles. Accordingly, while the emergence of a feminist viewpoint is possible and some celebration of the way that women differ from prescribed gender roles is in order, there are many aspects of gender identity for which celebration would be inappropriate. *See id.* at 151.

⁸¹ *See* Alan Wolfe, *Algorithmic Justice*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 361, 361–67 (Drucilla Cornell et al. eds., 1992) (arguing that the Derridean position that the text is indeterminate should lead deconstructionists to develop a theory of the reader, but that deconstructionism's antihumanist bent has precluded this and has left a gaping hole in deconstructionist theories).

⁸² *See* Barrett, *supra* note 11, at 216 (arguing that feminist theory does not need "more and better theories legitimating . . . feminist political practice," but rather "a better conception of agency and identity than has been available in either . . . poststructuralist thought or its . . . modernist predecessors").

⁸³ CORNELL, *BEYOND ACCOMMODATION*, *supra* note 16, at 18–19.

Women's subjectivity plays no role at this pole; indeed, it is not clear what part women themselves play, aside from being the passive material on which restylization acts.

At the other pole, language becomes a tool of women, who have virtually complete agency, and who somehow stand outside the productive forces of language in order to bend it to their own autonomous will. These women can reshape language and the conception of women to their own ends at will. It is at this pole that Cornell turns to Derrida's vision of the "maverick feminist" who

can resist and step back from a certain history [The] "maverick feminist" showed herself ready to break with the most authorized, the most dogmatic form of consensus, one that claims . . . to speak out in the name of revolution and history. Perhaps she was thinking of a completely other history . . . a history of women who . . . are today inventing sexual idioms at a distance from the main forum of feminist activity⁸⁴

The figure that Cornell celebrates here is a woman who comports remarkably with the humanist tradition Cornell elsewhere rejects. She is a woman who appears completely removed from the system in which she was formed. She need not engage in political activity to change that system, although she may choose to do so now and then. All that is required of her is to engage in solitary artistic activity.

Absent from both poles of Cornell's work is any discussion of the political and social conditions necessary to ensure that women reinterpret their own lived realities. Cornell pays no attention to how individuals themselves, with their relatively enduring dispositions, can change their self-identifications. She ignores the role of social context in encouraging or discouraging such reinterpretations. Finally, she makes no mention of the political work necessary to foster such reimagination.

2. *Steven Winter—The Vulnerability of Power in Social Relations*

a. *Winter's Theory*

Steven Winter draws his version of discourse theory from the work of Michel Foucault, rather than from Lacan or Derrida.⁸⁵ While Foucault, like Derrida, was a philosopher, he spent much of his career studying the workings of power in specific social systems, rather than engaging in

⁸⁴ *Id.* at 83–84 (quoting Jacques Derrida & Christie V. McDonald, *Choreographies*, in *THE EAR OF THE OTHER: OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION* 163 (Christie V. McDonald ed., Peggy Kamuf trans., 1985)).

⁸⁵ See Winter, *supra* note 16, at 793–819.

linguistic analyses of texts. As a result, his work would seem more amenable to feminist legal theory's project of changing how gender functions in such social systems.⁸⁶

For Foucault, power is not simply a restrictive force that prevents people from attaining their ends; it is also a productive force that shapes all humans—women and men, rich and poor—by molding their desires and self-concepts.⁸⁷ Power, in this view, is not located at a particular place or held by a particular person or group.⁸⁸ Instead, "power means relations, a more-or-less organised, hierarchical, co-ordinated cluster of relations."⁸⁹ As such, power operates in everyday interactions, where it "reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives."⁹⁰ Winter tells us that for Foucault, power is exercised by individuals, but never possessed by them.⁹¹ Instead, power over another is the function of inhabiting a specific position in a social relation; the individual can exercise that power only through that relation.⁹²

For Winter, Foucault's view of power, particularly his conception of power as inhering in social exchanges, offers women "new possibilities for empowerment."⁹³ Winter states that Foucault's "productive view of power is never absolutely controlling . . . precisely because what it produces *are* subjects, that is, agents capable of acting in particular ways."⁹⁴

⁸⁶ FRASER, *supra* note 60, at 154–55.

⁸⁷ See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 94 (Robert Hurley trans., 1980) [hereinafter FOUCAULT, *THE HISTORY OF SEXUALITY*]; see also MICHEL FOUCAULT, *Truth and Power*, in *POWER/KNOWLEDGE* 109, 119 (Colin Gordon ed., Colin Gordon et al. trans., 1980) [hereinafter FOUCAULT, *Truth and Power*].

[I]t seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. . . . What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse.

Id.

⁸⁸ See FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 87, at 94 ("[T]here is no binary and all-encompassing opposition between rulers and ruled . . . no such duality extending from the top down."); MICHEL FOUCAULT, *The Eye of Power*, in *POWER/KNOWLEDGE*, *supra* note 87, at 146, 156 (arguing that power is "a machine in which everyone is caught, those who exercise power just as much as those over whom it is exercised").

⁸⁹ MICHEL FOUCAULT, *The Confession of the Flesh*, in *POWER/KNOWLEDGE*, *supra* note 87, at 194, 198.

⁹⁰ MICHEL FOUCAULT, *Prison Talk*, in *POWER/KNOWLEDGE*, *supra* note 87, at 37, 39.

⁹¹ See Winter, *supra* note 16, at 797–98 (citing FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE*, *supra* note 87, at 78, 98).

⁹² See Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, 12 *PHIL. & SOC. CRITICISM* 112, 123 (1987) ("[T]here are relations of power throughout every social field.").

⁹³ Winter, *supra* note 16, at 820.

⁹⁴ *Id.* at 805–06.

Because power operates through social relations, it necessarily depends on the *participation* of the actors involved in these relations, even if some of the roles involved are unequal to others.⁹⁵ According to Winter, "Power cannot annihilate agency because it necessarily depends on it."⁹⁶ He also argues that conceiving power as inhering in social relations, through subjects performing their roles in relation to others "makes power vulnerable to disruption . . . because the 'powerless' always have the power to withhold or vary their performance."⁹⁷ Winter cautions, however, that although all parties have the power to perform in various ways, higher costs can be imposed on subordinates who vary their performances in subversive ways. "On this view, what we commonly refer to as 'having' or 'being in power' is in actuality the differential ability to inflict costs."⁹⁸

As an example of the inevitable relationship between power and resistance, Winter provides the gendered social role of mother. He points out that women who enact this role cannot simply comply passively with the dictates of patriarchal authority since, "[a]s anyone who has cared for a two-year-old knows, to be a mother requires empathy, dedication, resourcefulness, patience, and ingenuity."⁹⁹ In other words, it requires "imaginative enactments by actual subjects."¹⁰⁰ As a result,

even the enactment of the wife/mother . . . role[] in [its] most unreconstructed, gender stereotypical form will inevitably entail resistance. . . . [I]t always remains open to the [wife/mother] to couch her performance anywhere along the broad spectrum that stretches from deferential compliance through shamming, grumbling, sulking, footdragging, "working to rule," limit-testing, and mocking all the way to outright defiance. Because the role must be acted out, it always provides the occasion for resistance.¹⁰¹

b. Assessing Winter's Theory

Professor Winter's version of discourse theory avoids many of the pitfalls of Cornell's version. By drawing on Foucault, Winter considers discourse not in terms of linguistic systems removed from particular practices, but as a social practice embedded in a historically specific so-

⁹⁵ *Id.* at 808.

⁹⁶ *Id.*

⁹⁷ *Id.* at 831.

⁹⁸ *Id.* at 829–30.

⁹⁹ *Id.* at 806.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 809–10 (footnote omitted).

cial context.¹⁰² As a result, Winter treats the possibility for resistance as a statement of social dynamics, not a statement regarding the uncontrollability of textual interpretation.¹⁰³ Winter's theory therefore focuses attention on the way that power produces particular types of subjects with particular types of identities and possibilities for resistance, rather than on the linguistic systems that Derrida and Cornell stress.

Winter, accordingly, develops a discourse theory that provides a better account of identity and subjectivity formation than Cornell's. For Winter, the subject is constituted in and through discourse. And no one, including men, stands outside the effects of power and remains the holder of power without being produced by it. At the same time, Winter can still account for the development of agency/subjectivity through the productive quality of power. There is no portion of subjectivity that is not an effect of discourse, and accordingly, no agency or self/other awareness that is not itself socially constructed. Winter's discursive view of power in this way helps correct the flaws of the dominance model, explaining how women can be agents even if they are created in and through a patriarchal system. Yet Winter does this without erasing the concept of subordination: he makes clear that all subjects are not similarly situated with respect to power and that power in modernity has a dominant valence and strong normalizing tendencies.

In contrast to Cornell's discourse theory, Winter's view of power helps cast new light on everyday practices that could reconfigure the feminist agenda. For example, as Sandra Bartky shows, conceiving power in contemporary society as productive and as working through the disciplining of bodies at microlevels has revealing implications for feminism.¹⁰⁴ Under this conception, practices such as women's use of makeup, continual monitoring of their weight, and their mode of gesturing appear as part of a stream of uninterrupted coercion that regulates and normalizes women's bodies.¹⁰⁵ Rather than the innocuous "choices" of women (as the mainstream view would have it), women's conscious decisions to bend to a society that rewards appearance (as liberal feminists would have it), or the visible evidence of the underlying truth that women have been constructed as men's playthings (as the dominance view would have it), the Foucauldian view suggests that such practices actually reproduce rather than simply reflect gender hierarchy. In Bartky's words, these disciplinary practices "are part of the process by which the ideal body of

¹⁰² See FRASER, *supra* note 60, at 160.

¹⁰³ See *id.* at 160–61.

¹⁰⁴ See SANDRA LEE BARTKY, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in FEMININITY AND DOMINATION 63 (1990).

¹⁰⁵ This disciplining of women's bodies applies to all racial and ethnic groups in the United States, although it sometimes takes different forms for different groups. For example, as Paulette Caldwell argues, disciplinary pressure on African American women with respect to their hair differs from that applied to white women. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

femininity—and hence the feminine body-subject—is constructed; in doing this, they produce a ‘practiced and subjected’ body, i.e., a body on which an inferior status has been inscribed.”¹⁰⁶ In this view, these and other normalizing practices relating to gender are the way that gender hierarchy is both constituted and enacted. This focus on the role of everyday practices in reproducing gender subordination is particularly relevant to feminist legal theorists in an era in which the law has been purged of its most flagrant gender distinctions, yet in which cultural distinctions based on gender still remain rampant. It suggests that feminist theorists should think not only about the way that law itself constructs gender, but also about the way that gender is reproduced in culture. Theorists might therefore profitably turn their attention to the extent to which the law can interrupt the cycle of the cultural practices that construct gender.

Yet although Winter sets out a version of discourse theory that carefully straddles the line, managing both to move past outdated dominance notions of power yet still to retain the concept that power is valenced, he is less balanced in exploring the implications of his theory. In his account, the subordinated in society always have the capacity to resist: resistance is impeded only insofar as costs can be imposed on them for violating their social roles. Yet to say that it always remains open to subjects to refuse to enact their societally prescribed roles fails to take into account the way that power restricts subjects’ resistance. The brilliance of Foucault’s insights about power in modernity is his demonstration of the link between power and identity—power shapes who an individual sees herself as, what she desires, what roles she chooses to adopt, even what roles she conceives as possible and imaginable. It is certainly true that, in most enactments of power involving gender hierarchy in contemporary Western society, no one is holding a gun to women’s heads forcing them to adopt roles that contribute to gender hierarchy. However, Winter’s view that women can simply defy these dictates by exercising resistant capacities if they are willing to pay the costs misses the way in which women themselves internalize societal dictates. For many women, whether or not they could bear the costs of violating the role, outright defiance is out of the question because dissident practices so drastically violate a given subject’s sense of self or are simply unthinkable altogether.¹⁰⁷ Further, Winter’s theory of a perennial capacity to resist runs the risk of returning to the views that prompted feminists to develop the dominance view of power in the first place: the mainstream claim that

¹⁰⁶ BARTKY, *supra* note 104, at 71.

¹⁰⁷ Those who have taught feminist theory will be familiar with the phenomenon of women students recognizing that they participate in practices that perpetuate gender hierarchy, including dieting, wearing cosmetics, and behaving in a deferential manner. At the same time, these students find it extremely difficult to give up these practices and violate expected social roles, not because they fear retribution from others, but because these practices are so deeply integrated into the way in which they see themselves.

women make their own choices and therefore should not claim subordination on the basis of those choices. In this way, Winter harks back to the humanist notion of the autonomous individual who enters society with a pre-existing agency—a view that he purports to reject.

Winter's theory of the subject who always has resources to engage in resistance does not arise so much from a misreading of Foucault as from Foucault's own oscillation on the issue of individuals' capacity for self-creation. Foucault's early work leaves little room for subjectivity, socially constructed or not, let alone for resistance. This is the Foucault who famously declared the "death of the subject," and who likened the concept of "man," the self-possessed subject of humanist discourse, to "a face drawn in sand at the edge of the sea," subject to being erased by the incoming tide."¹⁰⁸ On this view, individuals cannot autonomously act out their chosen goals, or even make the choice to resist. Instead, when they exercise power, they do so to accomplish power's intentions, rather than their own.¹⁰⁹

In his later work, however, Foucault seeks to lessen the omnipotent hold of power on the subject by constructing a description of resistance and subjectivity that is interior to power.¹¹⁰ According to this later Foucault, from whom Winter generally draws,

there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power.¹¹¹

At his best here, Foucault envisions a subjectivity both constructed and limited by the possibilities of power that he convincingly describes in his earlier work. In this mode, he recognizes that the constitution of the subject must take into account the options, possibilities, and capacities

¹⁰⁸ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 387 (Alan Sheridan trans., 1970); see also MICHEL FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE*, *supra* note 87, at 78, 98 [hereinafter FOUCAULT, *Two Lectures*] ("The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle.").

¹⁰⁹ See FOUCAULT, *Two Lectures*, *supra* note 108, at 98. It is Foucault's earlier work, in which he traced the unbounded extent of disciplinary power, that led to the criticism that his theorization admitted no escape from such power. See MCGOWAN, *supra* note 1, at 126.

¹¹⁰ By Foucault's later work, I refer to work beginning with his chapter on method in the first volume of *The History of Sexuality*. See FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 87; see also MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME III: THE CARE OF THE SELF* (Robert Hurley trans., 1986); Foucault, *supra* note 92.

¹¹¹ FOUCAULT, *Power and Strategies*, in *POWER/KNOWLEDGE*, *supra* note 87, at 134, 142; see also MCGOWAN, *supra* note 1, at 140.

afforded the individual by a given social order.¹¹² This theory of the subject stakes out a careful middle ground, avoiding theorizing the subject as either completely passive or as the complete, humanistic master of her surroundings.

However, on other occasions, the later Foucault theorizes a subjectivity unconstrained by social forms and social possibilities. At these times, Foucault makes the same oscillation as Cornell and Derrida, moving from an antihumanistic position to a theory of humans whose subjectivity is transcendent. For example, in *What Is Enlightenment?*,¹¹³ Foucault criticizes humanism for being tied to value judgments that have varied greatly over time and place. Foucault states that that the humanist thematic “can be opposed by the principle of a critique and a permanent creation of ourselves in our autonomy.”¹¹⁴ Similarly, he turns to the work of “invent[ing] himself,”¹¹⁵ which involves “tak[ing] oneself as an object of complex and difficult elaboration.”¹¹⁶ In this mode of theorizing, Foucault, like Winter, conceives resistant capacities as perpetual: because power will always be present, so will resistance.

C. Conclusion—Power, Gender Hierarchy, and Resistance

In reading gender hierarchy as either remetaphorizable or subvertible at will, both Cornell and Winter fail to realize crucial gains that discursive theories of power offer feminism. By focusing on the way in which power is manifested in social relations rather than held by some and not by others, such theories of power provide a better description of contemporary power. At the same time, in focusing on the links among power, identity, desire, and resistance, discourse theories provide feminist legal

¹¹² Foucault, *supra* note 92, at 122.

I would say that if now I am interested, in fact, in the way in which the subject constitutes himself in an active fashion, by the practices of the self, these practices are nevertheless not something that the individual invents by himself. They are patterns that he finds in his culture and which are proposed, suggested, and imposed on him by his culture, his society, and his social group.

Id.; see also FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 87, at 100–01.

Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy.

Id.

¹¹³ MICHEL FOUCAULT, *What is Enlightenment?*, in *THE FOUCAULT READER* 32, 44 (Paul Rabinow ed., 1984).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 42.

