

## Notes from a First Generation

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## Notes From A First Generation\*

Wendy W. Williams†

I participate in this symposium as a throw-back. I was a child of the 1950's, started college in the 1960's when there was no women's movement, and graduated from law school in 1970 before a single course labelled "Women and Law" or "Sex Discrimination" appeared in a law school curriculum. I commenced work as a feminist lawyer in 1971, within a year of the first Women and Law Conference and just months after the first conference on teaching about women and law in a law school. I represent a collection of ideas about feminism and law that has not been the dominant one among feminist legal academics since at least 1980. It certainly was not in vogue before 1970, either, but then there were no feminist legal academics. Nonetheless, I continue to believe it is or should be an important one among feminist theories of law. In any event, it still speaks to me, as much as I have been stimulated, enriched and excited by recent perspectives offered by a new generation of feminist legal thinkers.

What divides the feminist approach to law with which I identify from some of the more recently articulated ones is the importance the approach places on what some have called "formal" equality: an insistence that laws not embody explicit sex-based distinctions. Christine Littleton has called us symmetrists and those who don't share this concern (some would say preoccupation) asymmetrists. For those who, like Professor Littleton, are asymmetrists, equality for women requires that at least some legal responses to women's circumstances be formally sex-based, or for-

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† Professor of Law, Georgetown University Law Center. I was going to title this essay, "Notes From *The First Generation*," but quickly realized the presumptuousness of that title. The generation of feminist law reformers and theorists who emerged in the early 1970's did not, it is true, have immediate predecessors, but we certainly did have several generations of predecessors in the first women's movement which began in the 1840s and culminated in the ratification of the Nineteenth Amendment in 1921. See generally Karen Morello, *The Invisible Bar: The Woman Lawyer In America: 1638 to the Present* (Random House, 1986); see also Barbara Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 *Ariz L Rev* 673 (1988).

mally sex-specific.<sup>1</sup> The terms symmetry and asymmetry are apt, and I will use them in my discussion here. I do so, however, with the following caveat: These terms do not capture all or even most of what those who fall in either category believe. Symmetry and asymmetry are used here simply to label a dimension of feminist legal theory that I feel the need to explore.

One might suspect that legal theories embodying what appear to be such polar approaches as symmetry and asymmetry have rich potential to lead to conflicts among feminists in concrete cases. Certainly this one has.<sup>2</sup> One of the most public among these conflicts arose in connection with what became a Supreme Court case, *California Federal Savings & Loan Assn. v Guerra*<sup>3</sup> (shorthand among us all as *Cal Fed*). The conflict arose over how to think about and address the disadvantages faced by pregnant wage earners.

The focus of the conflict was the meaning of the Pregnancy Discrimination Act of 1978 ("PDA"), an amendment to the definitions section of Title VII, which provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>4</sup>

The *Cal Fed* litigation arose when an employer, faced with a claim under a California law requiring employers to grant up to

<sup>1</sup> See, for example, Christine Littleton, *Reconstructing Sexual Equality*, 75 Cal L Rev 1279 (1987); Christine Littleton, *Equality and Feminist Legal Theory*, 48 U Pitt L Rev 1043 (1987).

<sup>2</sup> The pregnancy issue, on which this article focuses, has given rise to a large and sometimes contentious collection of literature. See, for example, Linda J. Krieger and 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 (1983); Ann Scales, *Towards A Feminist Jurisprudence*, 56 Ind L J 375 (1981); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955 (1984); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L J 1 (1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 NYU Rev L & Soc Change 325 (1985); Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum L Rev 1118 (1986).

<sup>3</sup> 479 US 272 (1987).

<sup>4</sup> 42 USCA sec 2000e(k) (West 1981).

four months leave from work for pregnancy-related disability, challenged that law<sup>5</sup> on the ground that it was inconsistent with the PDA and thus invalid under the Supremacy Clause. The employer sought invalidation of the California law. Some amici, and most notably the group for whom Chris Littleton wrote the brief,<sup>6</sup> read the PDA as permitting pregnancy to be singled out for different treatment in certain instances. The instance actually before the Court, that brief urged, was one of them. The Littleton amicus brief contended that only women are threatened with job loss when they reproduce; therefore job equality required a special provision eliminating that threat. An “asymmetrical” provision such as the California law, the brief argued, was necessary to carry out the purpose and intent of the PDA to prevent discrimination against pregnant workers.

