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AUTONOMY AND COMMUNITY IN FEMINIST LEGAL THOUGHT

SUSAN G. KUPFER*

In discussing the rights of woman, we are to consider, first, what belongs to her as an individual, in a world of her own, the arbiter of her own destiny, ...on a solitary island.... The strongest reason for giving...her the most enlarged freedom of thought and action...is the solitude and personal responsibility of her own individual life.

-Elizabeth Cady Stanton, 1892¹

[W]omen have always had to wrestle with the knowledge that individualism's prestigious models of authoritative subjectivity have refused female identification. Feminism, as an ideology, took shape in the context of the great bourgeois and democratic revolutionary tradition. It thus owes much to the male-formulated ideology of individualism, as it does to the special experiences of women who have been excluded from the benefits of individualism.

-Elizabeth Fox-Genovese, 1991²

In the hundred years between the statements of the two Elizabeths, feminist legal thought³ has contributed, in an

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1. ELIZABETH CADY STANTON, *The Solitude of Self*, IN ELIZABETH CADY STANTON, SUSAN B. ANTHONY WRITINGS AND SPEECHES 246 (Ellen C. DuBois ed., 1981).

2. ELIZABETH FOX-GENOVESE, FEMINISM WITHOUT ILLUSIONS 225 (1991).

3. "Feminism is then the range of committed inquiry and activity dedicated first, to describing women's subordination-exploring its nature and extent; dedicated second, to asking both how—through what mechanisms—and *why*—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third to change." Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3-4 BERK. WOMEN'S L.J. 1, 2-3 (1988).

explosion of scholarship, to the unpacking and understanding of the dichotomies of Woman/Man, Self/Other, Subject/Object, Individual/Community. As an introduction to this issue of the Women's Law Forum, I want to explore one particular aspect of the discussion, which Duncan Kennedy has called the "fundamental contradiction" of liberal thought: that "relations with others are both necessary to and incompatible with our freedom."⁴

Feminist scholarship, unlike critical theory, has not completely challenged the basic tenets of liberal ideology. While the critical view has been to reject the individualism of liberal political theory in favor of structural arguments against the legitimacy of state power,⁵ feminist scholarship has started from a focus on the position or experience of women as socially gendered. Because historically women have been relegated to the private sphere of home and family while subordinated to men in the public sphere of work and politics,⁶ feminist analysis has developed critiques of both aspects of the dichotomy of individual/ community. In seeking to remedy gender inequality, writers face a dilemma. The possibility of autonomy for individual women risks subscribing to liberal ideology, with its known inequities; yet, the focus on community flirts with reductionism, seeing women as only connected to others.

Robin West articulated the parallel development of the opposition of critical theory to classic liberal thought in what she terms 'irretrievably masculine' jurisprudence and contrasted it to a jurisprudence based on the subjective experience of women.⁷ Liberal theory seeks to protect the individual from 'annihilation' by others through the construct of legal rights; rights establish boundaries, enforced through law, but have the consequence, exposed by critical theory, of contributing to alienation and frustrating a desire for connection.⁸ The identical themes in feminist jurisprudence, which West calls "the state of connection,"⁹ create different oppositions: cultural feminism sees intimacy and connection as its main value and

4. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

5. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 9-10 (1987).

6. See Frances Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1061-62 (1992).

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

8. *Id.* at 4-12.

9. *Id.* at 3.

fears separation from others as its harm,¹⁰ while radical feminism seeks to maximize the integrity of the individual woman and views invasion or intrusion of the self (through commitment to children or others) as a primary obstacle to autonomy.¹¹

Recently public debate has focused on the extreme differences generated by conflicts in feminist ideology.¹² Within the academy, splits between liberal¹³, cultural¹⁴ and radical¹⁵ feminists demonstrate the strongly diversified approaches to the problem while the critique of anti-essentialism has denied the view that there can be one coherent voice for feminism.¹⁶ Outside the ivory walls, the media continues to reinforce cultural stereotypes 'proving' the failure of the feminist vision.¹⁷

The epigraph from Elizabeth Fox-Genovese typifies one aspect of the struggle: she argues that concentration by feminists on individualist notions of empowerment is misplaced and that it is the surrender to the community which will result in a better life for women.¹⁸ Robin West would agree: although she seems to understand the ideas of radical feminists supporting autonomy, she endorses an essentialist position for women as they are defined and connected by the experience, or capacity, for mothering.¹⁹

In Part I, following a brief analysis of the critique of liberal political theory, I argue that the theories of Fox-Genovese and West deny the felt experience of women in their own struggle to counteract the construct of gender; since women are "engendered" by social norms, they must first develop the subjective experience of autonomy, in which they seek to understand the inner direction of their authentic selves. Second, as I argue in

10. *Id.* at 13-28.

11. *Id.* at 29-36.

12. See, e.g., Jane Gallop, Marianne Hirsch, Nancy K. Miller, *Criticizing Feminist Criticism*, in CONFLICTS IN FEMINISM 349 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) (describing personal experiences with criticism); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990) (lamenting the splintering caused by the debate over essentialism).

13. See *infra* text accompanying note 26.

14. See *infra* text accompanying notes 30-37.

15. See *infra* text accompanying note 40.

16. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

17. Current examples include those detailed in SUSAN FALUDI, *BACKLASH* (1991).

18. FOX-GENOVESE, *supra* note 2, at 33-54.

19. West, *supra* note 7.

Part II, the idea of community, much bandied about, is a concept which is ill-defined in most feminist thought. Further, the prescription for women's place as part of a community generally ignores the experience of women who traditionally have been subordinated by their defined roles within communities.