¹¹⁶ *Id.* at 41.

theory with the opportunity to construct a more useful account of power by recognizing the implications of power for the possibilities of resistance. To take advantage of the gains from discursive theories of power, such an account would recognize that women often internalize what Foucault would call "the gaze"—that is, they impose their own discipline, such that their senses of self are structured by normalizing forces in society. In this way, they adapt their preferences to conform with the status quo and the limited opportunities it provides.¹¹⁷ Further, this account would recognize the ways in which women's actions and choices may be more or less constrained depending on the range of discourses and identities available to them. Finally, it would recognize the extent to which, through discourse circulating among a multitude of sites and subcultures, dominant gender images are already continually being contested in women's lived reality.

A few feminist theorists, though not specifically identifying themselves as postmodernists, have begun the necessary reconstruction of feminist theory to take into account the complex ways in which identity, agency, and choice are related to power. In a recent article, Kathryn Abrams embarks on the difficult project of theorizing agency in the context of power inequalities.¹¹⁸ She directs her article against liberal conceptions of autonomy and, in the process, sets out a theory of socially inscribed agency.¹¹⁹ Along similar lines, several theorists have called attention to the ways in which resistance can be limited by social factors but still exist in circumscribed form. These theorists argue that women's resistance has often been overlooked because theorists have failed to recognize the options for resistance that women have available to them in particular circumstances, or have defined resistance too narrowly.¹²⁰ For example, Martha Mahoney demonstrates that women's experience of battering is far more complex than is conveyed by the legal system's presentation of such women as passive victims.¹²¹ These women, even if they do not immediately end the battering relationship, may still resist the batterer in a number of ways that protect themselves and their children, both physically and psychologically, in the short and long term.¹²²

¹¹⁷ MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 151 (1999). Nussbaum notes that economist Amartya Sen has shown that "women in many parts of the world exhibit preferences that are deformed in this way, even when very basic matters such as physical health, nutrition, and security are concerned." *Id.*

¹¹⁸ Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

¹¹⁹ *See id.* at 823.

¹²⁰ *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 28–34 (1991); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 549–50 (1992).

¹²¹ *See* Mahoney, *supra* note 120, at 74–75.

¹²² As Kathryn Abrams points out, many resistant actions by women "may not be recognized as such, and some . . . even may be mistaken as acquiescence." Abrams, *supra*

Conceived in this manner, discourse theories of power can provide direction for a postmodern feminist legal agenda. Such a discourse theory would demonstrate that because power is inherently unstable and scattered through multiple processes and locations, and because dominant meanings are never completely monolithic, subjects can sometimes both gain access to and internalize divergent interpretations on which resistance to dominant norms can be grounded. Resistance can therefore be fostered in particular situations. The function of feminist legal theory, then, is not simply to assert that women can transcend expected gender roles, but to locate the social, political, and legal conditions that will foster women's ability to subvert traditional gender identities. This formulation of a postmodern feminist legal agenda would therefore require explicit focus on strategies that would call attention to subversive gender discourse in actual women's lives and strengthen women's ability to resist dominant discourses.

II. DECONSTRUCTING "WOMEN" AS AN IDENTITY CATEGORY

Feminist legal scholars have also incorporated poststructuralist insights into the critique of whether feminist legal theory can and should coherently describe the category "women." This issue links several related postmodern concerns. One of these is often called the "essentialism" issue, because it raises the question of whether the category "women" can be said to have any coherent essence. Some postmodernists argue that because there are no common underlying features or experiences shared by all women, the term "women" should not be used as a descriptive matter in feminist projects. Another associated postmodern concern relates to the ultimate vision for feminism. Postmodern feminists argue that feminism should seek to deconstruct existing identity categories, including the category "women," rather than reaffirm these categories, because they are a means through which power imbalances are maintained. Finally, postmodern feminists argue that, as a matter of strategy, the goals of feminism would be furthered best by a politics not based on women's identity.

In this section, I first describe the critiques of women's identity and difference made by postmodern feminist legal scholars by locating them

note 118, at 831. She cites the work of psychologist Louise Fitzgerald, who demonstrates that while women subjected to sexual harassment only rarely directly object or report the action to supervisors, most indirectly resist by, for example, leaving the room, using humor to defuse the comment, or changing the subject. *Id.* at 833 (citing Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 *J. Soc. Issues* 117, 118-21 (1995)). Both Marion Crain and Robin Kelley have pointed out that effective resistance practiced by workers in labor disputes has been overlooked because theorists have used too narrow a definition of resistance. See ROBIN KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* 17-34 (1994); Crain, *supra* note 26, at 1883-84.

in historical context. I then assess their usefulness for feminist legal theory. In doing so, I argue that postmodern feminist insights should cause feminists to seek to expand opportunities for establishing identities that diverge from dominant gender discourses. These insights should also cause feminists to hesitate before generalizing about women as a group. Yet feminists should neither eliminate “women” as an identity category nor translate postmodern theory into a rigid bar against generalizations based on gender. Deconstructing the category “women” ignores the fact that identities are not only inevitable, but also potential sources of strength. Further, while postmodernism clarifies the need to deconstruct the current rigid vision of a gender binary, and to detach it as far as possible from biology, these goals may not be best furthered by a prohibition on using the term “women.” Instead, refusing all gender-based generalizations could hinder movement toward gender equality by preventing scrutiny of the way in which women’s and men’s lives and subjectivity are shaped by the discourse and practices of gender hierarchy. Such a refusal also risks leaving male-biased standards unscrutinized and unchanged.

A. *Postmodern Objections to Gender Generalization*

The postmodern feminist critique of gender generalization emerged in response to earlier feminist legal theory’s treatment of the identity category “women.” This section seeks to explain the emergence of that critique in historical context. In doing so, I identify three different, albeit overlapping, phases in feminist legal theory’s treatment of the category “women,” and of the issue of “differences.”¹²³

¹²³ In tracing the emergence of these discourses, I will borrow to some extent from the schema laid out in both Nancy Fraser’s account in *Multiculturalism, Antiessentialism, and Radical Democracy*, and Susan Bordo’s somewhat different account of this debate in her essay *Feminism, Postmodernism, Gender Skepticism*. See SUSAN BORDO, *Feminism, Postmodernism, and Gender Skepticism*, in UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY, *supra* note 32, at 215; NANCY FRASER, *Multiculturalism, Antiessentialism, and Radical Democracy: A Genealogy of the Current Impasse in Feminist Theory*, in JUSTICE INTERRUPTUS, *supra* note 1, at 173. I categorize this history into three separate phases only for heuristic purposes. In the real world, of course, the underlying events do not break down into neat categories.

The phases I describe somewhat resemble the taxonomy of feminist legal theory presented in Martha Chamallas’s insightful book. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 23 (1999). However, because I focus specifically on how feminist theorists have treated the issue of difference, my categorization is somewhat different from Chamallas, who takes on the larger project of describing feminist legal theory generally. For example, I treat her “Equality Stage” and “Difference Stage” together, while I separate her “Diversity Stage” into what I call a “diversity phase,” and a postmodern phase. (In using the term “diversity phase,” I have borrowed Chamallas’s terminology, albeit in a slightly modified form.)

1. *Women's Differences from Men*

Feminist legal theory's first treatment of women as an identity category, dominant from the late-1970s to the mid-1980s, structured the conversation around women's differences from men. The question on the table was how the law should respond to women's differences from men in order to achieve sex equality. The initial answer, promulgated by liberal feminists, was the "equal treatment" position, which stressed women's similarities to men. Equal treatment feminists argued that the goal of sex equality required sex-neutral standards that de-emphasized differences between the sexes.¹²⁴ In response to the limitations of this position, and particularly in response to the issue of pregnancy, where women's differences from men are difficult to ignore, other feminists developed arguments that stressed women's differences from men. The first such "differences" approach, the "special treatment" position, contended that policies must take into account women's "real" (read: biological) differences from men. Special treatment advocates therefore supported gender-specific accommodations for pregnant and breastfeeding women, even when no comparable policy would accommodate men.¹²⁵

Two other approaches that stressed women's differences from men emerged later in the first phase. One of these, often referred to as "cultural feminism," posits that women are different from men in ways that extend beyond biological differences. Drawing on work by Nancy Chodorow¹²⁶ and Carol Gilligan,¹²⁷ cultural feminists contend that women generally define themselves in connection to others while men define themselves as separate from others. As a result, women generally ap-

¹²⁴ See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175 (1982); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325, 328 (1985).

¹²⁵ E.g., Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 *GOLDEN GATE U. L. REV.* 513, 537-57 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 *IND. L.J.* 375, 426-42 (1981).

¹²⁶ See NANCY CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) [hereinafter *THE REPRODUCTION OF MOTHERING*]. Chodorow, in contrast to some cultural feminists, sees women's differences from men as deriving not from immutable biology but from women's being assigned the majority of childrearing responsibilities. Chodorow is also quite clear that this assignment and the differences it produces between women and men are not mutually beneficial to the two sexes.

¹²⁷ See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). It should be noted that Gilligan does not present the different methods of moral reasoning that she identifies as specific to particular sexes. Instead, she states that her aim is to "highlight a distinction between two modes of thought" that have been produced generally, although not solely, along gender lines. *Id.* at 2.

proach the world differently than men.¹²⁸ “Women’s concept of value revolves not around the axis of autonomy, individuality, justice and rights, as does men’s, but instead around the axis of intimacy, nurturance, community, responsibility and care.”¹²⁹ Equality, for cultural feminists, requires changing societal standards in order to revalue women’s attributes, which have been wrongfully undervalued in patriarchal society. The issue is no longer accommodating women’s “differences” from men, but recognizing that law and societal standards should be adapted to two equally valid modes of orientation to the world.

The other feminist approach to differences that emerged at the end of the first phase is the “dominance approach” described in Part I, which is most closely associated with Catharine MacKinnon. MacKinnon, in contrast to cultural feminists, asserts that women’s differences from men represent a stunting of women’s capacities rather than a different mode of orientation to the world that should be valued either neutrally or positively.¹³⁰ In MacKinnon’s words, playing on the title of Carol Gilligan’s groundbreaking work: “Take your foot off our necks, then we will hear in what tongue women speak.”¹³¹ At the same time, MacKinnon argues that feminist theory during this first stage of the debate was itself misfocused in centering the discussion of sex equality on women’s differences from men. MacKinnon suggests that framing the debate in these terms ignored the problem with standards constructed on the basis of a male norm:

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

¹²⁸ See Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759, 767–73 (1990); Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447, 481–86; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584–85 (1986).

¹²⁹ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1988).

¹³⁰ See CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 39 (1987).

For women to affirm difference, where difference means dominance . . . means to affirm the qualities and characteristics of powerlessness. . . . Women value care because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don’t just speak differently. . . . Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is also silence of the deep kind, the silence of being prevented from having anything to say All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.

Id.

¹³¹ *Id.* at 45.

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.¹³²

Sex equality, she argues, should move beyond a focus on similarity and difference both to redress power disparities between men and women and to challenge androcentric standards.¹³³ These insights of MacKinnon's helped move the debate over equality in feminist legal theory beyond the discussion of women's differences from men and toward examination of societal norms that disadvantaged women.¹³⁴

2. Differences Among Women

Nevertheless, the discussion of differences continued in feminist theory, albeit in a reconfigured form, in the second phase of this discussion, which began in the late-1980s. In this phase, scholars turned away from focusing on women's differences from men toward focusing on differences among women. This movement was ushered in by women of color and was joined by others who demonstrated that what had been characterized as descriptions of "women" in the first phase were, in fact, often descriptions of only white middle-class women.¹³⁵ These "diversity theorists"¹³⁶ critiqued the first phase's descriptions of women as a group—particularly descriptions by cultural and dominance feminists, which tended to emphasize women's similarities to one another—as "essentializing" women. In other words, these theorists argued that many first-phase descriptions assumed an essence and a mode of oppression common to all women. Second-phase theorists pointed out that what it means to be a woman varies with, and is related to, the race of the woman. As this phase progressed, other feminist legal theorists pointed out how the first phase ignored other axes of power besides race, including class, age, and sexuality.¹³⁷ In response, feminist legal analyses in this

¹³² *Id.* at 34.

¹³³ *Id.*; see also Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1374–76, 1393–99 (1986).

¹³⁴ Ultimately, many scholars who took other positions in the first phase of the debate moved toward the position that eradicating male-biased standards is necessary to the achievement of equality. See, e.g., Nadine Taub & Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825 (1985).

¹³⁵ See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Crenshaw, *supra* note 35, at 1251–52; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mahoney, *supra* note 35; Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

¹³⁶ See *supra* note 123.

¹³⁷ See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989–90).

second phase began to offer accounts of oppression that considered multiple axes of power.¹³⁸

3. Poststructuralism and Difference

Beginning in the early 1990s, while diversity theorists continued to voice their concerns about the essentializing tendencies of feminist legal theory, feminist legal theory entered the third and current phase of the debate. In this phase, a different discourse emerged regarding women's "differences" from one another, this time influenced by poststructuralism.¹³⁹ In contrast to criticisms raised by diversity theorists, which center largely on whether the depiction of women accurately applied across groups of women, poststructuralist objections to the category of "women" relate to theoretical views on the relationship between power and discourse. According to poststructuralist theory, prevailing power relations replicate themselves through the way in which we categorize the world and the categories through which we see ourselves. These categories cannot be understood as stemming from the essence of the categorized objects themselves; they are, instead, products of discourse, in which knowledge and power come together to produce a particular picture of the world. Identity, then, is inextricably linked with the workings of power. Accordingly, for poststructuralists, relying on categories such as "gender" or "women" not only depicts prevailing visions of these concepts, it creates and perpetuates them through an exercise of power. As Tracy Higgins presents the issue,

Postmodernism suggests that the problem lies not in ensuring that the representation of women's experience is accurate, but rather in the concept of representation itself. Sexual difference, however it may be measured, is irretrievably bound up with gender. In short, gender itself is a product of power and language and social institutions, including law, not a reality that preexists those structures.¹⁴⁰

In this view, the subject of feminism, presumed in modernist discourse to be "women," is, in fact, an artifact produced by discourse.

¹³⁸ See, e.g., Crenshaw, *supra* note 35, at 1241–45; Harris, *supra* note 135; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Minow, *supra* note 135; Patricia Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11 (1989).

¹³⁹ See, e.g., CORNELL, BEYOND ACCOMMODATION, *supra* note 16; EISENSTEIN, *supra* note 14, at 31–36; FRUG, *supra* note 17, at 46–49; Patterson, *supra* note 17.

¹⁴⁰ Higgins, *supra* note 14, at 1570; see also EISENSTEIN, *supra* note 14, at 31 ("[C]ategories are created by the human mind.").

For feminist poststructuralists influenced by Jacques Derrida, language not only creates the category “women,” it is the instrument of Western metaphysics’ drive to subordinate them.¹⁴¹ For Derrida, the Western “metaphysics of identity,” or the “philosophy of the same,” neutralizes the threat of the Other, including the heterogeneity that might otherwise exist, by structuring Western language around a series of binaries in which one member of the pair is privileged, and the other is fixed in a secondary position.¹⁴² The subordinated item of the pair is inevitably conceived only in opposition to the privileged term; it delineates the boundaries of the privileged concept by showing what the privileged concept is not. According to Derrida, the relationship between “man” and “woman” is one of the primary binaries that structures Western thought. The category “man” is privileged over “woman” and is conceived of as “normal” and “whole.”¹⁴³ In contrast, “woman” is seen only in contrast to the privileged male term and only defines the boundaries of the category “man” through what is *not* woman: for example, if women are weak, men must be strong; if women are irrational, men must be rational. In this way, Western metaphysics both subordinates what is Other within the system while, at the same time, conveying the illusion of two, stable, differentiated categories.¹⁴⁴

Gender oppression in this view is inherently linked to society’s consideration of the gender binary as a primary form of categorization and its assignment of opposing characteristics to the two genders. Accordingly, even those feminists who ground their politics in the category “women” in order to eradicate gender hierarchy are engaged in a politi-

¹⁴¹ See, e.g., Patterson, *supra* note 17, at 260–61, 272–73, 301–02.

¹⁴² As Derrida writes: “Now, in its mastery and its discourse on mastery . . . philosophical power always seems to combine *two types* These two kinds of appropriating mastery, hierarchy and envelopment, communicate with each other according to complicities we shall define.” JACQUES DERRIDA, MARGINS OF PHILOSOPHY, at xix-xx (Alan Bass trans., Harvester Press 1982) (1972); see also DERRIDA, *Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas*, in WRITING AND DIFFERENCE, *supra* note 64, at 79.

¹⁴³ For Derrida’s most extensive analysis of the feminine in Western thought, see JACQUES DERRIDA, SPURS: NIETZSCHE’S STYLES (Barbara Harlow trans., 1979).