The symmetrists among the amici in *Cal Fed*<sup>7</sup> took the PDA to mean that pregnancy discrimination was to be analyzed in the same straightforward manner that sex discrimination under Title VII was: To discriminate against someone on the basis of pregnancy (either its presence or its absence) was prohibited unless justified in traditional doctrinal terms.<sup>8</sup> In our view, the second clause of the PDA, with its order to treat women affected by pregnancy the same as other persons “similar in their ability or inability to work” clinched the argument for a presumptively symmetrical

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<sup>5</sup> Cal Gov't Code sec 12945(b)(2) (West 1980).

<sup>6</sup> Brief Amici Curiae of Coalition for Reproductive Equality in the Workplace: Betty Friedan; International Ladies' Garment Worker's Union, AFL-CIO; 9 to 5, National Association of Working Women; Planned Parenthood Federation of America, Inc. et al (including 17 California labor, ethnic and feminist organizations and 16 individuals—among whom were a California Congressman and five state legislators) In Support of Respondents.

<sup>7</sup> Many of those associated with the “symmetrical” briefs had participated in the drafting and lobbying of the PDA years earlier. I participated in writing Brief Amici Curiae of The National Organization for Women; NOW Legal Defense and Education Fund; National Bar Ass'n, Women Lawyers' Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and Women's Legal Defense Fund In Support of Neither Party (“NOW Brief”).

<sup>8</sup> The idea behind the PDA as we understood it was that pregnancy discrimination would be analyzed like other forms of sex discrimination. If there was an overt pregnancy policy, it would have to be justified by the bona fide occupational qualification (“bfoq”) defense, as were other policies overtly based on sex. See USCA sec 2000e-2(e) (West 1981), which allows for the bfoq defense. If the policy was “neutral” as to pregnancy, but had a disproportionate impact on women because of pregnancy, that policy could be challenged under traditional disparate impact theory as set forth in *Dothard v Rawlinson*, 433 US 321, 328-32 (1977), and other cases. And where there was no policy, but a woman experienced an adverse job consequence which she alleged was motivated by her pregnancy, the disparate treatment analysis of *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 252-60 (1981), would be applicable.

treatment of pregnant and nonpregnant persons who were similarly situated in relation to their work. If the PDA required that pregnant and nonpregnant disabled workers be treated alike, California was thwarting that requirement by legally mandating a protection for pregnant workers that it did not extend to nonpregnant disabled workers.

The brief with which I was associated, authored by Susan Deller Ross,<sup>9</sup> urged the Court toward a symmetrical solution. We claimed that the employer should obey both the California state law (by providing leave to disabled pregnant workers) and the PDA (as we interpreted it) by providing to workers disabled by causes other than pregnancy the same protection the employer was bound to extend to pregnant workers under the California law.<sup>10</sup> The result we sought was a symmetrical one, as was the result sought by the employer; but where the employer sought the invalidation of the requirement of the California pregnancy disability law, we sought the extension of the protection it offered to other disabled workers as well.

Oddly, Justice Marshall, writing for the Court, declared both feminist positions right. The Court held that the California provision did not conflict with Title VII. The PDA, the Court said, authorized asymmetrical pregnancy rules, and the Court quoted with approval the Court of Appeals' conclusion that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"<sup>11</sup> But, the Court stated, if the PDA *had* required symmetrical treatment the proper resolution would have been to require employers to obey both the state law and Title VII, thus yielding a symmetrical result.<sup>12</sup> Of course, since the Court had just interpreted the PDA to authorize special treatment of pregnancy, the latter point was the merest dicta, with no apparent significance in pregnancy cases. Through *Cal Fed*, asymmetry had been read into the Pregnancy Discrimination Act.<sup>13</sup> For the asymmetrists, this was a clear

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<sup>9</sup> See note 7.

<sup>10</sup> We also thought that if the Court did find that the California law was preempted by Title VII, the proper solution was extension of the California law rather than invalidation. NOW Brief at 20-31.