While this essay considers a range of written work about feminism, there is no unified theory presented in the literature. The innovation and energy of the work is based upon contextual expression of various women's experiences²⁰ and it is the very point of subjective differences which is valued. This might be characterized as a post-modernist view.²¹ As Martha Minow has explored in an extended work, the emphasis on and discussion of difference holds the promise of a thoughtful reconsideration of some central ideas of liberal theory: neutrality (unpacking the assumptions underlying a certain, objective norm by which we measure difference) and universality or tolerance (valuing, not stigmatizing, the difference).²²

Feminist theorizing starts from the reality of women's varied, contextual experience as a source for examining gender inequality.²³ While there may be no single voice that speaks for Woman,²⁴ gender oppression continues to be both central and distinctive to inequality within our society. This does not minimize the vast inequities created by race, class or sexual preference but it does define a different slice of the social, economic and legal framework. A survey of the literature demonstrates its dazzling diversity:

Beginning in the late 1960's, the first wave of feminist legal thought focused on eradicating the legal differences between the genders.²⁵ The notion of formal equality culminated in the

20. For an elaboration of this idea, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

21. Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987). Nancy Fraser & Linda J. Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19, 35 (Linda J. Nicholson ed., 1990).

22. MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

23. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 821 (1990).

24. SPELMAN, *supra* note 16, at 133-59.

25. For the taxonomies that follow, I have drawn on accounts by Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 5-4 BERK. WOMEN'S L.J. 191 (1989-90); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990); Dalton, *supra* note 3; Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

attempt to pass the second Equal Rights Amendment and in the development of analyses examining unequal formal distinctions in employment, educational opportunities, reproductive freedom, pregnancy leave, rape laws and so on.²⁶ These theorists worked very much within the existing legal system, seeking to use the equal protection clause of the Fourteenth Amendment and governmental rulings to eliminate gender discrimination. The strategy had its limitations after its first few successes.²⁷

But the next wave of feminist theorists rejected the idea of formal gender equality in favor of recognizing and celebrating the differences between the genders.²⁸ Some revere the connections that women have to others and to the community.²⁹ They draw on psychological³⁰, ethical³¹, and sociological³² scholarship to inform their theories. They have been dubbed the "difference voice" feminists, after Carol Gilligan's major work³³ or the "cultural feminists" in Robin West's analysis.³⁴ Legal scholars have used the distinctive feminist perspective to articulate a different vision of law practice³⁵ and legal education³⁶, and to further the discussion and analysis of gender

26. Lucinda Finley, *Transcending Equality Theory: A Way Out of Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

27. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1375 (1986).

28. Cain, *Limits of Equality*, *supra* note 25, at 835-38.

29. See West, *supra* note 7.

30. NANCY L. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976); JULIET MITCHELL, *PSYCHOANALYSIS AND FEMINISM* (1974).

31. Drucilla Cornell, probably more of a postmodernist than a cultural feminist, nevertheless develops the idea of "femininity" in her ethical work. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Drucilla Cornell, *The Doubly Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990).

32. *E.g.*, Barrie Thorne, *Children and Gender: Constructions of Difference in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (Deborah Rhode ed., 1990).

33. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Gilligan's work has been extremely widely read and utilized. For a good critical commentary on her work, see Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of the Imagination*, 70 TEX. L. REV. 109, 120-30 (1991); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 840 n.181 (1989).

34. West, *supra* note 7.

35. *E.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERK. WOMEN'S L.J. 39 (1985).

36. *E.g.*, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988).

issues.³⁷ This second wave has generated two different critiques: one which deplors the debate over sameness/difference as a useless, divisive conflict in feminist ideology,³⁸ and the other which fears the focus on difference will trivialize and marginalize women's concerns.³⁹

Catharine MacKinnon is a radical feminist.⁴⁰ Her analysis, based on Marxist theory of class dominance/subordination, also focuses on difference between the sexes. She views gender as socially constructed and believes that men use the difference of sex to justify unequal power over the class of women.⁴¹ Where the cultural feminists might see difference as a product of biological or psychological determination, MacKinnon postulates that women are defined by men on the basis of their sexuality. Women as a class are defined by men according to their difference from men; this leads her to argue for special protections for women under law to redress women's subordination in the areas of sexual harassment, rape, and pornography.⁴² MacKinnon reduces women to an essential characteristic: their sexual "use and abuse by men."⁴³

Women of color, building on ideas generated by critical race theory,⁴⁴ also center their analysis on difference. However, they use the fact of difference and the exploration of context to argue against a unified theory of feminist thought. Instead, they have advanced the thesis of intersectionality⁴⁵ or anti-essentialism.⁴⁶ They attack traditional feminist theory as privileging only certain (white, middle class, heterosexual) women

37. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Mary Joe Frug, *Rereading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Martha Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

38. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism and Critical Race Theory*, 1991 DUKE L.J., 296.

39. Rhode, *supra* note 25, at 618; Schroeder, *supra* note 33, at 120.

40. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

41. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 40, 40-45.

42. MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 40, at Chapters 6 and 7.

43. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 40, at 5.

44. See generally Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

45. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

46. Harris, *supra* note 16.

while ignoring the concerns of the outsider⁴⁷ or the disadvantaged woman. They question whether there can or should be a unitary vision of a feminist agenda.⁴⁸

More recently, a number of theorists have elaborated upon frameworks from European intellectual theory to analyze gender issues in the fields of literary theory,⁴⁹ structuralism,⁵⁰ hermeneutics,⁵¹ and post-modernism.⁵² Post-modernism, generally, seeks to undermine the duality of normative discourse, to refrain from seeing dichotomies of self/other, man/woman, white/outsider, heterosexual/homosexual, dichotomies which not only define through contradiction (e.g. Woman is not Man⁵³) but imply a hierarchical advantage of the dominant definer over the other.⁵⁴ Rather, these theorists seek to understand a more central conception of the definition which takes aspects of both parts of the duality, not quite as a synthesis, but as a re-creation.⁵⁵

Lastly, relying on the centrality of women's subjective experience to an explanation and critique of gender inequality, the unique contribution of feminist theory may well be in the development of a methodology to explore gender differences⁵⁶ and to articulate the particulars of the gendered experience.⁵⁷ The methodology has the potential of generating true transformation as it substitutes ways of recalling the experience of women for society's presumptions about official neutrality and universality toward difference.⁵⁸ These methods include the theory of 'positionality,'⁵⁹ consciousness raising,⁶⁰ use of

47. *Id.* at 584.