¹⁴⁴ As Zillah R. Eisenstein describes this phenomenon, meaning possesses a

relational status In other words, a thing is both what it is and what it is *not*, and what a thing is *not* is endless. A woman is not a man, but she is also not a multitude of other things. What she *is* is thus endless as well, because meaning is expressed through the relation of “is” and “is not.” The problem here is . . . the hierarchical notion of difference that defines woman by what she is not, representing her as lacking. Difference in this instance is set up as a duality: woman is different from man, and this difference is seen as a deficiency because she *is not* man. This construction of difference homogenizes all women as different in the same way, the way they are different from all men, and establishes the duality man/woman.

EISENSTEIN, *supra* note 14, at 8.

cally counterproductive project: “[T]he premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category. These domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes.”¹⁴⁵ What follows from this is the conclusion that “the way to increase the freedom of women is to free both sexes from the oppositional mode of modernist thinking.”¹⁴⁶

As in the second phase of feminist legal theory, this third phase also critiques earlier feminist writings as essentialist, but this time on post-structuralist grounds. For example, Dennis Patterson criticizes Robin West’s cultural feminist analysis for viewing the concept of “woman” as having a “true nature.”¹⁴⁷ According to Patterson, West errs in assuming that “the idea of woman as a ‘unity of self and nature’ exist[s] outside legal discourse.”¹⁴⁸ Similarly, Tracy Higgins argues that “[f]or West, there is something that is ‘women’s experience’ that exists apart from legal discourse and against which the adequacy of legal categories may be measured. . . . She does not pause to consider the partiality of her own description or its regulatory implications.”¹⁴⁹ By the same token, Higgins argues that MacKinnon’s dominance theory “operate[s] to naturalize a particular type of women’s experience. . . . [through] privileg[ing] women’s accounts of sexual violence while discounting accounts of sexual pleasure as problematic, compromised, or even products of false consciousness.”¹⁵⁰

The different critiques of first-phase feminists made by diversity phase theorists, on the one hand, and postmodern feminists, on the other hand, lead the two groups to advocate different strategies for feminism.¹⁵¹ According to diversity theorists, feminists must attend to the intersection of different axes of power, considering the complex intermixing of oppression and privilege with respect to particular issues.¹⁵² While there

¹⁴⁵ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 4 (1990).

¹⁴⁶ Patterson, *supra* note 17, at 302; *see also* EISENSTEIN, *supra* note 14, at 8 (“[W]e need to dislodge this opposition and recognize the ground in between. Difference must mean diversity, not homogeneous duality, if we are going to rethink the meaning of sex and gender.”).

¹⁴⁷ Patterson, *supra* note 17, at 285; *see also* CORNELL, *BEYOND ACCOMMODATION*, *supra* note 16, at 6, 23–26, 51–64.

¹⁴⁸ Patterson, *supra* note 17, at 285.

¹⁴⁹ Higgins, *supra* note 14, at 1573.

¹⁵⁰ *Id.* at 1568.

¹⁵¹ *See* BORDO, *supra* note 123, at 220.

¹⁵² *See, e.g.*, Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468 (1992) (indicating that the law must recognize that “experiences of racism are shaped by . . . gender, and . . . experiences of sexism are often shaped by . . . race.”); *see also* Crenshaw, *supra* note 35, at 1242.

The problem with identity politics is not that it fails to transcend difference, as

will be times that making claims based on the category “women” will be appropriate, at other times the use of that category will obscure important configurations of power.¹⁵³ What becomes necessary for feminism, then, is a politics founded on listening carefully to other women,¹⁵⁴ and on coalition rather than unity.¹⁵⁵ Diversity theorists should focus less on eradicating the existence of the categories themselves and more on paying careful attention to which categories should apply in particular cases, and to remedying the subordination that accompanies these categories.¹⁵⁶

For postmodern feminists, in contrast, the goal is to deconstruct the term “women” as a unitary category. Since power is located in the creation of categories, power imbalances can be remedied only through destabilizing these categories. The view that Western reason suppresses differences by forcing them into conceptual categories therefore leads to an emphasis on the particular, a focus on heterogeneity. Thus, Dennis Patterson contends that “[p]ostmodernism holds open the possibility of breaking free from careless generalization, of renewing interest in the manifold properties of particular cases.”¹⁵⁷ For postmodernists, realizing this possibility requires pointing out contestation in both the concept of “women” and in its lived reality. As Barbara Johnson describes Mary Joe Frug’s work,

It is precisely when the word “feminist” becomes problematic that the essay becomes truly postmodern. In this analysis of the

some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences. . . . Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.

Id.; see also Mahoney, *supra* note 35, at 247 (“[W]hat happens to white women cannot be usefully described without further examination as what happens to ‘women.’”).

¹⁵³ For example, Kimberlé Crenshaw argues that the issue of male violence against women is one that cannot be understood without considering “intersecting patterns of racism and sexism.” Crenshaw, *supra* note 35, at 1243.

¹⁵⁴ Mahoney, *supra* note 35, at 248 (“Transformative work, which . . . is the point of feminist struggle, involves listening respectfully to those who can see what we cannot This work requires understanding and paying close attention to women as social actors.”).

¹⁵⁵ *Id.* at 250 (“Women can ‘coalesce across differences’ to work on issues of concern to women [M]aking difference visible and making white privilege non-neutral do not mean we need to declare against common ground for women.”); see also Crenshaw, *supra* note 35, at 1299 (arguing for politics of coalition).

¹⁵⁶ Crenshaw, *supra* note 35, at 1296–97 (“At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate it and destroy it.”). This is less true of Angela Harris’s work, which skirts the boundaries between the “diversity theorist” category and the postmodern feminist category. See Harris, *supra* note 135. While Harris points out that white feminists have used the category “women” in ways that have erased women of color, she calls for a politics influenced by postmodernism of “tentative, relational, and unstable” categories. *Id.* at 586.

¹⁵⁷ Patterson, *supra* note 17, at 302.

anti-pornography campaign, Frug does not self-consciously dissect the indeterminacy of “woman” as a theoretical issue . . . but rather she shows how, in real life, as feminists split and debate, the notion of “woman”—or feminist—acquires more than one meaning and becomes a subject of dispute in its own right.¹⁵⁸

Similarly, Dennis Patterson praises the work of Chris Weedon, who argues that “women’s subjectivity will always be open to the plurality of meaning and the possibilities contained within this plurality will have different political implications.”¹⁵⁹ Patterson also approves of Zillah Eisenstein’s recognition that “there is no (one) such thing as ‘female sexuality.’ On the contrary, there are many ways to think about female sexuality. Like pornography, ‘it has a multiplicity of meanings.’”¹⁶⁰

The poststructuralist distrust of generalizations about gender leads to the use of narrative as a privileged strategy. For Patterson, narrative reconstruction “steers a course between the Scylla of essentialism and the Charybdis of free-wheeling Deconstruction.”¹⁶¹ Narrative, in this sense, according to Anne Dailey, documents “the multiplicity of female experience in a way inaccessible to abstract theory.”¹⁶² It has the virtue, according to Joan Williams, of “avoid[ing] overstatements about the scope of commonality . . . among women.”¹⁶³

B. Evaluating Postmodern Hesitations to Generalize About Gender

In this section, I critique the usefulness of postmodern positions regarding women’s identity. These positions take three forms: (1) postmodern hesitations to use the category “women” as a descriptive matter in feminist projects; (2) postmodern visions of eliminating the categories of “women” and “men” in favor of more self-defined, less biologically based, identities; and (3) postmodern strategies of eliminating identity groups as a source for political change. I consider each in turn.

1. Gender Hesitations in Contemporary Descriptions

The postmodern feminist critique has added powerful insights to the way in which feminist theory’s use of the term “women” has perpetuated

¹⁵⁸ Barbara Johnson, *Response: The Postmodern in Feminism*, 105 HARV. L. REV. 1076, 1082 (1992).

¹⁵⁹ CHRIS WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* 167 (1987).

¹⁶⁰ Patterson, *supra* note 17, at 301–02 (quoting EISENSTEIN, *supra* note 14, at 172).

¹⁶¹ *Id.* at 313.

¹⁶² Anne Dailey, *Feminism’s Return to Liberalism*, 102 YALE L.J. 1265, 1276 (1993).

¹⁶³ Williams, *supra* note 14, at 322 n.122. Joan Williams also notes other reasons for feminist legal scholarship’s turn to narrative: “Current trends in legal scholarship . . . allow feminists to articulate the view that women’s experience is so thoroughly silenced by dominant forms of discourse that de-privileged genres, such as personal narrative, may be necessary to enable women to communicate what they see as basic realities.” *Id.* at 320.

false unities and exclusions. As both diversity scholars and postmodern scholars have shown, Gilligan, MacKinnon, and those who followed in their wakes often glossed over other dimensions of social identity, attributing to “women” what actually should apply to women of a certain class, race, and historical period. Further, much of this work failed to recognize how particular women diverged from the characteristics attributed to representative groups. Additionally, some cultural feminist discussions of the cause of women’s differences from men tended to read such differences as ahistorical, pre-political, and not susceptible to change.¹⁶⁴ Finally, such descriptions of women failed to show ways in which the concepts of “women” and “femininity” have no single meaning in contemporary Western society, but are instead sites of intense contestation.

With that said, the ethnocentric biases and oversimplifications of this earlier phase must be understood in historical context.¹⁶⁵ Feminism at this earlier stage of the debate had just recognized a multitude of biases in how society was structured that disadvantaged large numbers of women. While the work of feminist legal theorists during this first phase often presented men and women in overly broad strokes, these broad strokes allowed feminist legal theory to attack previously unassailable biases. In this way, feminists of this era claimed important ground that could later be reworked by other feminists. The critiques made by postmodern feminist scholars at their best constitute such reworkings. Postmodern feminist legal theorists, as well as the critiques from diversity theorists, have helped curtail ethnocentrism in feminist legal theory. They have helped draw more complex pictures of both women’s lived realities and the contested meanings of the concept of “women.” Further, they have starkly laid out the ways in which women’s current condition is not integral to women and hence unchangeable, but is instead the product of a particular historical and social context.

Yet some versions of postmodern feminism, in eschewing gender generalization under any circumstances, threaten the gains made by earlier feminist legal theorists. Gender, although a discursive fiction that is inherently unstable and contested, and while always intertwined with other axes of power, remains a primary axis of power in our society that affects the lived reality of men and women.¹⁶⁶ By foreclosing discussion of women’s similarities as a group, postmodern feminist legal theory risks missing the ways in which these discursive constructions have nor-

¹⁶⁴ This by no means applies to all work by cultural feminists. For example, both Carol Gilligan and Nancy Chodorow attribute women’s differences from men to cultural patterns, rather than to some pre-cultural, biologically fixed cause. See CHODOROW, *THE REPRODUCTION OF MOTHERING*, *supra* note 126; GILLIGAN, *supra* note 127.

¹⁶⁵ See BORDO, *supra* note 123, at 224.

¹⁶⁶ See *id.* at 215.

malized women (and men) as they live their lives. As Susan Bordo points out,

Too relentless a focus on historical heterogeneity . . . can obscure the transhistorical hierarchical patterns of white, male privilege that have informed the development of Western intellectual, legal, and political traditions. More generally, the deconstruction of dual grids can obscure the dualistic, hierarchical nature of the actualities of power in Western culture.¹⁶⁷

Insofar as postmodern feminism's rejection of the category of "women" in favor of describing women in their particularity stems from its rejection of "grand theory,"¹⁶⁸ feminist legal theory should approach postmodernism's claims with suspicion. Feminism is built on the premise that societal forces, even those embodied in local practices, create a field of power divided along the axis of gender. As Foucault's early work demonstrates, one of the most frightening features of power in modernity is the way in which certain kinds of practices cohere to produce normalizing forces of enormous strength and breadth. In John McGowan's words, power is still, "despite all Foucault's talk of micropower—seen as possessing a daunting generality."¹⁶⁹ In banning generalizations about women as a group, no matter how provisionally they are made and how well they are historically and culturally circumscribed, postmodern feminist legal theory risks being unable to pinpoint the purportedly neutral standards and practices that perpetuate gender hierarchy.¹⁷⁰

Without the ability to make generalizations, feminism could not have waged many significant legal battles. For example, absent some recognition that women tend to have smaller physiques than men, women could not have successfully attacked job structures that impeded equality in the workplace.¹⁷¹ Similarly, without recognizing that cultural standards pro-

¹⁶⁷ See *id.* at 234 (footnote omitted). In Fredric Jameson's words, "If we do not achieve some general sense of a cultural dominant, then we fall back into a view of present history as sheer heterogeneity, random difference, a coexistence of a host of distinct forces whose effectivity is undecidable." Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 *NEW LEFT REV.* 53, 57 (1984). Put another way, the focus on endless differences turns heterogeneity into a seamless unity, which Martin Jay has described as the poststructuralist "night of endless *différance* in which all cows [are] piebald." MARTIN JAY, *FIN-DE-SIECLE SOCIALISM AND OTHER ESSAYS* 148 (1988).

¹⁶⁸ E.g., Higgins, *supra* note 14, at 1569 ("The postmodern skepticism of grand theory resonates with feminist legal theory's increasing distrust of universal claims about women.").

¹⁶⁹ MCGOWAN, *supra* note 1, at 143. Foucault himself argues that the move away from traditional theory "does not mean that no work can be done except in disorder and contingency." FOUCAULT, *supra* note 113, at 47; see also *id.* ("The work in question has its generality, its systematicity, its homogeneity, and its stakes.").

¹⁷⁰ See BORDO, *supra* note 123, at 234.

¹⁷¹ Based on this recognition, a number of height and weight requirements have successfully been challenged as discriminatory. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321

duce a world in which most women know less about certain products than most men and in which women of all ethnic groups in this culture assume the majority of child-care responsibilities, it would have been impossible to identify the problems posed by the now-infamous job description for commission salespersons challenged in *EEOC v. Sears, Roebuck & Co.*¹⁷² The Sears job description, which reflected the stereotypical American male, demanded that employees work evening hours and sought knowledge of commission sales items like sporting goods, technical goods, and automotive equipment.¹⁷³ A feminist theory that destabilizes the category of women until it has become entirely indeterminate in theory sacrifices the ability to locate and contest existing societal standards adapted to fit the profile of men.¹⁷⁴

I am not arguing here that generalizations based on gender will always be appropriate—certainly there will be instances in which differences among women, or between different groups of women, should be deemed to eclipse their commonalities. And the era of uncritical ethnocentrism has passed—feminists should be quite sure that generalizations made about women apply generally across age, class, and ethnicity. Instead, I am arguing that the determination of commonality or difference among women can be made only after looking at the relevant similarities and differences and taking into account the purpose of the project. While there are many cases in which commonalities among groups of women regarding some issue will not be so strong as to warrant consideration of women as a group, with respect to other issues and other projects, discussions of women's commonalities will yield enlightening results. For example, while postmodern feminists are undoubtedly right that the experience of pregnancy and childbirth varies across cultural groups, generali-

(1977) (invalidating height and weight requirements for prison guards); *United States v. North Carolina*, 512 F. Supp. 968 (E.D.N.C. 1981) (striking down height requirement for state highway patrol officers that excluded more than three-fourths of female applicants); *Officers for Justice v. Civil Serv. Comm'n*, 395 F. Supp. 378 (N.D. Cal. 1975) (same with regard to city police patrol officers). Other job requirements adapted to men's rather than women's physiques have also been challenged. *See, e.g., Boyd v. Ozark Air Lines*, 419 F. Supp. 1061 (E.D. Mo. 1976) (finding that airplane cockpits built with reference to man of average height may hinder performance of woman of average height), *aff'd*, 568 F.2d 50, 54 (8th Cir. 1977).

¹⁷² 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

¹⁷³ *Id.* at 1289–90. The job description also conformed to this stereotype in seeking “aggressiveness or assertiveness, competitiveness, . . . persuasiveness, an outgoing or extraverted personality, self-confidence, personal dominance, [and] a strong desire to earn a substantial income.” *Id.* at 1290. A questionnaire for the “vigor” Sears deemed necessary for the job sought affirmative answers to such questions as: “Do you have a low pitched voice? Do you swear often? Have you ever done any hunting? Have you played on a football team?” *Id.* at 1300 n.29.