<sup>11</sup> 479 US at 285, quoting *California Federal Sav & Loan Ass'n v Guerra*, 758 F2d 390, 396 (9th Cir 1985).

<sup>12</sup> "[E]ven if we agreed with petitioners' construction of the PDA, we would nonetheless reject their argument that the California statute requires employers to violate Title VII. [The California law] does not prevent employers from complying with both the federal law (as petitioners construe it) and the state law." 479 US at 290-291 (footnote omitted).

<sup>13</sup> This conclusion was contrary to the legislative history, in my view. See Williams, 13

victory. For symmetrists, it was only half a loaf, and, for reasons discussed below, a half loaf fraught with difficulties.

Symmetry and asymmetry: They sound like different shores with oceans in between, airtight and irreconcilable dualities. From defended positions on these shores we have accused each other across the breach on the one hand of ignoring real differences between women and men to women's detriment, and on the other of reintroducing a version of women's separate spheres to women's detriment. I believe that these poles are overdrawn. I want to talk about what the poles have in common, or, more accurately, why the poles might not be properly understood as poles at all.

Most feminists struggle with the meaning of the idea of equality of the sexes. A few declare that they would throw out the idea of equality altogether and talk about justice or power or something else. Yet, even if we wanted to, I do not think we could leave the idea of equality behind. Equality talk is talk about what divides and what connects things and people, who or what is dominant and who or what is subordinate, who or what is encompassed and who or what is left out. Equality reaches deeply and centrally into the way humans understand who they are and how their world is configured. More fundamentally, the comparing and contrasting that is the essence of equality discourse reflects how language itself works and thus surely reflects the nature of the human mind.

For example, when I say I am a middle-aged woman, the mother of two young boys, and a law professor, I necessarily and inevitably invoke unspoken contrasts (most of them, upon inspection, gendered) without speaking of them. I am not young anymore, nor really all that old yet (does this call forth a different image for a woman than a man?); I am not a man, I am not a father; God deprived me of daughters; I am not a secretary, an elementary school teacher, or a nurse.

Somewhere at or near the core, pervading our definitions of self, our assessment of others, our social relations, institutions, law, theory, and language, is the sex of human beings. Almost always conceived of as only two in number, dichotomous and complementary (yin and yang, hand in glove), the two sexes are part of the deep structure of the world humans construct: Sex forms the basis of comparisons and contrasts that pervade our lives in every aspect. Neither justice nor power can be understood or altered without reference to that reality. Thus, inevitably, whether one em-

braces or repudiates the word equality, comparison and contrast of the sexes are necessarily central to feminist analyses and certainly to feminist legal analysis. Whether one is a symmetrist or an asymmetrist, difference and commonality are the subjects of inquiry.

However critical symmetrists may be of the Supreme Court's sex equality jurisprudence on other grounds, they do not fault the Court for its requirement of formal equality. (I will try to explain why shortly.) The Court's approval of formal equality is sometimes criticized on the ground that it treats as the same that which is different, that it fails to recognize and account for differences between the sexes.<sup>14</sup> A first (and somewhat technical) response to this assertion is that a claim to formal equality is not a claim of sameness. When I ask an institution to extend to me what you have on the ground that to do otherwise is to treat me unequally, I am not asserting that we are the same. If we *were* the same, if we *were* identical, I would not need to make the equality argument. I would already have been encompassed within the class that includes you. Formal equality arguments are arguments we resort to only if we are different. At the same time, equality arguments are arguments that appeal to some commonality across the divide. The phrase "similarly situated," used and abused in judicial doctrine about equality, captures the idea. Equality arguments necessarily rely upon context: We who are different share in this particular context at this particular time a quality, trait, need, or value that locates us on the same platform for this particular purpose. We see a connection in a particular respect that we who are different think entitles us to partake in the same meal, drink at the same trough, or march to the same drummer—at least in this particular parade.<sup>15</sup>

I do not claim we are the same; I do not desire to repudiate our different identities. (Frankly, I treasure mine and would be lost without it; I respect yours—at least I try to—and do not want to violate your sense of it.) It is not a requirement of formal equality, of symmetry, that difference be denied. The existence of difference is not incompatible with the assertion of a right to equal treat-

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<sup>14</sup> See, for example, Mary Becker, *Prince Charming: Abstract Equality*, 1987 Sup Ct Rev 201 (1988); Catharine A. MacKinnon, *Feminism Unmodified* 32-45 (Harvard University Press, 1987).