48. *Id.* at 585-90.

49. See, e.g., Jane Maslow Cohen, *Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction*, 25 TULSA L.J. 657 (1990).

50. See, e.g., Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 64 (1989); Ashe, *supra* note 21.

51. Schroeder, *supra* note 33.

52. Ashe, *supra* note 21.

53. This insight is Simone DeBeauvoir's; SIMONE DEBEAUVOIR, *THE SECOND SEX* (1952)

54. Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, The Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUDIES 33 (1988), paraphrasing Jacques Derrida: "the interdependence is hierarchical with one term dominant or prior, the opposite term subordinate and secondary." *Id.* at 37.

55. *Id.*

56. Bartlett, *supra* note 23.

57. Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991) (describing the use of narrative in feminist writing).

58. Kathryn Abrams, *Feminist Lawyering and Legal Methods* (Book Review), 16 LAW & SOC. INQUIRY 373 (1991).

59. Bartlett, *supra* note 23, at 880-87.

60. MACKINNON, *FEMINIST THEORY*, *supra* note 40, at Chapter 5.

narrative⁶¹ and practical reasoning or contextually situated analysis.⁶² Some have suggested that the new methods could generate a different view of due legal process.⁶³

Because of the diversity in the ways that feminist theorists understand and use the notion of difference, there is a risk that feminist theory will be trivialized by others as incoherent. At the core of the feminist struggle are the competing concerns of relieving inequality based on gender for individual women while appreciating the role of women within the community. Feminist legal thought vacillates between supposedly irreconcilable visions of complete equality and autonomy for the individual woman (liberal feminist thought) and primary identification of the woman with the needs of the community, most often defined as her family, her commitment to children and others (cultural feminist thought).

But, perhaps these may not be opposed dichotomies.⁶⁴ The strength of women's experience may very well be impulses to both: true equality through complete autonomy for every individual in society and full participation of the autonomous individual within the community. There is no reason that autonomous individuals cannot be joined by an interest or goal in transformative imaginings of the possibilities of difference.⁶⁵

I. AUTONOMY IN FEMINIST THOUGHT

A. BACKGROUND: THE CRITIQUE OF LIBERALISM

The radical views of critical legal studies, critical race theory and feminism reject the underpinnings of liberal legalism. Deborah Rhode puts it succinctly:

61. Abrams, *supra* note 57.

62. Minow & Spelman, *supra* note 20.

63. Cynthia Farina, *Conceiving Due Process*, 3 YALE J. OF LAW & FEMINISM 189 (1991).

64. "If relationism seeks to reconcile the self and the other, while respecting the otherness of the other, it may be intensely feminist." Schroeder, *supra* note 33, at 130.

65. Jennifer Nedelsky's vision of autonomy includes transformative aspects of community. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. OF LAW & FEMINISM 7 (1989); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 603 (1986).

[L]iberal theorists generally begin from the premise that the state's central objective lies in individuals' freedom to pursue their own objectives to an extent consistent with the same freedom for others. Implicit in this vision are several assumptions about the nature of individuals and the subjectivity of values. As conventionally presented, the liberal state is composed of autonomous, rational individuals.... Yet, while capable of full knowledge of their own preferences, these liberal selves lack similar knowledge of others. Accordingly, the good society remains as neutral as possible about the meaning of the good life.⁶⁶

Liberal legal thought protects the individual at the core of its ideology in two specific ways: through respect for freedom or autonomy and through the idea of equality or universal treatment. The individual freely cedes power to the state through the idea of the social contract, retaining the freedom to live a life which is self-determined. Individualism is protected in liberal ideology through the idea of rights which provide a defense of individual prerogatives against the threat from the community or from government. But, as critics of liberal ideology argue, the claims of liberalism to be "inclusive, participatory and egalitarian" are false.⁶⁷ Further, reliance on legal rights fosters selfish, atomistic, rational actors out to maximize their own goals, creating in the process a society which is alienating.⁶⁸ While reliance on state power to enforce rights subjects individuals to the indeterminate exercise of power by state officials,⁶⁹ it also privileges those who can take advantage of the competitive struggle. The focus on universality in liberalism, the critics argue, sublates real, divisive existing inequities of class, resources, race and such within the rhetoric of theoretical equality. And, while equality is the ideal of treating comparably situated individuals in the same way, analysis of the realities of daily life demonstrates that the true neutrality of the state toward outcomes succeeds only in

66. Rhode, *supra* note 25, at 627.

67. *Id.* at 628.

68. See Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); KELMAN, *supra* note 5, at 63; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

69. Tushnet, *supra* note 68.

advantaging those already privileged and marginalizing those who are disadvantaged.⁷⁰

Feminists are uniquely positioned to continue and to add to the critique of liberal legalism. "The personal is political" has two dimensions: a political view of personhood demonstrates the deeply engrained domination of the patriarchy in women's individual lives;⁷¹ at the same time a transformative view of the polity is possible from perspectives and values held by those in society who do not share the values of the dominant class.⁷²

We should not abandon the idea of autonomy because it bound up with contradictions of liberal legalism. For the experience of autonomy can cut both ways. When we describe the world we envision, surely we seek the experience of autonomy for everyone; it is a goal which recognizes some true values of humanity, particularly, the honesty of subjective self-knowledge and the power of self-determination. Feminists have proposed a "reconceived" autonomy⁷³ based on feminist principles, a reconception which promotes self-determination. Nor need we abandon the aspects of feminist thought which envision the place of the truly autonomous person in a community or legal system reflecting progressive, transformative values. The centrality of law in our society as the dominant public discourse⁷⁴ provides a platform for the integration of feminist thought into a redefinition of community.