¹⁷⁴ By the same token, postmodern difficulties with the issue of representation cannot be solved simply by reading the category of women as unstable and heterogeneous. Postmodernism shows us that *all* accounts and representations are partial and positioned. This applies to those that read the category of women as indeterminate as well as to those that read the category as determinate.

zations about reproductive issues across groups will still sometimes be illuminating. As Susan Bordo notes, no matter how different that experience is across cultures, it is unlikely that it is as different as women's reproductive experiences are from men's.¹⁷⁵

Rather than treat postmodernism as advocating a complete ban on gender generalization, the postmodern emphasis on difference and multiplicity should instead be understood as requiring a variety of approaches and accounts—some of which focus on women's differences, others of which focus on their commonalities. Some projects would be better served by demonstrating the ways in which women's lived reality is far more complicated than binary constructions of gender allow, in order, as Dennis Patterson argues, to undercut the view that "with respect to 'woman,' there is only one story to tell."¹⁷⁶ At other times, the gender dimension will be sufficiently illuminating of cultural patterns to warrant an analysis that focuses on women generally. In a world in which, as Foucault points out, "everything is dangerous,"¹⁷⁷ feminist legal theorists need to weigh which danger is greater with respect to a given project—the danger of essentializing women, or the danger of missing their commonalities.¹⁷⁸ No simple *a priori* ban on considering similarities can accomplish this task.

Of course, even in those cases in which a focus on commonality produces illuminating results, postmodernism helps us to think of ways in which this commonality should be presented. As Tracy Higgins insightfully argues, the postmodern problematization of representation is not a reason to back away from describing women; rather it requires acknowledgement that any such representations are partial, contingent, and an exercise of power.¹⁷⁹ Further, those asserting difference should be

¹⁷⁵ See BORDO, *supra* note 123, at 222.

¹⁷⁶ Patterson, *supra* note 17, at 310.

¹⁷⁷ Michel Foucault, *Afterword*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 227, 231 (Hubert Dreyfus & Paul Rabinow eds., 2d ed. 1983).

¹⁷⁸ See, e.g., BORDO, *supra* note 123, at 234.

¹⁷⁹ See Higgins, *supra* note 14, at 1580–81, 1593. Higgins also argues that postmodern insights require that feminist theorists stop arguing "that the alternative account of women is 'true' or representative of women's experience generally," *id.* at 1588, and instead transform "feminist arguments from claims of authority to claims of advocacy." *Id.* at 1593. In this way, according to Higgins, feminism can avoid the virtually unanswerable critique regarding the accuracy of a particular representation of women. Instead, the validity of a position depends upon whether it offers a persuasive account of the connection between women's experience and substantive commitments to equality and justice. See *id.* at 1588. Here, Higgins goes partially astray. Although postmodern epistemological critiques demonstrate that there is no definitive standard by which to measure the accuracy of particular accounts of women, feminism has no choice but to offer them, even though such accounts can only be judged according to culturally produced standards of truth. Without some account of women's condition, one cannot assess the connection between their experience and substantive commitments to the ideals that Higgins claims should be determinative. For example, the claim that the nation's commitment to sex equality requires the abolition of some minimum height and weight requirements is necessarily premised, albeit implicitly, on a claim that men meet these standards more often than women and that, therefore,

mindful of the historical contingency of the differences at issue.¹⁸⁰ Finally, cultural sensitivity needs to be used when the category of “women” is invoked so that generalizations do, in fact, apply to women generally.

2. *Deconstructing the Gender Binary as Feminist Vision*

By showing the ways in which identity categories are discursive constructions inherently linked to the workings of power, postmodern feminists also make strong arguments for the ultimate goal of deconstructing gender categories. In this way, postmodern feminism poses weighty questions both to cultural feminists and diversity theorists insofar as they seek to reevaluate existing identity categories. Postmodernism recognizes what cultural feminism and diversity theorists have often elided: that the very category of “women” (or “black women” or “lesbian black women”) and the contents of that category are both the effects of power and an instrument that reproduces power’s workings.¹⁸¹ The attempt to revalue this male/female binary risks adopting “the very models of domination by which we were oppressed, not realizing that one way that domination works is through the regulation and production of subjects.”¹⁸² Identities produced in this way, as Wendy Brown argues, may “become [so] deeply invested in [their] own impotence,”¹⁸³ in their status as injured victims, that it is deconstruction rather than reevaluation that feminism should seek.¹⁸⁴ Postmodernism, then, points feminist legal theory toward rethinking the contents of identity categories and de-emphasizing the delineation between categories, seeking more fluid notions of gender identity that are less closely linked to a particular sex.

Yet postmodern feminists go too far in asserting that feminists should seek to eliminate the category “women,” not only as that category applies to gender roles (meaning culturally constructed characteristics and roles applied to the sexes), but also as it applies to biological sex dif-

women are generally shorter and weigh less than men. Cf. Barrett, *supra* note 11, at 210 (“[D]espite disclaimers that there is no such thing as truth, only effects of truth that are discursively secured, Foucault’s substantive analyses themselves propose a *better account* of the history of mental illness, or punishment, or sexuality, than previous histories, and in this sense are loaded with epistemological claims.”).

¹⁸⁰ See Higgins, *supra* note 14, at 1580.

¹⁸¹ Marion Crain has pointed out to me that this insight parallels MacKinnon’s idea that “[d]ifferences are inequality’s post hoc excuse, its conclusory artifact, its outcome presented as its origin . . . its damage that is pointed to as the justification for doing the damage after the damage has been done . . .” MACKINNON, *supra* note 27, at 218–19. Moreover, the postmodern feminist critique of cultural feminists echoes MacKinnon’s own critique of Gilligan. See *supra* notes 130–131 and accompanying text. MacKinnon, however, does not take the next step taken by postmodern feminist theorists, who contend that because the problem is caused by the binary categorization, remedies that rely on this categorization will perpetuate rather than alleviate oppression.

¹⁸² Butler, *supra* note 1, at 48.

¹⁸³ BROWN, *supra* note 10, at 70.

¹⁸⁴ See *id.* at 70–74.

ferences. Certainly postmodern feminists have made a compelling case that the interplay of the biological and the cultural is far more complex than feminists previously recognized, and that biological differences between the sexes are not the neat binary feminists previously conceived.¹⁸⁵ Yet neither point leads inevitably to the conclusion that there are no biological characteristics that differentiate most men from most women that to some extent can and will shape people's lives.¹⁸⁶ While such biological characteristics are never entirely independent of cultural references, and the impact of these characteristics depends on the culture with which they intertwine, biology sets certain—and different—parameters on, for example, men's and women's average heights and their respective roles in the reproductive process.¹⁸⁷

It is at the peril of gender equality that feminists seek to deconstruct the conceptual structures that allow such differences to be identified in order to ensure that societal norms accommodate them.¹⁸⁸ While the goal of feminism should be to limit the impact that such differences have on

¹⁸⁵ For example, Judith Butler problematizes the often-made feminist distinction between "sex" and "gender" by pointing out that what feminists usually take as firm binary biological distinctions between men and women are actually themselves infiltrated by cultural constructions. See BUTLER, *supra* note 145, at 4, 6–7, 24–25. See also Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, SCIENCES, Mar.-Apr. 1993, at 20.

¹⁸⁶ In Martha Nussbaum's words,

it is much too simple to say that power is all that the body is. We might have had the bodies of birds or dinosaurs or lions, but we do not; and this reality shapes our choices. Culture can shape and reshape some aspects of our bodily existence, but it does not shape all the aspects of it. "In the man burdened by hunger and thirst," as Sextus Empiricus observed long ago, "it is impossible to produce by argument the conviction that he is not so burdened."

Martha C. Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37, 42.

¹⁸⁷ Along with embodied differences, differences between the sexes that relate to personality and temperament may also exist, although this remains a matter of dispute. See, e.g., CAROL TAVRIS & CAROLE WADE, *THE LONGEST WAR: SEX DIFFERENCES IN PERSPECTIVE* (2d ed. 1984). I take no position on whether such differences exist except to note two points: First, culture, in its interplay with biology, clearly plays a large role in creating any such differences. Second, to the extent that biology plays a role in these differences, feminists must seek to ensure that societal standards do not disadvantage women because of their differences from men.

¹⁸⁸ Much of the opposition to arguments based on biology in postmodernism comes from followers of Derrida, who deny the possibility of any reality beyond discourse. Despite his infamous statement that "[t]here is nothing outside of the text," DERRIDA, OF GRAMMATOLOGY, *supra* note 65, at 158, Derrida has in fact taken pains to explain that it is the unproblematic relationship between the text and the real that he disputes, rather than the denial of the real or any connection between language and the real. Thus, Derrida argues against the prevalent interpretation of his work as "a declaration that there is nothing beyond language, that we are imprisoned in language . . . and other stupidities of that sort. . . . [T]o distance oneself from the habitual structure of reference, to challenge or complicate our common assumptions about it, does not amount to saying that there is *nothing* beyond language." Derrida, *supra* note 71, at 173; see also NORRIS, *supra* note 51, at 143–44.

the lived reality of humans and to prevent these differences from being translated into gender hierarchy, addressing gender inequality will sometimes require recognition of certain differences even in a restructured culture. It is for this reason that the recognition both that women have the capacity to become pregnant and that society has some responsibility to ensure that this characteristic does not result in women's subordination has provided the foundation of much feminist legal theory.

3. *Gender Deconstruction as a Strategic Matter*

Further, even leaving aside issues of biological difference between the sexes, it is not clear that the complete deconstruction of the category "women" is practicable for feminism as a political matter. The view that feminist theory should seek to unsettle all identity categories misses postmodernism's own recognition that the construction of identity is a social process, which is forged in part through assuming particular social identities.¹⁸⁹ Postmodernism understates the formative importance of such social identities when it argues that they can and should be called into question. Ironically, this goal echoes the humanistic version of the self that postmodernism purports to reject—the version in which selves are free to reinvent themselves apart from their social determinants. The description recalls the image that Cornell embraces, Derrida's "maverick feminist" who can stand outside her social milieu, participating only when and if she chooses.¹⁹⁰

Advocating the deconstruction of such social identities also ignores the role that group consciousness plays in motivating political change. One of the key insights of multiculturalist movements and diversity theorists is that shared identities, whether or not they are created through marginalization, can be sources of strength.¹⁹¹ Social scientists have demonstrated that, in order to perceive discrimination and to imagine changing the status quo, individuals need collective identities.¹⁹² In Pamela Conover's words,

¹⁸⁹ See *supra* Part I (discussing postmodern discourse theories including Winter's, Lacan's, and Foucault's, which describe identity as socially constructed through relationships with others).

¹⁹⁰ See *supra* note 84 and accompanying text.

¹⁹¹ See Crenshaw, *supra* note 35, at 1297 ("[I]t is important to note that identity continues to be a site of resistance for members of different subordinated groups."); see also Susan Bickford, *Anti-Anti-Identity Politics: Feminism, Democracy, and the Complexities of Citizenship*, *HYPATIA*, Fall 1997, at 111; Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *HARV. WOMEN'S L.J.* 185 (1994).

¹⁹² See, e.g., Patricia Gurin et al., *Stratum Identification and Consciousness*, 1 *SOC. PSYCHOL. Q.* 30, 30–47 (1980); Donna Henderson-King & Abigail J. Stewart, *Feminist Consciousness: Perspectives on Women's Experience*, 23 *PERSONALITY AND SOC. PSYCHOL. BULL.* 415, 415–26 (1997); Arthur Miller et al., *Group Consciousness and Political Participation*, 25 *AM. J. POL. SCI.* 494 (1981).

it is difficult to move individuals to take collective action without a “we”—a sense of collective identity Moreover, to the extent that identities help to crystallize shared preferences, sabotaging collective identities may not only eliminate the emotional motivation for collective action, but it may also obfuscate the rationale for it—the common interests of the “we.”¹⁹³

Hence, while recognizing that the “we” of women is a discursive construct produced by the workings of power and at the same time seeking to ensure that less weight is placed on the importance of gender and that the binary lines of gender are blurred, feminists must still retain some vision of women as a category through which political action and resistance can be founded.

C. Conclusion

In sum, postmodern feminist legal theorists convincingly demonstrate the reasons that feminists should seek to move toward eradicating the existing, rigid gender binary. These theorists are less successful, however, in thinking through both how to accomplish this project and where to set its limits. Seeking to effect the deconstruction of the gender binary by ignoring the effects of gender on men’s and women’s lives exemplifies the tendency to confuse theorizing with political action. Instead, feminists must recognize the way in which gender has profound effects on individuals in society, in order both to challenge standards that contribute to inequalities between the sexes and to change the meaning of gender in human lives.

Further, rather than conceiving of social identities, including that of “women,” as inimical to the freedom of subjects, postmodern feminist legal scholars should recognize that individuals’ identifications with groups are an inherent part of the process of identity formation. To this end, a postmodern feminist legal agenda should be focused not on denying the identity category of “women,” but rather on both reducing the import of gender and on creating the legal conditions that ensure that people are offered an array of identities that depart from dominant gender images. These conditions would seek to ensure that citizens were exposed to exemplars of men and women living in ways that diverged from dominant views of men and women, protected in choosing such identities, and encouraged to define and redefine their own identities through association with others. I take up these issues in greater detail in Part IV.

¹⁹³ Pamela Conover, *The Politics of Recognition: A Social Psychological Perspective* 23 (undated) (unpublished manuscript on file with the author) (citing Hyojoung Kim & Peter S. Bearman, *The Structure and Dynamics of Movement Participation*, 62 *AM. SOC. REV.* 70 (1997)); see also Donald Kinder, *Opinion and Action in the Realm of Politics*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 778 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

III. POSITIVE PROJECTS—POSTMODERN STRATEGIES TO END
GENDER HIERARCHY

Postmodernists have often been criticized for their failure to propose concrete political projects, a failure that has been attributed to several sources. First, the backbone of much postmodern theorizing has been deconstruction, which has focused on dismantling conceptual oppositions in existing projects rather than on proposing constructive political projects of its own.¹⁹⁴ In addition, postmodern contentions that no objective truth or transcendent norms exist have left postmodernists on firmer ground in showing that particular positive projects are not justified by any concrete foundations than in developing positive projects. For this reason, Martha Minow warns that “postmodernism risks a relativism that conflicts with feminist commitments to political engagement, and with a continuing ability to name, authoritatively, and to fight, effectively, what is oppressive.”¹⁹⁵

Even when postmodernists have made positive proposals, they have tended to be pitched at a theoretical level far above the specific political tradeoffs necessary for a viable strategy of resistance.¹⁹⁶ Richard Rorty calls such proposals “futile attempts to philosophize one’s way into political relevance [that] are a symptom of what happens when a Left retreats from activism and adopts a spectatorial approach to the problems of its country. Disengagement from practice produces theoretical hallucinations.”¹⁹⁷ Critics have argued that such postmodern projects, often phrased in the form of vague admonitions to embrace tolerance, respect the Other in its otherness, or resist oppression, “empt[y] the category of the political.”¹⁹⁸ As John McGowan points out, everyone claims to be against oppression and in favor of working for freedom. The real question is how to activate such “vague norms in specific circumstances” to

¹⁹⁴ See *supra* note 11. Derrida, himself, in answering the question of whether deconstruction can be translated into political praxis, replied, “I must confess that I have never succeeded in directly relating deconstruction to existing political codes or programmes.” Derrida, *supra* note 71, at 169.

¹⁹⁵ Minow, *supra* note 11, at 1104; see also Marie Ashe, *Inventing Choreographies: Feminism and Deconstruction*, 90 COLUM. L. REV. 1123, 1127 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988)) (“Readers familiar with deconstructive theory will . . . wonder how the dance of deconstruction with feminism can be other than destructive.”).

¹⁹⁶ See also *supra* note 12.

¹⁹⁷ RICHARD RORTY, *ACHIEVING OUR COUNTRY* 94 (1999).

¹⁹⁸ Catherine Gallagher, *Politics, the Profession, and the Critic*, 15 DIACRITICS 37, 40 (1985). Gallagher argues that Edward Said’s politics serve as a case in point: “[C]omplete unspecifiability is the most striking feature of this politics, the feature that emerges most starkly from the rootlessness, the *disengagement*, inherent in critical affiliation.” *Id.* at 39. Marie Ashe makes a similar criticism of Zillah Eisenstein’s attempt to link feminism with deconstruction. See Ashe, *supra* note 195, at 1135.

curtail oppression,¹⁹⁹ an issue that postmodernists have thus far generally failed to address.²⁰⁰

Yet there are exceptions to the rule that postmodernists avoid proposing specific, positive programs. In this section, I describe two different types of proposals by postmodern feminist legal theorists and then critique their ability to move toward a world free of gender oppression. The first type of project, which I illustrate through work by Zillah Eisenstein²⁰¹ and Drucilla Cornell,²⁰² uses law to revalue differences. The second type of project, represented by the work of Duncan Kennedy, draws on resistant performances and interpretations to interrupt gender hierarchy.²⁰³ I argue that the works of these authors, while certainly different in a number of respects, share similar flaws. All overvalue the role of theory at the expense of the political and social work needed to end gender hierarchy. All also inadequately conceptualize the source of women's "differences" from men and their relation to gender hierarchy. Finally, they all fail to analyze the political and social conditions that will promote the dissident conceptions and performances of gender that they advocate.