<sup>15</sup> The parties to a lawsuit are engaged in a creative process, constructing and projecting different stories about dichotomy and connection to the court. Which stories are chosen and which are omitted is a matter of ideology, necessity, institutional constraints on the nature of legal arguments and the history, experience and perspective of lawyer, client, and judge. The same is true, although perhaps more subtly and diffusely so, outside the courtroom.

ment. Nor, for that matter, is the presence of some commonalities necessarily sufficient to justify equal treatment.

What I want to assert here is that symmetrists do not deny sex difference any more than asymmetrists deny sex commonality, although each group tends to forget or suppress this about the other. It is more a case of putting emphasis on a different syllable. The symmetrist has mostly spoken, when talking about judicial equality doctrine, in terms of the appropriateness of a presumption that overtly sex-based laws are unconstitutional, and the symmetrist places a heavy burden of justification on the state that chooses to legislate by sex. The subtext of this stance is that sometimes sex-based laws can be justified. The asymmetrists speak in many ways about the problem of equality and cannot be so neatly summarized. But on a practical level, all would prefer in some situations legal solutions to problems of importance to women that are not framed as sex-specific laws, to solutions that are clearly sex-specific. As one example, it is my sense that most asymmetrists would prefer to address the problem of the need to provide for leaves of absence from work to care for newborn or newly adopted children by establishing a right to leave for *parents* rather than *mothers*, even though "the reality" is that women are far more likely to use such leaves than men.

What is the conception of women's condition that leads to the different emphasis on or use to which symmetrists and asymmetrists put sex difference? I offer (tentatively) the idea that symmetrists and asymmetrists focus on different collections of differences. For symmetrists the most salient differences, the differences that matter most, are differences *among* women—differences of race, ethnic and religious heritage, class, age, values, personal style, sexualities, and experience. Symmetrists are riveted by two related problems, problems which I will label the problem of oppositions and the problem of essences; both of which, to symmetrists, point them toward an inhospitability to overtly sex-based categories in law.

The problem of oppositions is that sex-based categorizations in law define men and women as discontinuous complementary poles. Symmetrists, concerned with how such definitions restrict women, do not accept that version of reality and think the state should be foreclosed from enacting it into law.<sup>16</sup> Carol Gilligan's

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<sup>16</sup> Sex categorization—the requirement that the sexes be dual, polar and complementary—in its most fundamental and least visible form is a prerequisite to invocation of the laws against sex discrimination. Antidiscrimination law, like the neighbor peering into the

Jake and Amy<sup>17</sup> have great richness and power as metaphor. But when the state declares through its laws that public benefits and responsibilities are to be assigned on the basis of whether one is Jake (the presumptively independent, logical and self-sufficient male) or Amy (the presumptively caring, dependent, and relational female), the women who are supposed to be Amys but look more like Jakes, or in some other way not-Amy, are foreclosed from expressing who they are, and are officially invalidated for it.<sup>18</sup>