As others have argued, maybe the problem is that liberalism has not lived up to its full potential.⁷⁵ But for Catharine MacKinnon, along with other critical legal theorists, liberal legalism legitimates and perpetuates the existing order and domination. She is not led to advocate for a theory of individual autonomy since she views the collective class of women as the basic referent:

70. MINOW, *supra* note 22, at 146-56; Rhode, *supra* note 25, at 633.

71. See generally GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986).

72. This is the main point of "outsider" jurisprudence, which includes feminism and critical race theory. See Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. RPTR.* 7 (1989).

73. Nedelsky, *supra* note 65.

74. Martha Fineman describes the relationship of feminist method to the dominant legal discourse in Fineman, *supra* note 12, at 25-34.

75. See Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 *HARV. WOMEN'S L.J.* 189 (1990).

Liberal feminism takes the individual as the proper unit of analysis and measure of the destructiveness of sexism. For radical feminism, although the person is kept in view, the touchstone for analysis and outrage is the collective "group called women" ...[L]iberal feminism aggregates all women out of each woman. Radical feminism sees all women in each one....The relationship between the individual and the social delineates a split between liberal and radical feminism in their view of the personal. In liberal feminism, the personal is distinguished from the collective; in radical feminism, it comprises it.⁷⁶

MacKinnon does not believe that an individual woman can overcome the position she is allocated in the hierarchy; she denies any transformative sense of autonomy. Kathryn Abrams points out that MacKinnon's stance has the power to distance and alienate women (and others) who still ascribe to a generally liberal explanation of the state and desire to exercise choice in the conduct of their lives.⁷⁷ She criticizes the reliance on ideological argument because it might deter social change, but sees this, perhaps, as MacKinnon's differing strategy for remediation.⁷⁸

Autonomy should be about empowerment, self-determination, following an inner direction, freedom.⁷⁹ Focusing on autonomy as a political, philosophical, and even psychological construct, the autonomous individual must discover an "authentic self." MacKinnon, in contrast, sees a victim, defined by men, socially constructed, and either denying the reality of her subordination or having false consciousness about the extent of her victimization. MacKinnon's argument, fortunately, hasn't dissuaded other feminist theorists from conceptualizing a truly autonomous woman who can transcend the problems posed by the liberal framework.

76. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 40, at 40.

77. Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990). *But see* Schroeder, *supra* note 33, at 194, n.269, arguing that MacKinnon may view lack of autonomy as the root of injustice.

78. *Id.* at 779.

79. For the classical liberal concept of autonomy, note the discussion in JOSEPH RAZ, *THE MORALITY OF FREEDOM*, Chapters 14-15 (1986); Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1098 (1989).

I want to contrast MacKinnon's argument with that of Jennifer Nedelsky who proposes a feminist concept of autonomy different from the traditional liberal definition. Her definition of autonomy is freedom and capability: "a human capacity for making one's own life and self."⁸⁰ But she sees women's experience as providing a grounding in reality: "the centrality of relationships in constituting the self."⁸¹ This contrasts with the liberal definition of autonomy which concerns itself with boundaries and with rights to guarantee individual freedom.⁸²

Nedelsky expands her definition of autonomy: "its essential elements are "the (problematic) notion of self-determination...comprehension, confidence, dignity, efficacy, respect and some degree of peace and security from oppressive power."⁸³ In addition to the capacity for autonomy, she acknowledges the importance of comprehending the subjective experience of feeling autonomous. Liberal political theory attempts to separate the private and public spheres; it is in the private sphere that freedom from collective action is celebrated. Critics of the liberal tradition have demonstrated the incoherence of the public/private distinction and Nedelsky tries to develop a vision of autonomy that is not about boundaries but about what she calls integration with the collective. "The task is to make the interdependence of citizen and state conducive to, rather than destructive of, autonomy."⁸⁴ In the latter part of her argument, Nedelsky illustrates this interdependence by positing, for example, the use of procedural due process to empower citizens to change from helpless, dependent victims of state policy into those with a sense of "dignity, competence and power."⁸⁵

MacKinnon, on the other hand, sees the lack of choice or autonomy for individual women as an aspect of their collective oppression as a group. She defines rights in the negative as a boundary protection to freedom of individual action and says "no amount of negative freedom legally guaranteed to the [oppressed] group will make it the equal of the first [group]."⁸⁶ She sees women as objects, fundamentally disempowered and

80. Nedelsky, *supra* note 65, at 8.

81. *Id.* at 9.

82. See the discussion in Rhode, *supra* note 25, at 632-35.

83. Nedelsky, *supra* note 65, at 11.

84. *Id.* at 14.

85. *Id.* at 27.

86. MACKINNON, *FEMINIST THEORY*, *supra* note 40, at 164.

incapable of true autonomy because they have been socially constructed by the dominant class of men. "Women cope with objectification by trying to meet the male standard, and measure their self-worth by the degree to which they succeed."⁸⁷ Autonomy, for MacKinnon, is not a virtue. It privileges individual women, contributing to their false consciousness of oppression and forcing them to emulate the male norm, depriving the collective class of women of the knowledge and power to move for structural change.⁸⁸

It is not clear to me why this need necessarily be so.⁸⁹ Critical legal studies theorists join with radical feminists to construct the following syllogism: individualism maximizes the selfish, atomistic goals of (male normed) beings, leads to a concern for rights which protect the privileges gained against the state or the claims of others within the community and defeats collective movement for social change.⁹⁰ Some see rights as alienating in themselves, creating a situation where there is no possibility of true community.⁹¹ To me, there is an alternative vision. The goal is true (political, social, economic) autonomy for each person, regardless of gender, race or class. A redefined community consists of those autonomous, authentic selves who aspire to this vision. To use a rights analysis to protect and encourage the development of autonomy need not result in a static, conservative, protectionist world. Pluralist strains in liberal society, rather than standing only for the state's neutrality toward the pursuit of individual ends, can result in an accommodation of the many, energetic visions for the future, a true non-essentialism.⁹²

I next want to discuss how the concept of autonomy can be reformulated by feminists without buying into the negatives of liberal legalism. I suggest that a true concept of feminism which strives for the creation of an "authentic" self will not only supply a building block for feminist legal theory but will be the basis of a relational theory of authentic selves within a strong community. If feminism has transformative goals, recreating self-determination will inevitably result in women sharing their experience of autonomy.