A. Using Law to Revalue Differences—Zillah Eisenstein and Drucilla Cornell

1. Eisenstein's and Cornell's Projects

In separate works, both Zillah Eisenstein and Drucilla Cornell propose to move to a postmodern future by rethinking the law's treatment of

¹⁹⁹ MCGOWAN, *supra* note 1, at 176.

²⁰⁰ Drucilla Cornell's explication of Jacques Derrida's work in her book, *The Philosophy of the Limit*, serves as a case in point. CORNELL, *THE PHILOSOPHY OF THE LIMIT*, *supra* note 16. Cornell states that her project demonstrates "why the continuing emphasis on [Derrida's] quasi-transcendental analysis is crucial to justice and, more specifically, to a conception of justice that promotes, not just allows, legal transformation." *Id.* at 8. According to Cornell, Derrida shows the need for "projecting a horizon of the good" within the meaning of the legal system, which recognizes that the legal decisions should always aspire "to pay witness to the otherness of the Good with respect to established convention." *Id.* at 94. Few would deny that judges should seek to do justice in a larger sense than the simple rote application of legal rules. The difficult questions are in what, specifically, justice consists (beyond vague statements of the need to recognize the other in its alterity), and how to mesh this larger conception of justice with the application of the existing system of legal rules. Cornell does not approach these more difficult issues in *The Philosophy of the Limit*.

²⁰¹ See *supra* note 14.

²⁰² See, e.g., Cornell, *Gender, Sex*, *supra* note 18; Cornell, *Sexual Difference*, *supra* note 18.

²⁰³ See KENNEDY, *supra* note 18. I include Kennedy's essay here because it is directed toward eradicating gender hierarchy, influenced by postmodern feminist theorists, including Judith Butler and Mary Joe Frug, and raises the not atypical postmodern strategy of dissident performance. Kennedy, however, specifically disclaims that he is a feminist, apparently on the ground that he is not a woman. *Id.* at 129 ("I do not think of myself as a feminist any more than I think of myself as a black nationalist.").

differences. Their proposals have a number of similarities. Both argue that existing sex equality law cannot achieve its end because it takes men as its standard and therefore fails to value appropriately women's differences from men. For both, differences, derived from the commingling of the biological and the social, exist within and between the sexes.²⁰⁴ While these differences are themselves positive,²⁰⁵ according to these authors they become problematic for women because of a discourse, including a legal discourse, that divides the heterogeneous array of differences in the human population into the binary categories of male and female, reads each of these categories as homogeneous, and then privileges male differences over female differences.²⁰⁶ For Cornell, women's differences from men are also problematic because of the constraints on what men and women can become, in other words, "the imposed law of gender identity on lived possibilities."²⁰⁷

The solution for both authors is to rethink differences in terms of heterogeneity and multiplicity, rather than in terms of a gender binary. According to Eisenstein,

[w]e need to adopt a radical pluralist method for thinking about how difference constitutes the meaning of equality. Such an approach assumes that differences and plurality constitute society but understands that hierarchy and unequal relations of power presently structure those differences. A feminism rooted in radical pluralism aims to destroy the hierarchy and the oppositions that hierarchy constructs, and it seeks to create a view that recognizes a multiplicity of individuals who are free to be equal and are equal in their freedom.²⁰⁸

Each author therefore seeks to reconceptualize sex equality to allow respect for differences by eradicating requirements that women be the same as men in order to be treated equally with them.²⁰⁹ As Cornell frames the issue, two steps are necessary: sexual difference, specifically feminine sexual difference, must be claimed and "celebrated" in order to achieve equality; in addition, rigid structures of gender identity that limit human

²⁰⁴ E.g., EISENSTEIN, *supra* note 14, at 31.

²⁰⁵ Eisenstein states that "[a] methodology of difference(s) focusing on diversity views differences as positive. I have used this radical pluralist methodology to critique the dualistic standpoint of engendered 'difference,' which denies variety and applauds homogeneity." *Id.* at 35; see also *id.* at 33. Similarly, according to Cornell, Derrida's intervention into Lacan opens up a space to "affirm[] [feminine] sexual difference" by demonstrating that women's differences from men are not fully reducible to the dominant definitions of "the feminine" within the gender hierarchy. Cornell, *Sexual Difference*, *supra* note 18, at 2275; see also Cornell, *Gender, Sex*, *supra* note 18, at 280-81; *supra* Part I.A.

²⁰⁶ E.g., EISENSTEIN, *supra* note 14, at 31-33.

²⁰⁷ Cornell, *Gender, Sex*, *supra* note 18, at 281.

²⁰⁸ EISENSTEIN, *supra* note 14, at 222.

²⁰⁹ See *id.* at 1, 33-35.

possibility must be challenged.²¹⁰ Like Eisenstein, Cornell aims toward an appreciation of differences—Derrida’s dream of a “new choreography of sexual difference”—in which gender exists in multiple articulations without a system of hierarchy.²¹¹

The proposals of each author, while similar in seeking to abandon the male standard as the measure for equality, differ in their specifics. For Eisenstein, institutionalizing this new respect for difference in law involves “decenter[ing] the privileged position of the male body”²¹² through sex equality laws that focus on the pregnant body, a condition that has no point of comparison for males. Acknowledging the pregnant body, for Eisenstein, will sometimes, though not always, require that legislation explicitly treat men and women differently. While Eisenstein recognizes that sex-specific legislation raises the danger of subordinating women by suggesting that they need special protection, she argues that without recognition of at least some of their differences, the male standard will reign intact.²¹³

Eisenstein provides no clear statement regarding when sex-specific legislation should be used to further women’s equality, arguing instead that both sex-specific and sex-neutral legislation “need to be assessed in terms of the particular issues at hand, for their strategic effect.”²¹⁴ At specific points in the text, however, Eisenstein indicates that she favors legislative changes that would recognize women’s specificity in ways that exceed those generally conceived of as biologically based. For example, she quotes with approval Alice Kessler Harris’s statement that “a woman’s sense of morality and responsibility, and her behavioral codes (including those that derive from her sense of family and her childbearing capacity),” should, as a matter of social policy, be recognized as a valid alternative within the workplace.²¹⁵ Eisenstein then adds that “[s]pecified legislation can be used to instigate changes in the workplace that would recognize women’s lives in terms of their unique place in the family By attending to the workplace through the family and women’s place in it, we can begin to shift the centered phallus.”²¹⁶

²¹⁰ Cornell, *Gender, Sex*, *supra* note 18, at 293; Cornell, *Sexual Difference*, *supra* note 18, at 2250–51.

²¹¹ Cornell, *Gender, Sex*, *supra* note 18, at 287 (quoting Jacques Derrida & Christie V. McDonald, *Choreographies*, in *THE EAR OF THE OTHER: OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION* 163 (Christie V. McDonald ed., Peggy Kamuf trans., 1985)).

²¹² EISENSTEIN, *supra* note 14, at 1.

²¹³ *Id.* at 205.

²¹⁴ *Id.*

²¹⁵ *Id.* at 206.

²¹⁶ *Id.* at 207. At another point in the text, however, Eisenstein suggests that the distinction between sex and gender should be the dividing line between sex-specific and sex-neutral legislation. *See id.* at 195, 200. Thus, legislation relating to women’s childbearing capacities might generally be sex-specific, while those relating to women’s parenting responsibilities, which is associated with gender rather than sex, might be sex-neutral.

In contrast, for Drucilla Cornell, respect for differences can best be achieved in law through translating respect for sexual difference into Title VII of the Civil Rights Act of 1964,²¹⁷ the federal employment discrimination statute. Cornell argues for interpreting Title VII to guarantee what she calls “equivalent rights” both to nontraditional, intimate relationships and to feminine sexual difference. Equivalent rights, for Cornell, are rights that recognize and value women’s differences from men at the same time that the social implications of these differences are restructured in a way that does not disadvantage women.²¹⁸ According to Cornell, equivalent rights recognize feminine sexual difference as of equal value to its male counterpart without “demand[ing] that the basis of equality be likeness to men.”²¹⁹

By delegitimizing both limits on sexual choice and gender hierarchy, Cornell tells us, equivalent rights move us toward a world in which sexual difference is not differentiated simply into “male” and “female.”²²⁰ However, Cornell argues, the equivalent rights guarantee does this in a way that recognizes “the feminine point of view in law in the name of equality and not by appeal to special privilege.”²²¹ In sum,

equality of well-being in the area of sex and sexuality can only be protected by equivalent rights which value our difference as sexuate beings while, at the same time, breaking down and delegitimizing—and I have suggested this deconstruction engages in precisely this delegitimization—the imposed sexual choices of our current gender hierarchy.²²²

Like Eisenstein, Cornell is fairly vague regarding exactly what equivalent rights would look like in practice. Yet, she too appears to intend her theory to protect both traits and life patterns associated with women as well as women’s physical differences from men. The protection she would offer, however, would explicitly apply to men who possessed traits or adopted life patterns associated with “the feminine.” For example, Cornell contends that equivalent rights would disallow “mommy tracks,” in other words, job tracks that give less pay, prestige, and benefits to those—mostly women—who cannot work long hours because of child care responsibilities. According to Cornell, “if ‘mothering’ is a valued social activity, then there should be no sacrifice of either status or

²¹⁷ 42 U.S.C. §§ 2000e–2000e17 (1994).

²¹⁸ Cornell, *Gender, Sex*, *supra* note 18, at 291–93; Cornell, *Sexual Difference*, *supra* note 18, at 2249, 2257.

²¹⁹ Cornell, *Gender, Sex*, *supra* note 18, at 283; Cornell, *Sexual Difference*, *supra* note 18, at 2248–49, 2257, 2272.

²²⁰ Cornell, *Gender, Sex*, *supra* note 18, at 282, 293; Cornell, *Sexual Difference*, *supra* note 18, at 2248–51.

²²¹ Cornell, *Sexual Difference*, *supra* note 18, at 2250.

²²² Cornell, *Gender, Sex*, *supra* note 18, at 293.

pay and, of course, in the name of collapsing the gender divide, we should encourage men to take up this activity.”²²³ In other words, “men can also be ‘mommies.’”²²⁴

2. *Assessing Eisenstein’s and Cornell’s Projects*

Given the difficulties that other scholars have had in translating postmodern principles into a positive agenda, both Eisenstein’s and Cornell’s attempts to do so are noteworthy. Moreover, in seeking a politics of difference and heterogeneity, both provide feminist legal theory with a valuable goal. At the same time, however, these projects demonstrate similar flaws that impede movement toward ending gender hierarchy. First, they fail to develop an adequate account of how to conceptualize women’s differences from men. In considering difference as unremittingly positive, their views overlook the conditions of inequality in which these differences were produced and the problems that valuing such differences can pose for the feminist project. Second, both theorists fail to think through practical difficulties with their strategy of requiring the law to recognize and revalue traits associated with “the feminine.” Such a strategy not only recapitulates the flaws of earlier positions in feminist legal theory, it also fails to mediate between the authors’ dual goals of reevaluation and deconstruction of women’s differences from men.

a. *Valuing Difference*

At various points in their work, both Eisenstein and Cornell point to the dangers for feminism of adopting an overly simplistic view of women’s differences from men. The equal treatment approach, they tell us, errs in denying differences between the sexes and in granting women equality only insofar as they are the same as men.²²⁵ Cultural feminism, in contrast, Cornell tells us, is flawed in that it sees all women as the same and women’s differences as ahistorical and not subject to change.²²⁶ Further, dominance feminism, for both, falls short in that it treats women as if all their differences from men are negative.²²⁷ Both Eisenstein’s and Cornell’s work therefore gestures toward a more nuanced account of women’s differences from men under gender hierarchy, and a more nuanced corresponding strategy for seeking sex equality. Yet in laying out the path law should follow, both authors simplistically affirm the value of women’s differences from men.

²²³ *Id.* at 292.

²²⁴ *Id.*

²²⁵ EISENSTEIN, *supra* note 14, at 1; Cornell, *Gender, Sex, supra* note 18, at 283; Cornell, *Sexual Difference, supra* note 18, at 2272.

²²⁶ Cornell, *Gender, Sex, supra* note 18, at 281.

²²⁷ *E.g.*, Cornell, *Sexual Difference, supra* note 18, at 2264–68.

Eisenstein's and Cornell's affirmation of women's differences from men stands in tension with the more frequently voiced postmodern hesitations to generalize about women discussed in Part II. This tension, I think, can be attributed to two different sources. First, it stems from the difficulty of developing positive political projects to end gender hierarchy without generalizing to some extent about women's condition. As discussed above, theorists have found it extremely difficult to suggest which direction feminism should take to achieve equality without some diagnosis of women's condition.²²⁸ Second, Eisenstein's and Cornell's affirmation of difference stems from the positive valuation of heterogeneity and multiplicity that runs through postmodern theory generally. Here, Cornell and Eisenstein see the differences between men and women as a subset of the heterogeneity that postmodernism seeks to promote.

In adopting this positive valuation, Cornell and Eisenstein have chosen between two fairly settled schools of leftist thought regarding differences between social groups. On the one hand, those influenced by Marxism and socialism, who might be called the "political left," have tended to treat differences as the unfortunate product of inequality. To feminists within this group, including dominance feminists and some liberal feminists, women's differences from men are the unfavorable result of gender hierarchy. These differences are viewed in much the same way as the political left views low birth weights for babies born to poor families. The appropriate remedy, under this view, is to provide women with the political, economic, and legal conditions needed for equality so that these differences will disappear.

On the other hand, those influenced by multiculturalism and postmodernism, who might be called the "cultural left," have tended to conceive differences as cultural variations rather than the product of inequality, and, thus, to view them positively. Differences here are viewed much as one might view different religious traditions. Feminists who adopt this view, including cultural feminists and multiculturalists, seek not the disappearance of women's differences, but increased respect and protection for devalued traits and characteristics associated with women. Cornell and Eisenstein adopt this latter view of difference.

Yet in taking this position, both authors fail to think through the implications of postmodernism's recognition that selves and their capacities are socially constructed. Some differences produced in conditions of inequality may therefore be the product of this inequality, as the political left recognizes.²²⁹ Attempting to revalue all differences produced in these conditions could be politically counterproductive, since some of these

²²⁸ See *supra* Part II.B.2.

²²⁹ This insight seems especially difficult to ignore given that Cornell draws from the work of Amartya Sen, who focuses on the way in which people's capacities can become stunted when they are deprived of certain tangible and intangible goods. See, e.g., AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

differences could be of the type that should wither away in a world free of gender hierarchy. The issue, then, is the role that particular differences should play in moving toward a restructured world free of gender oppression. We cannot simply celebrate differences without first assessing them. This requires a more differentiated theory of differences than presented by either Eisenstein or Cornell—a theory that would treat different differences differently. To this end, feminists have two possible routes: they can seek legal and societal reevaluation of roles and characteristics associated with women so that women are no longer devalued for these things, or, alternatively, they can seek the disappearance of such roles and characteristics. Which approach they adopt should depend on the particular difference at issue.²³⁰

As Eisenstein, Cornell, and cultural feminists recognize, some of women's differences from men, even when constructed in conditions of sex inequality, should simply be considered just that: "differences" that are akin to cultural variations. Such differences should have *no negative or positive value attached to them* in comparison with the corresponding traits associated with men. An example of such a trait might be some women's less confrontational style as litigators, compared to some men's aggressive strategies. Both styles may work equally well in the practice of law, despite the standard image that the best litigators have a confrontational style. Similarly, women's and men's differences in reproductive roles should be treated as variations, neither of which is valued over the other. In such cases, ensuring that women are not disadvantaged for their "differences" is clearly appropriate in order to move to a society free of gender oppression.

A second set of traits, despite their association with women in conditions of oppression, should conceivably *be valued even more positively* than simply as a cultural variation. Such traits, paradigmatically represented by nurturing, might properly be encouraged in both sexes in a restructured world, rather than protected on a par with comparable qualities in men. For example, the Family and Medical Leave Act of 1993 ("FMLA"),²³¹ while recognizing that women perform the bulk of caretaking activities in our society, protects that activity when undertaken by women or men because of its important role in society. In doing so, it protects and promotes both sexes' engagement in nurturing activities.

However, a third type of difference is also possible: as recognized by MacKinnon, some traits and characteristics associated with women might appropriately *be considered to have a negative valence*, representing the "stunting of skills and capacities" as a result of gender inequality.²³² The

²³⁰ Here I borrow the schema of different types of differences from Nancy Fraser's essay *Culture, Political Economy, and Difference: On Iris Young's Justice and the Politics of Difference*, in *JUSTICE INTERRUPTUS*, *supra* note 1, at 189.