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baby carriage, requires that we be female or male ("is it a boy or a girl?") before it will extend its protection. It is not sex discrimination under Title VII for an employer to require men and women employees to wear "sex appropriate" uniforms while they work. *Carroll v Talman Federal Savings and Loan Association of Chicago*, 604 F2d 1028 (7th Cir 1978). Women must cover their breasts in public or face criminal penalties. *Seattle v Buchanan*, 584 P2d 918 (Wash 1978). See Mary Whisner, *Gender Specific-Clothing Regulation: A Study in Patriarchy*, 5 Harv Women's L J 73, 109 (1982). Courts do not conceive of the discrimination faced by a person who is making or has made the physical and social transformation from one sex to the other (or who is born with the physical characteristics of both sexes) as sex based. See, for example, *Ulane v Eastern Airlines, Inc.*, 742 F2d 1081 (7th Cir 1984). Nor will they extend the protections of Title VII to men fired because they are "effeminate" (or, presumably, to women who are "butch"). See, for example, *Smith v Liberty Mutual Insurance Co.*, 569 F2d 325 (5th Cir 1978). Most fundamentally, laws that prohibit sex discrimination in employment do not protect employees whose sexual orientation is toward their own sex. See, for example, *DeSantis v Pacific Telephone & Tel. Co.*, 608 F2d 327 (9th Cir 1979); see also *Singer v Hara*, 522 P2d 1187 (Wash App 1974). Thus discontinuity and complementarity are the prerequisites to remedies under the antidiscrimination laws: A person must be one sex, maintain the appearance (in clothing and effect) of that sex, and prefer sex with the "opposite" sex. If a person has complied with the requirement that he or she be properly "sexed," the law will then provide partial protection against penalties for being of a sex. This judicial stance is troubling enough. To narrow the compass of who women (and men) can be compounds the problem.

<sup>17</sup> Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982). Jake and Amy were eleven year old sixth graders, "both bright and articulate," id at 25, who were presented with a hypothetical dilemma: Should Heinz, whose wife will die without a certain drug, steal the drug for her if he has no money? In his answer, young Jake assigns logical priority to life over money and concludes that Heinz should steal the drug. By contrast, Amy, struggling with her feeling that Heinz should neither steal the drug nor let his wife die, suggests that "they should just talk it out and find some other way to make the money" or get a loan or talk with the druggist. Jake sees the question as a self-contained problem in moral logic while Amy sees the problem as one of human relationships and communication. Gilligan concludes: "Amy's judgments contain the insights central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach." Id at 30. These different understandings of the moral dilemma posed by the Heinz problem (Jake asking, "should Heinz steal the drug;" Amy asking, "should Heinz steal the drug") epitomize, for Gilligan, the different paths of moral development traveled by boys and girls.

Gilligan herself would presumably resist the assignment of spheres of activity by sex (and the implicit injunctions about how each sex *should* behave) that sex-based lawmaking inevitably entails. In the final chapter of *Different Voice*, she makes the point that a fully developed morality would include both the voice she identifies as male (as exemplified by Jake) and the voice she identifies as female (Amy's voice). Id at 174.

<sup>18</sup> Likewise for the Jakes who look more like Amys. I for one believe we would be better

The related problem of essences is that by sorting people categorically as either Amy or Jake, the law produces a definition of sexual essence *within* the category female and *within* the category male. Amy has been important to me; I embrace her, but I am suspicious of her. I suspect she might be middle class, Protestant and white, a socially acceptable girl/woman in traditional terms. I know her well enough<sup>19</sup> to know that part of who she is derives from what subordinates and oppresses her. She, with her considerable virtues, is without doubt the woman dominant gender ideology wants us to be.<sup>20</sup> Project woman as Amy in law and the complexity and richness of women's current and evolving diversity is disapproved, thwarted, and disowned by the state.<sup>21</sup> Women's struggle to understand and undo subordination is thereby arrested.

Symmetrists' objection to overtly sex-based legislation arises from a valuing of difference across and within sex categories, from wanting urgently to assert that men and women come in many

off if the Jakes who partake of Amy-ness are not denied official existence by the law of the land. See Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, 1978).

<sup>19</sup> Carol Gilligan, I need to say something to you about Jake and Amy at this point. When you assigned value to Amy's voice, you honored my mother and, to a lesser extent (I never was *quite* the good girl I was supposed to be), you honored me and validated me. You praised the part of me I was taught to think of as morally appropriate for a woman. But then, I both wanted and did not want to be a good girl. Mom said I could be smart, but I'd better not show it or men wouldn't like me. She said I should cross my legs at the ankles. Men, she told my law partner's husband, always sit at the head of the table in our house. Those also serve who only sit and wait, she said. Turn the other cheek. Do unto others. Don't bother your father, he's worked hard all day. Me last, me least, me not at all, she said without saying it. If I could give my mother something, it would be a little Jake-ness. If I could forgive myself something, it would be the Jake in me.