87. *Id.* at 149.

88. *Id.* at 124.

89. *See, e.g.,* Schroeder, *supra* note 33, at 193-96.

90. *See* the discussion in MINOW, *supra* note 22, at 164-72.

91. Gabel, *supra* note 68.

92. *See* Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985 (1990).

Feminist methodology can redefine the arguments for autonomy: first, autonomy has intrinsic value both in recognizing the subjectivity of individual experience and the importance of agency. Second, rights analysis should not be totally dismissed as it may provide important protection for the subordinate group as it struggles to assert its identity. And, finally, claims of ideological determinism by radical feminists such as MacKinnon are counterproductive to her own goal of freedom from domination since they interfere with the development of autonomy. I do not simply adopt a defense of liberal political theory; my idea of autonomy is grounded in the transformative lessons of feminism.

B. THE INTRINSIC VALUE OF AUTONOMY

First, autonomy is ultimately the capacity of a person to choose freely the direction of her life.⁹³ As an aspect of liberal theory, it has intrinsic value in the concept of liberty, though it has been distinguished from freedom in that it implies an aspect of inner direction, not merely the absence of constraint on choice of activity.⁹⁴

For an individual to develop an inner direction, she must be in touch with her 'authentic self.'⁹⁵ The authentic self is the subjective experience, truly understood. It is here that feminist methodology can help construct (reconstruct?) subjectivity, through the experience of consciousness-raising, context and narrative.⁹⁶ Robin West says:

As we become more aware of the presence of
patriarchal power, we become more aware of

93. RAZ, *supra* note 79, at Chapter 14.

94. Waldron, *supra* note 79, at 1103-08.

95. The notion of an "authentic self" appears frequently in feminist theory, defined in different ways. Ruth Colker sees it as "some intuitive sense of each of our human possibilities." Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U.L. REV. 217, 221 (1988). She recognizes that feminist theory, particularly that of MacKinnon, tends to focus on externalities "rather than internal changes in consciousness." *Id.* at 218. Gloria Steinem focuses on the development of self esteem in individual women as essential to the success of a feminist movement. GLORIA STEINEM, *REVOLUTION FROM WITHIN* (1992).

However, for Nancy Chodorow, whose feminist writings center upon the self's development of individuality through its connection to the mother, it is explicitly linked to psychoanalytic insight of object-relations theory "[which] conceptualizes the self as inexorably social and intrinsically connected." NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 158-59 (1989).

96. See, e.g., Christine Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 782-84 (1989) ("[T]he experience of shared experience . . . is what constructs women as an *oppositional class*").

that which is within us—whether or not we decide to call it a “self”—and of that which is vulnerable to patriarchy’s terrible destructivity.... Through consciousness-raising, women come to reclaim a self that is within.... The critical female self knows herself as a fantastic, un-lived, unspeakable, unspoken alternative which cannot render itself more concrete, and which is known in large part through its absence from cultured life.⁹⁷

Because West believes that it is primarily a lack of self which is reinforced by existing social constructs, she rejects critical legal theory’s regeneration of an unalienated self. West draws on MacKinnon’s idea of the “giving self” (who may give to avoid male violence), Chodorow’s idea of “connectedness” through a girl’s identification with her mother and her own theory of the centrality of reproduction in women’s lives to construct a feminist self-identity.⁹⁸ It is her attempt to define the inner direction that shapes women’s lives that helps to create a respect for autonomy different from that of classical liberal thought.

1. *Subjectivity*

Feminism’s rallying cry of the “personal is the political” is central to its focus on the discussion of shared experience. Ironically, when feminists attempt to advance the discussion toward personal growth, they are dismissed and marginalized as fixating on personal issues.⁹⁹ However, relation of subjective experience through consciousness raising or narrative or other group methods, can contribute to a political definition of autonomy.

Ann Freedman explicitly links “serious work on personal issues as part of (and not a substitute for) collective efforts to make change.”¹⁰⁰ She attributes, for example, her failure to renounce discriminatory tenure and appointments problems at her law school to the “lifetime in a sexist culture in which my

97. Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 88.

98. *Id.*

99. See, e.g., STEINEM, *supra* note 95.

100. Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849, 853-58 (1990) (describing her personal experience with internalized sexism and a program for change).

self esteem and sense of entitlement have been continually undermined." To recover a sense of empowerment, she notes that "the false equation of self-love with greed and selfishness must be challenged."¹⁰¹ (MacKinnon, on the other hand, says "Since when is politics therapy?"¹⁰²) Freedman's story shows that even the privileged among us experience powerlessness from sexism in ways that seriously interfere with our autonomy.

To the extent that autonomy focuses on the subjective experience of the individual it values the inner direction and sense of the person. And, paired with the feminist methodology of consciousness raising, reflections on subjective experience help to define and delineate collective notions of realization and empowerment.¹⁰³ Since the effect of sexist or patriarchal experience in our culture is to demean, marginalize and subordinate women, it seems necessary to undo that damage, to rekindle the individual sense of self-worth before undertaking the dismantling of the cultural constructs. It is difficult to see how the collective experience can fuel movement toward change without attainment of autonomy for individual women. In response to MacKinnon, work in therapy can certainly affect individuals, but an effective collective strategy for raising and articulating individual experiences of marginalization will contribute toward growth and true autonomy.¹⁰⁴

2. Agency

Agency, by which I mean self-determination, is another aspect of autonomy to be valued intrinsically. However, women's capacity for self-determination is hindered by the experience of gender. First, women as a group lack equal access to the economic conditions which will support autonomy.¹⁰⁵ As Pat Cain puts it, "[T]he goal of feminism is to achieve sufficient changes in the material conditions of women's lives so they can create themselves as freely and authentically as men."¹⁰⁶ There must be a minimum fulfillment of basic needs before the capacity for autonomy can be exercised.¹⁰⁷ Women are

101. *Id.* at 857.

102. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 40, at 220.

103. Littleton, *supra* note 96.

104. Freedman, *supra* note 100.

105. Williams, *supra* note 33.

106. Cain, *The Limits of Equality*, *supra* note 25, at 826.

107. RAZ, *supra* note 79, at 373-76; Waldron, *supra* note 79, at 1108-09.

economically disadvantaged through divorce, single parenthood, pregnancy, pay disparity, promotion and because of their obligations to the families and have trouble supporting the capacity for autonomy.

Second, Kathryn Abrams supports the feminist argument for agency from the perspective of women as rational decision makers. She articulates the importance of women having the true capacity for free choice and fears that ideological determinism, such as MacKinnon's dominance theory, will encourage scrutiny of women's personal choices and detract from women's ability to make meaningful individual decisions. In the areas of choice within the abortion decision and the decision to leave the workplace during parenting, she notes that women labor under a stereotype of doubts about their capacity for making meaningful choices and that these doubts have "fueled the opposition to women's equality."¹⁰⁸

C. THE CONTINUING UTILITY OF RIGHTS ANALYSIS

In contrast to critical legal scholars, feminist theorists find liberal rights analysis useful in ways which impact upon the connection of the individual to the community. Whereas liberal theory protects the individual through legal rights, feminist theory transforms rights discourse to account for the individual woman's perspective, which then affects the definition of the right and its consequences for the collectivity.

Patricia Williams, for example, comments in the context of African-American rights: "Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken, or smuggled)."¹⁰⁹ "[T]he goal is to find a political mechanism that can confront the denial of need."¹¹⁰ "The task...is not to discard rights but to see through or past them so that they reflect a larger definition of privacy and property: so that privacy is turned from exclusion based on self regard into regard for another's fragile, mysterious autonomy;

108. Abrams, *supra* note 77, at 779-83. See also Williams, *supra* note 33.

109. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149 (1989). Compare the discussion in Williams with CAROL SMART, *FEMINISM AND THE POWER OF LAW*, 144-59 (1987); MINOW, *supra* note 22, at Chapter 6; Rhode, *supra* note 25, at 632-35.

110. Williams, *supra* note 109, at 152.

and so that property regains its ancient connotation of being a reflection of the universal self."¹¹¹

Williams exquisitely balances the problems of the real world in which she feels disempowered and her vision of the world to work for: where "society must *give* [rights] away...Give to all of society's objects and untouchables the rights of privacy, integrity and self assertion; give them distance and respect. Flood them with the animating spirit that rights mythology fires in this country's most oppressed psyches, and wash away the shrouds of inanimate-object status, so that we may say not that we own gold but that a luminous golden spirit owns us."¹¹²

Elizabeth Schneider proposes a resolution to the rights problem: that it be used to establish a dialogue to bridge theory and practice.¹¹³ Her recognition of the reality of legal practice demonstrates the transformative potential of rights which are utilized, not merely to enforce the status quo, but to define areas of protection for the oppressed. Schneider argues for an Hegelian interaction in which the politics of the collective movement is energized and enhanced by the necessity of developing legal theories of rights: "The articulation of women's rights provides a sense of self and distinction for individual women, while at the same time giving women an important sense of collective identity...they also actively shape public discourse."¹¹⁴ While recognizing criticism from the feminist critical theorists that rights convert real political goals into abstract, neutral claims, Schneider argues that "these claims, articulated in the language of rights, have advanced the political development and organizing potential of the movement, and expanded and concretized the consciousness of feminist activists and litigators."¹¹⁵

Schneider examines conflicts among feminists regarding legal rights solutions to items on the feminist agenda: reproductive freedom, pregnancy leave, pornography, sexual harassment and battering. She argues that articulation of legal theories of rights, in each case, "illuminated broader political perceptions of patriarchy and sexual subordination"¹¹⁶ and, in effect, started the conversation within and without the legal forum for political change.

111. *Id.* at 164.

112. *Id.* at 165.

113. Schneider, *supra* note 65.

114. *Id.* at 625.

115. *Id.* at 640.

116. *Id.* at 650.

Schneider sees rights analysis as benefiting *both* individual women and women as a class because of the potential for political transformation. She does acknowledge the perception that “an equal rights perspective only affords individual women access to treatment as males,” but she believes “the source of the claims, women’s experience, modifie[s] the substance of the claims themselves.”¹¹⁷ She argues for an ongoing dialectic in which both the creative aspects of rights claims and a critical stance toward rights contribute to political strategy for the movement as a whole.¹¹⁸

A different problem in relying on rights analysis through definition of abstract legal rights is presented by those who critique an essentialist feminism. While the critical theorists see rights as indeterminate, capable of manipulation by the legal establishment, and therefore both unhelpful in securing true equality and contributing to continued reliance on an illegitimate system, the critique from the anti-essentialist perspective sees the difficulty in arriving at any one clear articulation of a legal right to secure advantages for all women.

A response to this critique is to encourage a multiplicity of perspectives from which to engage in rights discourse. A different perspective views rights, not as abstract notions of legal entitlement, but as ‘practices’. Adelaide Villmoare proposes listening carefully to women, not just lawyers, who, in the context of their daily experience, rely on rights discourse, creating the potential for “articulating liberatory visions or more immediate political and social alternatives.”¹¹⁹ Villmoare characterizes these critical perspectives as a postmodern approach: “[they] respect the partiality of interpretation and develop understandings of phenomena as practices within local contexts. And they seek out multiplicities of experiences where differences and distinctions assume notable significance.”¹²⁰ She proposes a focus on the context of women’s actual experience to define what rights women claim and argues that this method helps constitute women’s self-identity.¹²¹ Anti-essentialist feminism and postmodernism both accept the multiplicity of women’s experience; reliance on rights analysis in the context

117. *Id.* at 639-42.