²³¹ 29 U.S.C. §§ 2601–2654 (1994).

²³² FRASER, *supra* note 230, at 203.

association of women with such qualities should ideally disappear in a restructured world. Timidity might serve as one example of such a trait. Revaluing this last group of traits could be counterproductive because it would prevent the disappearance of these qualities while it simultaneously solidified women's association with them. The solution here is not to revalue this third set of differences that should otherwise disappear in a restructured society, but to restructure society to eliminate the inequalities that caused the traits to be associated with women in the first place.

Instead of engaging in the difficult scrutiny that differences require, Eisenstein and Cornell adopt a flawed postmodernism that seeks to embrace *all* difference as positive, and to demand, uncritically, recognition of *all* differences in the law. To them, the problem of sex inequality rests fundamentally on the valuation and interpretation of differences; the unequal conditions that spawned these differences are irrelevant. Their proposals therefore embody the flaws characteristic of a politics that focuses solely on cultural modes of oppression while turning a blind eye to the unequal conditions in which these differences were produced. In this way, despite postmodernism's repeated debunking of the humanist myth of individuals who stand apart from their constitutive conditions, postmodernists themselves perpetuate the illusion that selves (and the "differences" they display) transcend conditions of inequality. The result is a program that could impede transformation toward a restructured society.²³³

b. Treatment of Women's "Differences" Under the Law

Feminists should question not only Eisenstein's and Cornell's advocacy of a wholly positive legal valuation of women's differences but also their preferred methods of achieving this legal revaluation. In particular, both theorists advocate forms of legal review that explicitly distinguish between the two genders in the name of equality. Eisenstein advocates sex-specific legislation that recognizes the differences between women and men. Cornell argues that equivalent rights should be used to celebrate "feminine difference" and to ensure that women's modes of life are valued similarly to men's. This section argues that both proposed strategies risk impeding the elimination of the gender hierarchy that these theorists seek to accomplish.

²³³ In the introduction to the new reprint of her book, *Beyond Accommodation*, which was released as I was finishing this Article, Cornell argues that her "emphasis on the aesthetic nature of our knowledge of sexual difference does not stand in the place of the struggle to change our material conditions." DRUCILLA CORNELL, *BEYOND ACCOMMODATION*, at xxxii (new ed. 1999). To the contrary, this Article argues, it may. Changing material conditions could lead to the disappearance of some of the differences between women and men; celebrating women's differences from men could do just the opposite.

While both Cornell and Eisenstein claim to supersede the previous feminist debate concerning differences through their focus on heterogeneity, they both present proposals that strongly recall the "special treatment" position in that debate. Special treatment advocates argued that because societal standards were not designed with women or childbearing in mind, males would be left as the standard unless legislators crafted specific benefits and protections to cover women.²³⁴ For example, prior to the passage of the Family and Medical Leave Act of 1993, special treatment advocates supported laws requiring employers to grant pregnancy leave for women even where no general disability policy or family leave policy existed for workers of both sexes.²³⁵ While Eisenstein argues that under her proposal sex-specific legislation would allow women to be seen not as disabled or different, but as having different needs, and while Cornell argues that her equivalent rights approach "provides a cultural framework in which recognition of feminine sexual difference need not be reduced to an appeal to 'special treatment,'"²³⁶ even these justifications hark back to those provided by special treatment proponents.

Linda Krieger and Patricia Cooney, probably the best-known advocates of the special treatment position, argued almost twenty years ago that their proposal, in ensuring that women were not disadvantaged for their reproductive differences from men, "does not provide women with an additional benefit denied to men; it merely prevents women from having to suffer an additional burden which no male would ever have to bear."²³⁷ This kind of law, according to Krieger and Cooney, "places women on an *equal* footing with men and permits males and females to compete *equally* in the labor market."²³⁸ The plaintiffs in the 1987 case *California Federal Savings and Loan Ass'n v. Guerra*²³⁹ argued a similar position: "Since men never lose their jobs due to pregnancy disability, the state statute does not grant preferential treatment to women. It simply guarantees equality for all workers."²⁴⁰

²³⁴ See, e.g., Krieger & Cooney, *supra* note 125, at 533; Scales, *supra* note 125, at 426–30.

²³⁵ See Krieger & Cooney, *supra* note 125, at 518–22.

²³⁶ Cornell, *Sexual Difference*, *supra* note 18, at 2257.

²³⁷ Krieger & Cooney, *supra* note 125, at 533.

²³⁸ *Id.*

²³⁹ 479 U.S. 272 (1987).

²⁴⁰ Brief for Respondent at 5–6, *Guerra* (No. 85–494). Eisenstein echoes the special treatment theorist Ann Scales in asserting that the road to equality requires applying different standards for women and men at some points and the same standards at other points, and in suggesting that the appropriate line between the two situations is the distinction between sex and gender. See Scales, *supra* note 125. Scales argues that while women's distinctive needs must sometimes be recognized in legislation, feminism needs "a rule limiting which differences between the sexes can be taken into account and a requirement that in all other circumstances men and women be treated as equals." *Id.* at 432–33. That line, for Scales, is based on basic differences in women's and men's reproductive capacities. Scales would therefore give women special protections only for pregnancy and breastfeeding. *Id.* at 435–36.

The similarities between Eisenstein's and Cornell's positions and the special treatment position leave Eisenstein and Cornell vulnerable to many of the same criticisms that have been leveled against special treatment. Specifically, protecting particular qualities and activities as "feminine sexual difference," in Cornell's words, or codifying "sex/gender specific needs," as Eisenstein would advocate, runs the risk of entrenching the association between women and these qualities and simultaneously stigmatizing women as needing special protection.²⁴¹

Further, these strategies would seem to be undermined by the theorists' own views of how gender hierarchy operates. Both theorists contend that a crucial, oppressive strategy for submerging difference in the West is to categorize heterogeneous elements into binary categories, and then subordinate one category to the other as an abnormal variation of the dominant category. For both, gender hierarchy operates according to this scheme: as women are lumped into one category, men are lumped into the other, and women are then considered defective for not being men. Given this view, will seeking renewed legal recognition of either a male/female or a masculine/feminine binary, then advocating for either a different standard for women or a new respect for "the feminine," really allow women to achieve equality? It seems far more likely that this strategy will contribute to the tendency to view gender as a marker for important, underlying binary differences, and that the calls for the application of different standards to women, or renewed respect for the feminine, will be reconceived as calls to give women the special help they need because of their divergence from the norm.²⁴²

In contrast to the special treatment position, both Eisenstein and Cornell also argue that we must *deconstruct* the sexual binary at the same time that we recognize women's as well as men's needs. By doing so, these postmodern theorists move an important step beyond the special treatment position, which confined its solutions to sex-specific legislation that sought accommodation for women's differences from men. It is here that their postmodernism makes its impact. Yet despite the importance of Eisenstein's statements that the goal of legislation that recognizes women's specificity is to displace the man/woman binary in legal discourse, and

²⁴¹ See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 79 (1990).

²⁴² Cf. Ashe, *supra* note 195, at 1137.

Had Eisenstein examined more carefully the proposition that *differance* is persistent and inescapable, she might have dealt more deeply, less certainly, and more satisfactorily with the notion of "escape from binarism" that she advocates. Given the power of engendered discourse—the "privileging" of maleness that Eisenstein fully recognizes—this issue becomes of great importance. The question is: What kinds of discourse may be possible if *differance* cannot be evaded?

Id.

Cornell's statements that we must both increase the value associated with women's differences *and* deconstruct them, neither author explores the tension between their means and their goals. Namely, neither author considers how giving specific content to "the feminine" for the purpose of giving women legal protection, which would highlight differences between the sexes, could militate against the deconstruction of the sex/gender binary in this society.

Are there strategies through which postmodern feminism can simultaneously revalue and protect characteristics and roles associated with women and yet still move toward loosening the bonds of gender identities? One strategy that would make this more likely would be to ensure that societal standards protect such qualities and roles without either adopting a dual standard for men and women or specifically tagging such qualities with the label "feminine." In other words, rather than create additional protections for women/the feminine while leaving the original standard intact, this strategy would create more inclusive norms that render irrelevant differences that seemed relevant under previous standards. Such a strategy is not new—it is the position toward which most participants within the "difference debate" have gravitated.²⁴³ It does, though, meet postmodern feminism's goals both of ensuring that women's differences, like men's, are protected and valued, and of helping move to a world in which the gender binary disappears. On this view, Cornell's revalued "mommy track" should become a "parenting track," protecting all those who parent. This revaluation has the advantage of making men more likely to participate in caretaking activities than they would as a result of assurances that they, too, can be "mommies." It would therefore help to deconstruct the gender binary in human lives as well as in legal discourse.

B. Dissident Performances and Interpretation—Duncan Kennedy

1. Kennedy's Project

In his essay *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*,²⁴⁴ Duncan Kennedy presents a very different strategy for combating gender hierarchy than Eisenstein or Cornell. Rather than focusing on legal remedies, Kennedy instead focuses on the way in which "small-scale resistance is possible, in the sense that it is not precluded by the hegemonic power of the regime."²⁴⁵ Adopting a Foucauldian view of

²⁴³ See, e.g., Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 72 (1987); Taub & Williams, *supra* note 134; Maxine Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988).

²⁴⁴ KENNEDY, *supra* note 18.

²⁴⁵ KENNEDY, *Preface*, in *SEXY DRESSING ETC.*, *supra* note 18, at vii. ix.

power, Kennedy contends that the only possible solution to the regime of gender domination perpetuated and performed through routine daily interactions “lies in those same routine daily interactions—for example in the dailiness of dress.”²⁴⁶

Kennedy prefaces his essay by noting that he agrees with radical feminist claims that “the regime of patriarchy constructs male and female sexuality so that both men and women are turned on by experiences and images of male domination of women.”²⁴⁷ This regime, Kennedy accepts, causes women to wear sexy dress as a form of both acceptance and political participation in the regime of male dominance.²⁴⁸ Yet he argues that the radical feminist account of patriarchy fails to distinguish between the regime itself and the men and women who live in it. The regime, he contends, does not completely control all of men’s and women’s actions. Because of this, and because conflicting interests and interpretations are always present, people can still subvert the regime on a microlevel. For Kennedy, sexy dress, which he defines as dress that is “close to, at, or over the line that separates dress for this setting from dress for a more sexually charged one,”²⁴⁹ is a resistant strategy.

Kennedy contends that women who wear sexy dress, because of its contested meanings and the different interpretations of it that are possible, may in fact be engaging in behavior resistant to gender hierarchy.²⁵⁰ Kennedy argues that a number of interpretations are possible in reading sexy dress that are more complex than the radical feminist view that it is intended to arouse men sexually and demonstrate that women are there for men’s sexual pleasure. Among these readings, sexy dress can be interpreted as female defiance of patriarchy:

[T]he meaning of sexy dress out of place sometimes seems to be that the woman claims the right to present herself as sexual without the permission, which she can have only at the cost of being available, that goes with being a wife alone with her husband, a single person on the make, a prostitute, or an actress acting. And then she claims the further right to deny sex to the men she has aroused.²⁵¹

The woman engaged in sexy dressing therefore “conveys sexuality and, at the same time, defiantly, autonomy.”²⁵²

²⁴⁶ KENNEDY, *supra* note 18, at 162.

²⁴⁷ *Id.* at 127.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 163.

²⁵⁰ *Id.* at 187.

²⁵¹ *Id.* at 201.

²⁵² *Id.* at 203.

Kennedy admits that the way in which such sexy dress is interpreted of course depends on the observer. He argues, however, that this does not destroy the case for sexy dressing as a resistant practice. According to Kennedy, while

any particular woman's pleasure in her defiant sexy dress is often shadowed by the possibility that no one, not one single person, experiences it as she would want—that the whole audience consists of “dirty old men,” abusers lying in wait, and critics who think she is a slut or politically incorrect or too old or not pretty enough or doesn't really know how to do it right.

I think nonetheless that some of the time, some sexy dressers and some of their audience are engaged in pleasure/resistance in the interstices of the regime. They are eroticizing female autonomy. In so doing they undermine not only the structure that opposes madonna and whore but also that which opposes straight white bourgeois vanilla sexuality to the (imagined) kinky, animal, androgynous sexuality of the margins.²⁵³

Sexy dress, for Kennedy, may therefore be read as women resisting sexual violence against women and expressing their own autonomy.

2. *Assessing Kennedy's Project*

In advocating sexy dress as a dissident practice, Kennedy gives too little weight to the strong possibility that while there may be multiple and conflicting readings of gender performances in late modern society, this does not mean that there will not be dominant readings of these performances.²⁵⁴ Put another way, simply because Kennedy can create scenarios in which sexy dressing is interpreted as resisting gender hierarchy does not mean that all, most, many, or even a few men will, in fact, interpret sexy dressing in this manner. Overemphasizing the dissident implications of a practice ignores the normalizing tendencies of power in disciplinary societies that Foucault takes great pains to point out.

²⁵³ *Id.* at 206.

²⁵⁴ My critique of Kennedy is strongly influenced by Susan Bordo's critique of Judith Butler's work. See BORDO, *supra* note 77, at 289–95. Kennedy argues that Bordo, in another of her essays, errs by providing a totalizing interpretation when she analyzes the Madonna video *Open Your Heart* as objectifying Madonna. See KENNEDY, *supra* note 18, at 196 (citing BORDO, *supra* note 75, at 272–75). Kennedy argues that in his view the video has other meanings, as well, that are “at least as important.” *Id.* I do not wish to debate Kennedy regarding the dominant meaning of the Madonna video. I do, however, want to argue Bordo's basic point that although subversive currents are always present in our culture, this subversion occurs in historical and social context. Simply because subversive readings may be possible, and may feel ingenious and exciting, does not mean that the gender system is continually being destabilized by these possible readings.

Indeed, Kennedy himself admits that the dominant view of sexy dress is that women are sending a message that they are sexually available. While other readings of sexy dress are certainly possible, Kennedy gives us no reason to believe that they will stand on an equal footing with the dominant reading. And given that sexy dress is not a new innovation, Kennedy provides us no explanation of why men's readings of sexy dress would change in the direction of these dissident interpretations now, when they have not done so to date. Kennedy demonstrates, in Susan Bordo's words, "a characteristically postmodern inclination to emphasize . . . the instabilities of current power-relations rather than their recuperative tendencies."²⁵⁵ Put another way, he romanticizes the degree to which sexy dressing can be seen as a form of resistance.

To the extent that he argues that sexy dressing is resistant because it represents a refusal by women to subscribe to either version of the roles that society prescribes for women—madonna or whore—Kennedy reads current cultural pressures on women as far too black-and-white. While there are certainly currents of late modern society that still enforce the madonna/whore distinction, far more strands of culture demand that women be a little of both. The ideal woman, in this reading, may be a professional at work, but she is still always sexually provocative. Contrary to Kennedy's reading of women's sexy dress as resistant to dominant images, such dressing comports well with currents that punish women who appear asexual and reward women who at least hint (although not too brazenly) at their sexuality. Women who adopt sexy dress may nonetheless feel empowered and resistant; yet, as Foucault points out repeatedly, what subjects may experience as empowering and resistant may actually be examples of power's recuperative tendencies. It is only within the given social context that one can distinguish between practices that reinforce and practices that subvert gender hierarchy. In exploring this context, a number of difficulties arise in conceiving of sexy dressing as dissident practice.

First, why, except in conforming to disciplinary pressures, would women choose sexy dressing when so much of this dress, itself, is so deeply implicated in the history and imagery of sexual subordination? Given that other modes of resistance are possible—taking self-defense classes, pressuring for legislative reform, etc.—why choose as a mode of resistance wearing the high heels that, as so many feminists point out, transform women's gait to an awkward tottering, cause serious foot injuries, and make walking painful?²⁵⁶ While Kennedy's answer sometimes seems to be that women do it because it is pleasurable to them, this an-

²⁵⁵ BORDO, *supra* note 77, at 294.