<sup>20</sup> Amy is most powerful when it comes to pregnancy and motherhood. Her concern for relationships, and her ethic of care leads her unerringly to gratefully accept the "Mommy Track," and unquestioningly take those secure, lowpaying and unchallenging jobs Sears, Roebuck says that women want. Sears successfully defended itself in a suit brought by the Equal Employment Opportunity Commission by persuading the court that women preferred not to work in commission selling, which involved work at night, selling in people's homes and more risk-taking. *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F2d 302, 320-21 (7th Cir 1988). Radical revision of the workplace is not likely to be on Amy's agenda.

<sup>21</sup> I distinguish "enacting Amy," from the use of the ethic Gilligan ascribes to her. While the legislating of sex categories is undesirable for the reasons I discuss, the use of the ethic of care identified by Gilligan to evaluate and criticize current legal constructs and to inform one's approach to legal process and practice is an undertaking I believe is enormously fruitful and ultimately transformative. See, for example, *Symposium: Women in Legal Education—Pedagogy, Law, Theory and Practice*, 38 J Legal Educ 1-193 (1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L J 39 (1985); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am U L Rev 1065 (1985). For a discussion of a generalized ethic of care, see Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 Signs: J of Women in Culture & Society 644 (1987).

shapes, sizes, sexualities, aspirations, experiences, and life patterns, from an understanding that we are not discontinuous and dichotomous, but complexly overlapping, divergent, interconnected, and historically changing. Symmetrists target overtly sex-based legislation as problematic because it limits how we may define ourselves and how we can unfold over time. We stubbornly insist that it is for us, not the state, to say who we are.

For asymmetrists the salient differences are differences between women and men. Why do asymmetrists not see formal sex categories as problematic in the way I just described, and why might they be indifferent to or even embrace these categories? I think the answer lies in the asymmetrists' perception that abolishing overt sex categories in the law does not automatically alter the maleness of our institutions and laws, nor directly attack women's disadvantages and subordination. As a result, asymmetrists tend to view formal equality—symmetry—as at best irrelevant because it does not reach the deeper structures of male definition and dominance. At worst, asymmetrists view symmetry as a fraud and a deception because the achievement of formal equality, they contend, only confers male privilege upon women who can fit a male model of work and participation in public life, and thus masks the reality that the majority of women remain subordinated and disadvantaged.<sup>22</sup>

This brings me to the second, and decidedly nontechnical, response to those who assert that symmetrists fail to recognize and account for the differences between the sexes that matter. A deep and powerful connection between symmetrists and asymmetrists is a shared perception of a world constructed on a male model, a perception which is poorly or not at all grasped by nonfeminists. Symmetrists and asymmetrists both see the need, as the central focus for feminist legal theory, to restructure, revise, and reinvent the legal world to undo the maleness of that world and to project femaleness into it. The perception that male dominance and women's subordination should be the targets of social change is simply not controversial within the feminist legal community.

A point generally missed by the press, public and perhaps even some participants in the *Cal Fed* litigation was that all of the feminist briefs, whatever their disagreements, agreed on a central reality: The workplace is structured to respond to the life patterns of male workers and inadequately accommodates workers who be-

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<sup>22</sup> MacKinnon, *Feminism Unmodified* at 32-44 (cited in note 14).

come pregnant, give birth and carry major parental responsibilities. All agreed that employed women who give birth need job protection. In this respect, as in others not immediately at stake in *Cal Fed*, our mutual commitment is not to finding places in the work world for women who can function like the traditional man-with-wife-at-home employee, but in restructuring work and family, and reordering the relations of the sexes. Our disagreements in *Cal Fed*, just like our disagreements generally, arose not over what we believed, substantively, that women needed in the workplace, but over the shape the remedy to these problems should take. Symmetrists hold that the objective is to achieve equality in form and substance. Courts, highly constrained institutions that they are, can do little more, and frequently do less, than lay down the requirement of formal equality in the cases that come before them. They are only weakly capable of substantive reform.

The equality cases that come before courts are typically cases in which someone is seeking what someone else has. In the sex equality cases, that can frequently be (but is not always) a woman seeking a right, privilege, or benefit that has been the province of men, or a woman challenging less favorable treatment because of her sex. If the petitioner is lucky, a court might give her what she seeks. The result in her case is "formal equality." The result in her case multiplied by all the successful cases like hers is the assimilation of women into a male structure, rather than a redoing of the structure itself.