118. *Id.* at 640.

119. Adelaide H. Villmoare, *Women, Differences and Rights as Practices: An Interpretive Essay and a Proposal*, 25 *LAW & SOC’Y REV.* 385, 392 (1991).

120. *Id.* at 400.

121. *Id.* at 402-03.

of differences among women helps to construct, not a universal, abstract theory of rights, but a link between individual women's experience and feminist "law, politics and research."¹²²

Rights analysis in feminist legal thought reflects the richness of these arguments. First, there is the recognition that rights are not a luxury for those oppressed by a dominant legal system. Then, the notion that the articulation of legal rights fuels ideas about political movements. Finally, insistence on the integration of women's experience or practice to understand the derivation of rights resists the universality of abstract legal claims.

D. FALSE CONSCIOUSNESS, COLLABORATION AND DENIAL

My final argument for autonomy stems from my discomfort with the structural argument that claims women are so dominated by the gender construct that they cannot make free choices about the path of their lives. The primary proponent of the argument is MacKinnon,¹²³ but Robin West also agrees.¹²⁴ Kathryn Abrams terms this "ideological determinism" and suggests that it might show an ultimate disrespect for individual women and a devaluation of their own experience.¹²⁵

MacKinnon and West both understand gender as a social construction and argue that there is no self apart from that which is socially determined. MacKinnon, for example, believes that women, collectively oppressed under male domination, cannot freely choose their lives, even if they say their choices are freely made.¹²⁶ She borrows from Marxist analysis to claim that women experience false consciousness if they do not understand the full implications of the reasons for their lack of true autonomy.

MacKinnon has been criticized by other feminist writers for this position.¹²⁷ Ironically, her prescription for change, to the extent that she offers one, involves consciousness raising,¹²⁸ a way of exploring the destructive effects of oppression by men through the sharing of women's experience. While consciousness raising can have political impact, it also is a means of self-realization, a path toward individual choice and autonomy.

122. *Id.* at 406.

123. MACKINNON, *FEMINIST THEORY*, *supra* note 40, at 103.

124. West, *supra* note 97.

125. Abrams, *supra* note 77, at 774-75.

126. MACKINNON, *FEMINIST THEORY*, *supra* note 40, at 124.

127. SMART, *supra* note 109, at 77-81; Weisbrod, *supra* note 92, at 993 n.38.

128. MACKINNON, *FEMINIST THEORY*, *supra* note 40, at Chapter 5.

Joan Williams reports a slightly different story: that of the internalization by women of social norms created by men.¹²⁹ Ultimately, this results in what Robin West calls denial of women's true selves.¹³⁰

West feels women "distinctively bear the mark of patriarchal power by denying rather than acting upon...their pleasures and internalizing and identifying with rather than avoiding their pains...if patriarchy has affirmatively created a social existence for women, it is one of objecthood, or otherhood, but most assuredly not selfhood."¹³¹

These arguments about false consciousness and denial portray women as incapable of an autonomy of self. They are seen as passive victims of male domination so pervasively embedded in the culture that women are not aware of its effects, and, in fact, have internalized patriarchy's agenda. As Abrams notes, these claims can be counterproductive to both the falsely conscious victim and others in society listening to the claim.¹³² The problem is that acceptance of this view denies even the existence of a capacity to create a feminist explanation for theory.¹³³

MacKinnon's account goes further. In defending her proposed ordinance remediating victims of pornography against attacks by liberal feminist lawyers on privacy and first amendment grounds, MacKinnon calls them "collaborators." She argues that:

[W]e were let into this profession on the implicit condition that we would enforce the real rules: women kept out and down, sexual access to women enforced. These remain the rules whether you are in and up, and whether you practice it or have it practiced on you. It keeps the value of the most exceptional women high to keep other women out and down and on their backs with their legs spread...What law school does for you is this: it tells you that to

129. Williams, *supra* note 33.

130. West, *supra* note 97, at 87-89.

131. *Id.* at 88.

132. Abrams, *supra* note 77.

133. Weisbrod, *supra* note 92.

become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience.¹³⁴

Abrams discusses the reasons why MacKinnon's 'categorical discourse' may need to use the polemical form as a political strategy.¹³⁵ I fear that MacKinnon's image of women lawyers is as exaggerated as it is powerful. Because it is demeaning to all women, it is a strange way to build a political movement or to encourage women to join the battle. It reduces all women to the centrality of their sexuality (MacKinnon's main point) and their complicity with male domination if they fail to support her program.

And, of course, it suggests that they are not truly autonomous, capable of supporting or refusing to support an issue on principled grounds, further marginalizing their views. The centrality of women's sexual use and abuse by men as the key description of gender domination may obscure potential development of other issues in feminist thought. Yet what seems so wrong about MacKinnon's argument is its lack of respect for the self-determination and autonomy of those she addresses.

Autonomy can be a transformative concept, as Nedlesky points out.¹³⁶ While the classic liberal concept of the individual does not seem full enough to account for women's differing vision for a society,¹³⁷ the core values of autonomy (subjectivity, agency, self-determination) seem necessary for creation of freedom from subordination. If feminism is serious about women's relation of their subjective experience through narrative and contextual analysis, it must get equally serious about confronting and affirming the development of a transformative concept of autonomy.

II. COMMUNITY IN FEMINIST THOUGHT

Liberal legal thought attempts to counter the critique of selfish individualism by situating the self in a community of

134. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 40, at 205.

135. Abrams, *supra* note 77, at 770-74. Angela Harris used the term categorical discourse in reviewing MacKinnon's work to describe argument which is, ultimately, reductionist. Angela Harris, *Categorical Discourse and Dominance Theory* (Book Review), 5 BERK. WOMEN'S L.J. 181 (1990).