²⁵⁶ As stated in a letter to the editor that Kennedy quotes, "Why, after all, would any sane person dress that way for her own comfort or pleasure?" KENNEDY, *supra* note 18, at 177 (quoting Janice Zaniski, Letter to the Editor, *On the Clothes Women Wear to Work*, BOSTON GLOBE, Jan. 25, 1992, at 22).

swer puts him back where he started: pleasure is socially constructed, and, in Kennedy's own words, "the regime of patriarchy constructs male and female sexuality so that both men and women are turned on by" images of vulnerability associated with women.²⁵⁷

Second, Kennedy briefly mentions, but generally ignores, the link between capitalism and sexy dressing. Yet the relationship between the two affects the extent to which women's sexy dressing subverts or reinforces prevailing power relations. Women are subjected to virtually endless streams of advertisements cynically communicated by the fashion and beauty industries telling them that a sexy appearance is empowering and subversive. Without irony, however, Kennedy cites *Vogue* for the proposition that "[c]orsetry . . . is not about fashion titillation but about a world in which sexual harassment is a burning issue."²⁵⁸ He conducts his analysis as if women's desire to dress sexy can be separated from the drives of capitalism.

Finally, despite Kennedy's best intentions, sexy dressing may contribute to rather than eliminate the gender hierarchy by reinforcing the gender binary. In Kennedy's project, women remain the objects of sexual attention, while men remain the subjects.²⁵⁹ Kennedy presents the perpetuation of the gender binary as unimportant compared to the primary benefits that sexy dress would supposedly serve, namely resisting sexual violence. This justification, however, conflates different forms of power. In Kennedy's description, the primary threat that keeps women in line, subordinates them, and subjugates them is the always-present threat of violence against women, especially against those who dare to flaunt their sexuality. Yet the view that the threat of physical violence to women is the primary enforcer of patriarchy far better comports with the dominance view of power associated with radical feminism, a view of power that Kennedy rejects in the course of the article. Under a more consistent reading of the discursive view of power that Kennedy adopts, violence, although certainly real and having daily repercussions in women's lives, is only one—and probably not the most important—means by which women are subjugated in contemporary society. Rather, gender domination in late capitalism is better conceived as enforced not only through violence and its threat, but also through the thousands of disciplinary mechanisms that occur in women's daily lives—in Kennedy's words, the "routine daily interactions" that shape their existence as different from men.²⁶⁰ The pressure on women to look sexy must be counted as one of the disciplinary pressures central to enforcing a crucial concept underly-

²⁵⁷ *Id.* at 127.

²⁵⁸ *Id.* at 200.

²⁵⁹ Kennedy briefly considers the notion that men, too, could adopt sexy dress and allow women to watch them, but dismisses this idea as utopian within the current regime. *Id.* at 208.

²⁶⁰ *Id.* at 162.

ing the gender binary: the idea that women are there to be seen in order to give men pleasure. Eradicating the gender hierarchy will require rejecting, rather than enforcing, those disciplinary pressures in order to confound binary notions of gender.

Missing from Kennedy's proposal, as from so much postmodern work, is the difficult political and social work necessary to implement reinterpretations of performances, especially on such deep-seated issues as gender and sexuality. To the extent that views about violence toward women have changed in the last thirty years, they have done so largely because feminists have organized, first among themselves, and then in the public forum. They have argued long and hard in courts and in public fora about the unacceptability and illegality of sexual harassment, domestic violence, and rape. They have successfully sought to change the law on these issues. They have held Take Back the Night marches to reclaim both discursive and physical space denied women. They have educated police officers and applied public pressure to ensure that women who were subjected to sexual violence and domestic violence were treated with dignity. In this way, they have accomplished the type of reinterpretations regarding acceptable treatment toward women that Kennedy's proposal seeks, but has no way to effectuate.

C. Conclusion

While Eisenstein's and Cornell's projects, on the one hand, and Kennedy's project, on the other, may seem quite different at first glance, at a closer look, they demonstrate similar weaknesses in postmodern feminist proposals for change. All seek to celebrate traits, life patterns, and, in Kennedy's case, sexy dressing, associated with women without adequately investigating the extent to which these things contribute to, rather than resist, both gender binaries and the gender hierarchy. All tend to inflate the power of theory to dismantle gender hierarchy at the cost of undermining the political and legal work needed to effect this change. All tend to focus on the cultural, without exploring its links to the material. Finally, all treat women's capacity to resist as perpetual, rather than investigating the particular legal and social conditions that would foster this capacity. In the next section, I seek to develop an agenda for postmodern feminist theory that addresses these flaws.

IV. TOWARD A REFORMULATED POSTMODERN FEMINIST LEGAL THEORY

In the first three Parts of this Article, I have argued that postmodernism has valuable insights to offer feminist legal theory, but that postmodern theorists have generally incorporated these insights in ways that reduce their efficacy in helping move toward a world without gender hierarchy. In this section, I seek to outline a version of a postmodern femi-

nist legal agenda that overcomes these limitations. This agenda incorporates the insights of postmodernism to focus on the ways in which law can help both to increase the salience of alternative gender discourses in women's and men's lives and to encourage their adoption in lived reality. In this discussion, feminism provides the political commitment and positive direction often missing in postmodernism's hesitation toward normative commitments and political projects. In addition, legal theory helps to ground postmodernism in a way that forces it to move beyond the metaphysical to make specific arguments about specific laws in a specific culture.

I divide this last Part of the Article into two sections. The first briefly lays out the framework for a reformulated postmodern feminist legal project. The second sets out one version of a more specific agenda for feminist postmodern legal theory.

A. A Framework for Postmodern Feminist Legal Theory

Four related propositions undergird my version of a postmodern feminist legal agenda. First, this version takes seriously the postmodern recognition that power relations reproduce themselves through, rather than apart from, social relations. This version does not accept the view that the inclination to resist gender hierarchy is either automatic or produced as an inevitable accompaniment to disciplinary power. Rather, it recognizes that resistance to gender hierarchy is fragile and that its emergence depends on a number of circumstances. The mission of postmodern feminist legal theory should not be simply to trumpet women's heretofore undiscovered capacity for resistance, but to think through the concrete political and legal conditions that would encourage subjects to resist gender hierarchy. In this regard, postmodern feminists must use the link that they have so clearly demonstrated between power and identity to encourage women to resist dominant notions of gender roles.

Second, in my view, feminist legal theory should take to heart postmodern feminist insights regarding the importance of seeking more fluid notions of gender identity that are less closely linked to a particular sex. As feminist poststructuralists have shown, gender oppression is intrinsically bound up both with the weight placed on the conceptual distinction between women and men and with the accompanying assignment of opposing traits, roles, and activities to women and men. Movement toward ending gender oppression will require lessening the weight placed on this distinction and loosening the assignment of particular characteristics to particular genders. Again, however, this movement cannot be accomplished by theoretical fiat or by banning the recognition that many women in contemporary Western cultures currently bear many similarities to one another. Instead, a postmodern feminist legal agenda should recognize that these binaries must be actively confounded in human lives. The pro-

liferation of heterogeneity much heralded by postmodernism, in other words, is not a metaphysical or ontological fact, but a political feat that in large part remains to be accomplished.

Third, insofar as differences between women and men exist, feminist legal theorists should hesitate before celebrating them and touting their recognition as a mode of accepting “the Other.” What Derrida, Foucault, and other postmodernists demonstrate at their best is that no subject produced within a system can truly stand outside that system. While feminists should strive for standards that would value and protect difference in a restructured world, they must both consider the source of these differences and choose strategies that do not interfere with the goal of deconstructing gender. To do so, a postmodernist legal theory must distinguish between traits and characteristics it seeks to revalue and those it seeks to make disappear through the elimination of oppression.

Fourth, and finally, a postmodern feminism based on differences and heterogeneity must ultimately be grounded in a politics of material equality. Only within a system in which certain basic equalities exist can differences truly be valued rather than represent the visible scars of oppression. For this reason, a postmodern feminist legal agenda must place a high priority on ensuring that respect for difference is accompanied by basic rights as well as certain baseline equalities in material goods and opportunities.²⁶¹ Postmodern feminist legal theorists must think concretely about what law can do to redress sex inequality, which involves both the economic and the cultural. They must therefore seek to combine cultural and material politics in ways that are both complementary to one another and politically practicable.²⁶²

²⁶¹ I take seriously here critiques by critics such as Richard Rorty and Nancy Fraser who argue that the cultural left has too often ignored material inequality through an exclusive focus on the politics of “difference” or “recognition.” See RORTY, *supra* note 197, at 76–77; NANCY FRASER, *From Redistribution to Recognition*, in JUSTICE INTERRUPTUS, *supra* note 1, at 11. In Rorty’s words, the cultural left believes that because

the very vocabulary of liberal politics is infected with dubious presuppositions which need to be exposed, the first task of the Left must be . . . the rectification of the names. The concern to do what the Sixties called “naming the system” takes precedence over reforming the laws.

“The system” is sometimes identified as “late capitalism,” but the cultural Left does not think much about what the alternatives to a market economy might be, or about how to combine political freedom with centralized economic decisionmaking. Nor does it spend much time asking whether Americans are under-taxed, or how much of a welfare state the country can afford, or whether the United States should back out of the North American Free Trade Agreement. When the Right proclaims that socialism has failed, and that capitalism is the only alternative, the cultural Left has little to say in reply. For it prefers not to talk about money. Its principal enemy is a mind-set rather than a set of economic arrangements

RORTY, *supra* note 197, at 78–79.

²⁶² On this point I disagree with Richard Rorty, who believes that the government can

B. A Postmodern Feminist Legal Agenda

A revised postmodern feminist legal agenda would combine all four propositions described above. It would seek to provide the legal conditions that would encourage the resistance of gender hierarchy and the adoption of alternative gender discourses while at the same time seeking to loosen the bonds between sex and gender and increase the fluidity of gender categories. In doing so, it would also attempt to protect and re-value traits and characteristics currently associated with women that have been wrongfully devalued, while it ensured that such differences were informed by the principle of equality. Accordingly, such an agenda would include basic guarantees of rights, opportunities, and material goods. What might such a program look like? I here outline one possible example.

1. The Pursuit of Heterogeneity (Propositions 1 and 2)

The first two propositions, the development of the capacity to resist dominant articulations of gender and the development of more fluid gender identities, would be fostered by such closely related legal requirements that I will consider them together. Both, I argue, depend on the presence of sites that encourage subjects to develop alternative discourses and practices. Both also require that these alternatives be communicated to others as possible and livable alternatives. Finally, they depend on the presence of certain material conditions.

Encouraging dissident gender practices and broader interpretations of gender identities depends on the development of social associations and networks that can both develop alternative practices and support those who engage in such practices. While Alexis de Tocqueville noted in the nineteenth century the important role that the presence of associations in civil society play in preventing government tyranny, his counsel is well taken in a very different era, in which the risk of the monolith appears less from government than from increasingly homogenous cultural messages produced within a system of advanced consumer capitalism. Here, too, a vibrant civil society can play a role in countering such pressures through helping “to keep alive and to renew the circulation of opinions and feelings.”²⁶³ The role of church groups in the civil rights movement and consciousness-raising groups at the inception of second

do much to redress economic inequality, but little to redress cultural inequality. See RORTY, *supra* note 197, at 99 (“The problems which can be cured by governmental action, and which such a list would canvass, are mostly those that stem from selfishness rather than sadism.”). This statement seems to me to reflect a failure of Rorty’s otherwise broad imagination.

²⁶³ 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 132 (Henry Reeve trans., 1961) (1840).

wave feminism exemplify the power associated with alternative visions of life that can emerge from such associations and the important role of social networks in social and individual change. The importance of intra-group networks is highlighted by recent work in social psychology that demonstrates that the strongest impetus for change occurs when individuals see changes in others whom they view as similar to them.²⁶⁴ This research also demonstrates that new ways of thinking and new identities evolve simultaneously out of collective processes.²⁶⁵

Recent work in political theory, particularly by Nancy Fraser, bolsters the importance of specific social sites at which alternative identities and messages can be developed.²⁶⁶ Fraser argues that the arena of public discourse—the sphere of public conversation between official state discourse and private conversation—serves as a powerful counterweight both to the state and to economic pressures in late capitalism. She contends, however, that in societies such as our own, where societal inequalities exist, this sphere of public discourse cannot be shielded from the effects of inequality for two reasons. First, because “unequally empowered social groups tend to develop unequally valued cultural styles,” the contributions of members of subordinated social groups tend to be marginalized both in everyday life contexts and in official public spheres.²⁶⁷ Second, because they have fewer material resources, subordinated social groups have less access to the media and fewer means of participation in public discourse than dominant social groups.²⁶⁸ To counteract these disadvantages, Fraser argues that the sphere of public discourse would be better conceived as “subaltern counterpublics”—parallel locations at which subordinated social groups could “invent and circulate counterdiscourses—which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs.”²⁶⁹ The goal for Fraser is not simply the cloistering of such groups “for the formation and enactment of social identities,”²⁷⁰ but also the functioning of such groups “as bases and training grounds for agitational activities directed toward wider publics.”²⁷¹

In my version of a postmodern feminist legal agenda, feminists must locate and support the legal conditions that would promote “subaltern

²⁶⁴ See, e.g., Conover, *supra* note 193, at 12. See generally JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); Arnos Tversky & Itamar Simonson, *Context-Dependent Preferences*, 39 *MGMT. SCI.* 1179 (1993).

²⁶⁵ See generally Hyojoung Kim & Peter S. Bearman, *The Structure and Dynamics of Movement Participation*, 62 *AM. SOC. REV.* 70 (1997).

²⁶⁶ See NANCY FRASER, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *JUSTICE INTERRUPTUS*, *supra* note 1, at 69, 81.

²⁶⁷ *Id.* at 79.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 81.

²⁷⁰ *Id.* at 83.

²⁷¹ *Id.* at 82.

counterpublics,” and shield them from the pressure of dominant discourses emanating from the state, the market, and culture.²⁷² These legal conditions would include allowing people the time and resources for social/civic participation through paid child-care benefits, shorter mandatory working hours, paid parental leave, and the deductibility of expenses for civic organizations, in addition to currently available tax deductions for donations to such organizations.²⁷³ While the most vibrant civic space that these measures would support could give rise both to groups calling for a return to more traditional gender roles and to those calling for the opposite, the simple recognition that different groups approach gender roles in different ways may itself call into question the inevitability of the existing gender binary.²⁷⁴

Law can also help foster the conditions that encourage the proliferation of alternative gender discourses by directly protecting people engaging in nontraditional gender roles. Since the family is the central institution through which gender roles and practices are perpetuated, and because the family is central to the everyday practices that form views of the world, it is clearly an important site for such legal protections. Postmodern feminist theory should therefore place a high priority on broadening the definition of family beyond the stereotypical model (composed of a heterosexual adult male breadwinner and a heterosexual adult female caretaker along with their biological children), and on creating a network of protections that makes it costless for families to diverge from this model. These protections would include pressing for the same legal and tax benefits for broadened definitions of a family as for the traditional family, custody standards that do not penalize persons who choose atypical gender roles (women in professional jobs, male part-time employees, homosexual parents), and providing a broader network of assistance for single parents, gay parents, and other nontraditional family groupings. In pressing this agenda item, postmodern feminists can draw on a significant body of work by feminist legal theorists who seek to widen

²⁷² The increasing dominance of the market impedes women’s progress by presenting increasingly homogeneous images of women that are broadcast from increasing numbers of commercial sites. At the same time, it cuts into the vigor of civil society both by encroaching on the field of public life and by monopolizing the time that citizens might spend on civic affairs. Robert Putnam attributes declining civil involvement in the U.S. to increased television viewing, ROBERT PUTNAM, *BOWLING ALONE* (2000), which, as Robert Kuttner notes, is both “the emblem and the reality of a heavily marketized society” in which audiences are assembled in order to sell products. ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 353–56 (1997). In this way, the triumph of the commercial sphere prevents the formation of alternative sites that might produce different messages.

²⁷³ See KUTTNER, *supra* note 272, at 350–51.

²⁷⁴ Cf. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 18–19 (1998) (arguing for a plurality of groups in order to develop citizens’ moral capacities).

the scope of family protections.²⁷⁵ The end sought here is to deconstruct the notion of binary gender roles as close to home as possible—indeed, at home, itself—by encouraging relationships that do not fit into dominant gender patterns. Further, as such diverse families become more prevalent, they raise recognition by others that a number of gender patterns are possible.

The workplace provides another forum in which people spend great portions of their lives, and serves as another important site at which dissident gender interpretations can and should be legally protected. To this end, the postmodern goal of heterogeneity would be well served by interpreting Title VII to protect dissident gender performances: the effeminate man and the masculine woman.²⁷⁶ The goal is not to move toward an androgynous ideal that eliminates gender, but to undermine dominant gender roles and, to the extent possible, to undermine the ostensibly fixed sex binary to which gender is currently seen to be attached.