If courts were the whole or even the major locus for seeking substantive gender justice, this critique would depress the most avid symmetrist. But of course courts never have been, are not now, and never will be authorized, given our tripartite allocation of government powers, to fundamentally reorder the workplace, the family, or the political order.<sup>23</sup> It is now, as it always has been, the legislature that can deliver that kind of reordering. Thus, while from one angle of vision courts are assimilating privileged women into the male structure, from another they are laying down a rule for legislatures about the shape of substantive equality legislation.

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<sup>23</sup> The closest courts come, in legal doctrine, to "reordering" is when, as a remedy for discrimination in a class action, they require employers to undertake affirmative action or to throw out certain job criteria or practices that harm women as a class. This latter idea is captured in the more potent forms of disparate impact analysis which maintain the commitment to symmetry by prescribing as the remedy for a falsely neutral (read "male defined") rule a "truly neutral" rule (read rule redefined to capture women's condition). See Nadine Taub and Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation From the Existing Social Structure?*, 37 Rutgers L Rev 825 (1985).

They are saying (sometimes) what symmetrists litigated to get them to say: When legislative bodies enact legislation that addresses women's subordination, which redistributes power, social or economic, between the sexes, which targets violence against women, they must do it in a symmetrical form or it is subject to challenge in court.

As asymmetrists perceive, symmetrical forms of legislation can be hollow and sometimes harmful without substance. Symmetrists would add that substance is undercut without careful attention to form. For symmetrists, formal equality is a necessary, although not sufficient, condition for substantive equality of the sexes. Given what symmetrists understand to be the institutional constraints of courts, we are satisfied if courts maintain a commitment to formal equality as a constitutional principle. This commitment to formal equality by courts constitutes a requirement that legislatures, whose powers are precisely to deliver substantive responses to social needs, deliver measures directed to women's equal participation, opportunity, autonomy, physical integrity, and economic viability in a symmetrical form.

What can explain this commitment by symmetrists and asymmetrists to differently configured solutions? Ideas do not have power in the abstract, they have power because they speak meaningfully to people located in particular times and circumstances. I want to explore one set of possibilities which feels helpful and healing to me. To borrow (and misuse) a title from Paula Giddings' fine book on black women's history,<sup>24</sup> it is partly a matter of "when and where we entered."

Let's take first "when we entered"—a generational explanation for the commitment to differently shaped solutions to women's inequality under law. If one "entered"<sup>25</sup> the feminist legal enterprise around 1970, one entered when we lived under a thoroughgoing set of "Jane Crow" laws, explicitly sorting the world by gender in ways that defined us into the single role of wife/mother/dependent<sup>26</sup> and which overtly and explicitly privileged men in the public and private spheres. We felt the squeeze of the oppositions problem (women and men belong in separate spheres) and we felt

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<sup>24</sup> Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (William Morrow and Company, Inc., 1984).

<sup>25</sup> Here, I am not talking about the age of the person, but rather the time at which she became involved.

<sup>26</sup> See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 *Women's Rights L Rptr* 175 (1982).

the squeeze of the essences problem (woman equals no more and no less than wife/mother).

Necessarily, our first target was those formally asymmetrical laws.<sup>27</sup> Our attack in the courts was an attack on asymmetrical lawmaking in general because we knew what that era's asymmetry meant for women. We ourselves experienced the distortions it imposed upon our own lives and definitions of self. We understood the ideological underpinnings of asymmetrical lawmaking as premised centrally on discontinuity between the sexes, and unity of women's purpose in life. Our target was and is gender-based law; which in its most overt form, the form in which we first experienced it, was formally sex-based law.

By contrast, if one entered the feminist legal enterprise around 1978 or thereafter, Jane Crow was gone (a tribute in part to our success in court, as well as to numerous state commissions on the status of women and whatever hardy band undertook the de-sexing of the United States Code). What was still very much in evidence was women's inequality as manifested by the wage gap, by violence (sexual and nonsexual) against women, by women's poverty, and, at a deeper level, by the way law was conceived, taught, practiced, and experienced. One who entered at that point would perceive a world of purported "neutrality" stacked against women.<sup>28</sup> It is not surprising that those who entered earlier continue to advocate the avoidance of overtly sex-based laws, seeing in them a tangible threat to substantive equality for women. Nor is it surprising that those who came later would not necessarily understand, let alone share, that commitment.