Feminists must not only protect the space for alternative gender discourses, but also ensure that these practices and identities are communicated. In seeking to foster the adoption of alternative gender discourses, I rely on the postmodern recognition that the perpetuation of particular ways of life, including those associated with gender hierarchy, has less to do with intellectual agreement with these practices than with a basic acceptance of everyday life that comes from the security of daily routines and familiar practices.²⁷⁷ In this view, people's adoption of alternative

²⁷⁵ See, e.g., NANCY DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997); Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); Iris Marion Young, *Reflections on Families in the Age of Murphy Brown: On Gender, Justice, and Sexuality*, in REVISIONING THE POLITICAL 251 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFF. 77 (1991); Martha Minow & Mary Lyndon Shanley, *Revisioning the Family: Relational Rights and Responsibilities*, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 84 (Mary Lyndon Shanley & Uma Narayan eds., 1997).

²⁷⁶ Supreme Court interpretations have, in fact, moved in this direction. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L.J. 1 (1995) (arguing that Title VII should protect men who exhibit qualities deemed "effeminate" as well as women who exhibit "masculine" qualities).

²⁷⁷ As Roberto Unger writes:

In every society we can distinguish the repetitious activities and conflicts that absorb much of people's effort from the formative institutional and imaginative order that usually remains undisturbed by these routines and gives them their shape. The routines include the habitual limits to the uses of governmental power, the available ways for combining labor and capital, and the accepted styles and criteria of normative argument Formative contexts do not exist as facts open to straightforward observation like the atomic structure of a natural object. Nor does their existence depend entirely upon illusions that a correct understanding might dispel. Rather, they subsist and become entrenched in a practical sense, by gaining immunity to challenge and revision in the course of ordinary social activity.

gender discourses, practices, and identities are best encouraged by their demonstration, even if in some relatively moderate form, in women's and men's lived realities. The goal is for people to recognize that other lifestyles are both possible and, in fact, being lived. This insight comports with recent work in the social sciences that demonstrates that people need to conceive of alternative selves in concrete ways for them to change their own self-images and behavior.²⁷⁸ Accordingly, the theorization of some newly imagined vision of the feminine will be much less successful in encouraging rejection of dominant gender images and practices than will be the men who work as secretaries or stay at home with their children while their wives work; the women who work construction or as high-flying CEOs; the people who choose atypical family forms, such as co-parenting children in same-sex relationships; or the women or couples who choose not to have children. Even if these exemplars do not directly inspire resistance, they will expose the incoherence of supposedly immutable binary gender representations featured in dominant discourses.²⁷⁹

To be effective, feminists must thus seek legal protections to ensure that alternative gender discourses are communicated publicly, rather than drowned out by normalizing narratives. For example, a postmodern feminist agenda could seek laws to require television stations that receive public funding to produce programs featuring divergent depictions of gender roles. Similarly, postmodern feminists could seek to ensure that alternative gender discourses are communicated to children and young adults through federal or local mandates that require schools to expose students to examples of those who diverge from standard gender depictions of women and men. Such a requirement would go beyond simply presenting jobs and qualities in sex-neutral terms. Instead, students would be exposed to women and men in nontraditional occupations.

Finally, fostering the capacity to resist dominant gender roles requires that certain baseline material conditions be met. As advocates of battered women have repeatedly recognized, people's resistance to oppression decreases when they have few other means for material survival.

ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 92-93 (1986); see also Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 111 (1984) ("Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself").

²⁷⁸ See, e.g., Hazel Rose Markus & Paula Nurius, *Possible Selves*, 41 *AM. PSYCHOL.* 954 (1986); Daphna Oyserman & Hazel Rose Markus, *Possible Selves and Delinquency*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 112 (1990).

²⁷⁹ See BARTKY, *supra* note 104, at 81 ("Sometimes, instances of resistance appear to spring from the introduction of new and conflicting factors into the lives of the dominated: The juxtaposition of old and new and the resulting incoherence or 'contradiction' may make submission to the old ways seem increasingly unnecessary.").

I discuss the outlines of how such a material politics might be pursued in section 3 below.²⁸⁰

2. *Revaluation of Differences (Proposition 3)*

Along with encouraging the proliferation and adoption of dissident gender discourses, postmodern feminist legal theory should recognize the need to revalue traits and characteristics currently associated with women that have been wrongfully devalued because of their association with women or “the feminine.” Sex equality cannot be reached until societal structures accommodate humans generally, rather than humans of a particular gender. Yet postmodern feminists should be aware of ways in which their goal of revaluing traits and characteristics associated with women may conflict with their goal of encouraging the deconstruction of differences between the sexes, and they should choose strategies that reconcile these goals. For this reason, a postmodern feminist legal agenda should seek revaluation of wrongfully devalued qualities associated with women under more inclusive norms that apply to people generally, rather than in a form that specifically designates such qualities as appropriate to women only.

To facilitate deconstruction of differences between the sexes, this revaluation should, when possible, be performed through statutes that do not specifically rely on sex as a triggering factor. For example, the Family and Medical Leave Act²⁸¹ provides a model for such revaluation since it protects caretaking activities that are generally accomplished by women in our society without protecting these activities only when they are performed by women and without linking the rationale for the protection to the fact that women perform them. Caretaking activities, the FMLA makes clear, should be protected because of their importance to a good society.²⁸² This model of legislation could also be used, for exam-

²⁸⁰ See *infra* notes 290–296 and accompanying text.

²⁸¹ 29 U.S.C. §§ 2601–2654 (1994).

²⁸² The preamble to the FMLA recognizes the importance of the “development of children and the family unit”; the needs of “fathers and mothers [to] be able to participate in early childrearing” without being forced “to choose between job security and parenting”; the national interest in preserving “family integrity”; and the goal of equal opportunity for men and women. 29 U.S.C. § 2601 (1994).

While I recommend the FMLA as a model for other legislation because of its sex-neutral trigger, other features of the FMLA are far less attractive. Not only should these features be corrected in future legislation, they should be remedied in the FMLA itself. Specifically, the FMLA implicitly encourages women rather than men to take family leave because it is unpaid. Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 355 (1999). It is therefore generally used by women with male partners in good jobs, because those women can afford to take such leaves. See also Martin Malin, *Fathers & Parental Leave*, 72 TEX. L. REV. 1047 (1994) (arguing that many fathers don’t take parental leave because the FMLA appears to offer no wage replacement, and contending that proper interpretation of the FMLA would allow husbands paid leave by substituting accrued sick leave). Cf. Maxine Eichner, *Square Peg in a Round Hole: Par-*

ple, for new legislation requiring that part-time employees receive at least a pro rata share of the wages and benefits that they would get as full-time employees, which would aid those whose caretaking responsibilities keep them from full-time paid positions (a category currently occupied disproportionately by women).

Yet statutes that are specifically triggered by sex disparities can, if carefully applied, also mediate between the goals of revaluation and deconstruction. Title VII, the federal employment discrimination statute, provides a case in point. Under its disparate impact standard, disparities between the sexes with regard to a particular employment practice trigger review.²⁸³ While this trigger tends to call attention to binary gender roles in a way that militates against deconstruction of differences, other facets of the standard can in the end work in favor of both deconstruction and revaluation. Specifically, under this cause of action, employment practices are ultimately justified by their relevance to sound business practices, rather than their link to a particular sex. Under the business necessity justification standard, courts are required to reject exclusionary practices unless they have a “manifest relationship to the employment in question” and are “job related,” and no alternative practices exist.²⁸⁴

Postmodern feminists can therefore use the disparate impact cause of action both to revalue those qualities and life patterns associated with women that have been devalued, and, at the same time, to do so based on their worth in a restructured workplace, rather than on their connection to a particular gender. Practices that might be challenged under this cause of action include job descriptions that require traits stereotypically associated with men and job structures that favor men’s physiques over women’s.²⁸⁵ Furthermore, this cause of action could be used to challenge

enting Policies and Liberal Theory, 59 OHIO ST. L.J. 133, 148–50 (1998) (discussing limitations of the FMLA).

²⁸³ A showing that the challenged requirement has an adverse impact on protected groups triggers disparate impact scrutiny, one of Title VII’s two causes of action. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

²⁸⁴ The “manifest relationship” and “job related” standards for business necessity were introduced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 436 (1971). See also *Albemarle*, 422 U.S. at 425. However, a number of years later, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *rev’d in part by statute*, 42 U.S.C. § 2000e-2(k) (1994), the Supreme Court altered the business necessity standard in a way that significantly aided employers, holding that the standard was met where the employer simply articulated a reasonable “justification for his use of the challenged practice.” *Id.* at 659. The court added that a challenged practice need not be “essential” or “indispensable” to the employer’s business for it to pass muster.” *Id.* Two years after *Wards Cove*, however, in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (1994), Congress overturned the new business necessity standard and reinstated the prior standard.

²⁸⁵ I describe in detail elsewhere how the disparate impact cause of action can be used to challenge “male-biased” job requirements. See Eichner, *supra* note 243. More recently, Joan Williams has suggested how the disparate impact cause of action could be used to challenge what she calls “masculine ideal-worker norms.” Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 328 (1999).

job requirements adapted to the family roles and work schedules that men have typically adopted, such as those requiring frequent travel, overtime work, or refusing to allow an employee to work part-time.²⁸⁶ While not a perfect statute for the dual goals of deconstruction and revaluation because it is triggered by sex disparities, Title VII has the distinct advantage of being current, good law that immediately can become a part of a postmodern feminist strategy.

In applying such scrutiny under Title VII, the goal of decreasing the import of gender could be furthered by courts making it clear, where appropriate, that the differences between women and men that triggered review are socially created rather than linked to immutable differences between women and men, and that they do not accurately describe all people of either gender.²⁸⁷ This would enable the rethinking of qualities devalued because of their association with femininity without either entrenching qualities that would ideally disappear in a restructured society or impeding the deconstruction of sex roles by reifying the association between certain traits and women.

3. *The Pursuit of Equality and a Material Politics (Proposition 4)*

The focus on changing discourse and revaluing women's differences can occupy only one part of a postmodern feminist legal agenda. This cultural agenda needs to be accompanied by a material agenda of the type long advocated by the political left.²⁸⁸ Under this agenda, women's oppression is seen as linked to the deprivation of particular rights, freedoms, and goods rather than to cultural patterns of interpretation. Although postmodernists have recovered the value of the discursive/ideological from the subordinate position to which Marxism relegated it, they have too often neglected the material.²⁸⁹ Focusing solely on oppression based on patterns of performance, interpretation, and evaluation leaves out oppression rooted in inequality in the distribution of goods. It therefore fails to focus on the need for changes in the distribution of such goods as wealth, income, jobs, education, medical care, and the right to be free from fear of bodily harm.²⁹⁰

While postmodernism has undercut any simple dualism between the discursive and nondiscursive,²⁹¹ a postmodern feminist legal agenda must recognize that women's oppression is a complex mixture of cultural pat-

²⁸⁶ See *supra* Part III.

²⁸⁷ See generally Case, *supra* note 276.

²⁸⁸ See *id.*

²⁸⁹ Cf. FRASER, *supra* note 123, at 180–83; RORTY, *supra* note 197, at 76–79.

²⁹⁰ Marxism represents the classic source of such a materialist analysis, although the New Left in the 1960s and the early feminist movement, along with much of the current feminist movement, were rooted in materialist analyses.

²⁹¹ See, e.g., NORRIS, *supra* note 51, at 142–44.

terms of devaluation and material inequality.²⁹² In accordance with the cultural model, women are oppressed through acts such as the privileging of “male” traits, presenting stereotypical images of women in the media, and ignoring or misinterpreting women when they speak at meetings or in deliberative bodies. Yet in accordance with the material model, women’s secondary status is based, at least in part, on a system that exploits women’s free labor in the domestic arena and women’s underpaid labor in a sex-segregated marketplace, and the vulnerability that results from this exploitation.²⁹³ The two forms of oppression cannot be easily disentangled. As Catharine MacKinnon pointed out nineteen years ago, standard Marxist critiques of material inequality as the root of women’s oppression fail when they come to analyzing gender precisely because the ideological and the material are so intertwined.²⁹⁴ It is, after all, the intertwining of ideology and biology that creates gender in the first place. Thus, women are excluded from many well-paying jobs by their own and others’ beliefs that men are better suited for such jobs. Women are vulnerable to domestic violence in part because of the belief that they cannot or should not fight back and in part because of men’s greater upper body strength and speed.

A material agenda helps to fill in the missing pieces from the standard postmodern agenda. Without basic equalities in society, a politics of difference too easily can become a façade for oppression, as structurally created inequalities are plastered over and approved as differences. Moreover, insofar as gender oppression derives from structural inequality, a cultural politics will not address it: the revaluation of qualities associated with women may be appropriate to redress women’s oppression when oppression is based simply on the improper valuation of such qualities. However, when oppression is instead based on preserving men’s economic prerogatives, structural solutions will be more appropriate.²⁹⁵

²⁹² See FRASER, *supra* note 261, at 11.

²⁹³ For an excellent account of how women’s inequality in the family results from lower expectations in the workplace and from childbearing and childrearing responsibilities, see SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

²⁹⁴ See Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982).

²⁹⁵ Vicki Schultz develops a structural approach to gender hierarchy and describes her project as providing

a new account of hostile work environment harassment that emphasizes its role in reproducing work and work competence along masculine and feminine lines. In this account, harassment is not driven by a need for sexual domination but by a desire to preserve favored lines of work as masculine. By maintaining a hold on highly rewarded employment, men secure a host of advantages in and outside the workplace. Some of these advantages are material: Wage superiority over women, for example, ensures men’s position at the head of the household as well as their place at the helm of most powerful institutions in society. Equally significant are powerful psychological factors: Both breadwinning and work competence are

Accordingly, a reformulated postmodern feminist agenda should continue to press on many of the same issues on which feminists have long focused: ensuring that women are safe on the streets at night; that they can remain in their homes without fear of violence; that they have control over their bodies; and that they have an equal say in the conduct of their government. In incorporating such a material politics, postmodern feminists should choose strategies that accord with the cultural goal of blurring the gender divide in men's and women's lives. For example, domestic violence laws should apply to both men and women rather than stigmatize women as the weaker sex.

At the same time, feminists must pick up the reins of the political left's agenda regarding the distribution of income and wealth in this country. Given that women, especially single women, stand at the bottom of the income distribution ladder, feminists must still place issues of economic equality and economic insecurity high on the feminist agenda. As Richard Rorty notes, any list of reforms that seeks a redistribution of wealth must be headed by true reform of campaign financing, without which no truly redistributive measures will ever be passed.²⁹⁶ Feminists should also push for a tax structure that places more of the tax burden on those with more money. Moving further down the material agenda, a postmodern feminist legal agenda should seek to ensure that all workers earn a minimum wage high enough so that those who perform a decent day's work can have a living wage and still be able to care for their children. By the same token, feminists should push for benefits for part-time workers, and equal pay for equal work initiatives. Needless to say, specific measures that seek to lessen material inequality should be structured in sex-neutral ways that avoid reinforcing existing gender stereotypes, and in which both sexes can truly take advantage of them. By focusing on material equality, postmodern feminist legal theory can ensure that heterogeneity, multiplicity, and difference can be celebrated as the end of women's oppression, rather than mourned as the expression of this oppression.

central to the dominant cultural understandings of manhood. By protecting their jobs from incursion by women, or by incorporating women only on inferior terms, men sustain the impression that their work requires uniquely masculine skills. Maintaining their jobs as repositories of masculine mastery, in turn, assures men a sense of identity (even superiority) as men.

Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1690-91 (1998). In this account, women's economic inequality leads to other types of inequality. "[B]y portraying women as less than equal at work, men can secure superior jobs, resources, and influence—all of which afford men leverage over women at home and everywhere else." *Id.* at 1761.

²⁹⁶ RORTY, *supra* note 197, at 149 n.14.

CONCLUSION

Through their recognition of the productive aspects of power in shaping subjects' identities and the way in which discursive patterns contribute to oppression, combined with their renewed focus on the value of heterogeneity, postmodern insights have the potential to reinvigorate feminist legal theory's quest to end sexual oppression. To do so, however, feminist legal scholars must treat postmodern strivings for heterogeneity, multiplicity, and difference as ends to be achieved through political and legal work, rather than as goals that can be reached through simple theoretical pronouncements.

Accordingly, a reformulated postmodern feminist legal agenda should focus on establishing the legal measures that will promote the reinterpretation of the culture's dominant messages about what it means to be a man or woman. It should seek to promote the political and legal conditions that would foster the capacity both to resist dominant gender discourses and to adopt more fluid notions of gender identity. Such an agenda would not automatically celebrate all differences as positive but would affirm those differences that are appropriate in a restructured world. At the same time, this agenda would seek some baseline equality of material goods and opportunities in order to ensure that differences are not the product of oppression. In this way, postmodern feminist legal theory would work toward creating a world in which binary notions of gender begin to dissolve in the lived reality of human beings.