I want to move next to the question of "where we entered." Really, this is a reiteration in slightly different terms of a point I have already made. Where one enters the debate, what the angle of

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<sup>27</sup> At least, our professional target was those laws. We also struggled with the personal consequences of these societal injunctions in conscience raising groups. Many of us found ourselves in a life and death struggle with Amy—who didn't yet officially have a name, but whose gentle voice insisted that we suppress anger, maintain our traditional connections to the men in our lives, put others' feelings and needs first, and rather than fight, put away our jump ropes and end the game. (See Gilligan, *In A Different Voice* at 10 (cited in note 17), on dispute resolution in boys' and girls' games.)

<sup>28</sup> In a parallel transformation, young heterosexual women of the 1960's, raised under a double standard of sexual morality, experienced the freedom of sexual expression made possible by the newly available birth control pill as liberating. A decade later, the dangers of The Pill and IUDs (intrauterine devices) had become manifest while the sexual politics of "liberation" turned out to be as complicated for women as that of the old double standard. A second generation of feminists emphasized the dangers, rather than the pleasures, of the post-Pill sexual world. In the '80s, AIDS (Acquired Immunodeficiency Syndrome) has wrought a further, profound reassessment.

vision is, has a good deal to do with how one analyzes particular situations. If, to invoke again the example of pregnancy, your posture is that of seeking what is by law denied you on the basis of your sex (for example, the right to continue working while pregnant and healthy, and the right if pregnant and incapacitated to partake of certain fringe benefits, such as a leave and sick or disability pay, or the same level of insurance coverage as one's coworkers), your perspective leads you to discern the analogies, the connections and the commonalities between the condition of women and men, between pregnancy and other conditions that are more favorably treated. Your arguments are grounded in those commonalities.

If, by contrast, one enters at the point at which a legislative provision which confers a needed and important benefit upon women is being challenged and threatened on the ground that it is denied to others claimed to be similarly situated (for example, an unpaid leave of absence with job protection for pregnancy related disability), one would be inspired to detail the distinctions between pregnancy and other conditions that might render a worker unable to do his or her job, or, more broadly, detail the different implications of reproduction for men and women. Perceptions of commonality and difference depend very much on the angle of vision, on why one is looking, on what one needs to see.

What conclusions do I want to draw from all this? First, it seems to me that we, symmetrists and asymmetrists, are all engaged in a common enterprise in the specific sense that we are exploring from different angles the social construction and meaning of gender. I see in our shared conception of the maleness of the legal world and desire to undo it a powerful potential for working together, despite our differences, on many fronts—judicial, legislative and community-based. To offer just one example of such an opportunity already grasped, we worked together (and will need to continue our efforts) toward passage of the Family and Medical Leave Act, a bill formally structured to satisfy symmetrists<sup>29</sup> and aimed at a substantive change in the work world that is a priority for both symmetrists and asymmetrists alike. It is worth noting, moreover, that the proposed legislation was conceived, in large part, because of feminist concerns highlighted by the *Cal Fed* case

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<sup>29</sup> HR 925, 100th Cong, 1st Sess (Feb 3, 1987), in 133 Cong Rec H528 (daily ed Feb 3, 1987). The Family and Medical Leave Act creates a right to unpaid leave for serious medical conditions, including pregnancy and childbirth. Leave upon birth or adoption is available to parent-employees of both sexes.

in its early stages; the political opportunity to push for such legislation resulted in part from the publicity about the lack of and need for parental leave generated by that case as it made its way to the Supreme Court.

Second, I offer the thought that if our perspectives along parameters such as symmetry and asymmetry derive from different experiences and different circumstances—if part of our division derives from when and where we embarked upon the feminist legal enterprise—we have much to offer, and much to receive, from each other, which cannot help but enrich our theory and practice as feminists.