136. Nedelsky, *supra* note 65.

137. *But see* Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, in *FEMINISM AND POLITICAL THEORY* (Cass R. Sunstein, ed., 1990) for the argument that JOHN RAWLS' *A THEORY OF JUSTICE* (1972) is consistent with a feminist vision.

interests. Michael Sandel, a proponent of this view, argues that our "constitutive self-understandings comprehend a wider subject than the individual alone...[with] a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of the participants is reduced if never finally dissolved."¹³⁸ While Sandel envisions the melting of the "otherness" of the individual, the cultural feminists see a stark opposition by relating the dichotomy of individual/community to that of male/female.¹³⁹

As Iris Marion Young describes liberal thought: "The culture identifies masculinity with the values associated with individualism - self-sufficiency, competition, separation, the formal equality of rights. The culture identifies femininity, on the other hand, with community - affective relations of care, mutual aid and cooperation."¹⁴⁰ Women are seen as nurturant, giving beings, drawn naturally to communities to express their ethic of care.¹⁴¹ For example, Robin West describes a woman's use of her power over an infant as emphatically not one of hierarchy or domination but one of care. She argues that women can therefore imagine a different, non-hegemonic way of relating.¹⁴² Annette Baier, focusing on the development of trust between human beings, similarly postulates a theory of feminist morality directly opposite to the [male] arms-length contractarian model, one which allows for inequality of power and a natural connection to others.¹⁴³

The ethic of care set out by Carol Gilligan is often cited as an example of women's distinctly different approach toward communitarian models. Yet there has been surprisingly little development of exactly what a community defined by a feminist vision would look like. One of the reasons, I suspect, is that it is difficult to generalize about a homogeneity of interests without tripping the anti-essentialist critique. If there is no essential constitution of Woman, the content of the community's values is unclear. And the critique has been power-

138. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 147-53 (1982). Michael J. Sandel, *Justice and the Good*, in *LIBERALISM AND ITS CRITICS* (Michael Sandel ed., 1984).

139. Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM/POSTMODERNISM*, *supra* note 21, at 300.

140. *Id.* at 306.

141. *Id.*

142. West, *supra* note 97, at 80.

143. Annette Baier, *Trust and Antitrust*, in *FEMINISM AND POLITICAL THEORY*, *supra* note 137, at 279.

ful. The cultural feminists are left describing a vision of cooperation which is so general as to be meaningless.

For example, Wendy Kaminer argues that concern for community is basic to feminism. It is "a belief that what women share is character—the capacity to 'care' and compromise and make peace . . . they share a past—of economic powerlessness, dependence and vulnerability to sexual abuse, of child rearing, homemaking and community service. The irony for feminists is that the separate women's world created by discrimination and traditional divisions of labor have always been a source of strength for women as well as a fount of frustration."¹⁴⁴ But these generalizations are not necessarily universal nor do they lead to a positive concept of community.

Marilyn Friedman explores the limits of the 'social self,' which both contributes to self-identity and gives meaning to individual lives.¹⁴⁵ She finds this self engaged in a redefinition of community, one based on the ethics of care. Yet she cautions that a community premised on family, religion or neighborhood can be constraining because it imposes moral claims upon its members. As she points out, many communities (churches, for instance) have a long history of gender domination and oppression which impact on women, doubly so if women honor the moral claims made.¹⁴⁶ Friedman ends up proposing freely chosen communities, rather than ones in which the self and identity are embedded. The example she gives is of the city, where women can be free from the gender roles imposed on them by their families, neighborhoods, and religious institutions.¹⁴⁷ Her prescription for a feminist version of community ends up looking much like the vision of autonomy proposed above.

In her critique of individualism, Fox-Genovese argues for using "the proud vocabulary of shared pain" between men and women as a basis for confronting a commitment to social justice, rather than looking toward women's subjective experience, which is one of oppression.¹⁴⁸ "Above all, we are groping toward

144. WENDY KAMINER, *A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY* (1990).

145. Marilyn Friedman, *Feminism and Modern Friendship*, in *FEMINISM AND POLITICAL THEORY*, *supra* note 137, at 143.

146. *Id.* at 147.

147. *Id.* at 155.

148. FOX-GENOVESE, *supra* note 2, at 240, 234. Her critique of individualism in the feminist movement is premised on a return to community.

an understanding of all individuals as hostage to the collectivities to which they belong and which alone give their identities meaning."¹⁴⁹ Fox-Genovese argues that adherence to individualism has ended up disadvantaging women who had previously been cared for by social institutions, such as marriage, leaving them with the cruel idea of individualism but no valid support.¹⁵⁰ "Feminism, as the daughter of women's exclusion, understands that social opportunity must lie in access to the various roles that society offers."¹⁵¹ She concludes that reconceiving the nature of community is crucial. Because "difference lies at the core of our humanity," gender relations must be subject to constant reinterpretation for society to understand the consequences of difference.¹⁵²

The idea that the concept of community is a "set of shared understandings located in the self"¹⁵³ also tends to dissolve the dichotomy of individual/community, "thus generat[ing] a dialectic in which each is a condition for the other."¹⁵⁴ The dissolution of the dichotomy of individual/community is the postmodern ideal. Nedelsky expresses a related idea when she sees autonomy as dependent on links to the community for its definition; that autonomy is enhanced by interaction with the community rather than by respect for boundaries, creating the potential for both freer individuals and a stronger, more integrated community.¹⁵⁵

But if the idea of community is premised on shared understandings or values, the danger is that the community will need to be homogeneous to reach agreement. As the criteria to find agreement are narrowed, the group thus constituted will exclude more than it will include. While this coming together to reinforce identity is a powerful alternative to alienation in the society as a whole, it validates exclusion as a principle and draws attention away from common ground between groups.¹⁵⁶

149. *Id.* at 240. Although she acknowledges Friedman's argument that communities have historically oppressed women, she persists in her critique of feminist theory which seeks to free women from their related institutions. In this way, she and Friedman are at opposite poles.

150. *Id.* at Chapter 2.

151. *Id.* at 241.

152. *Id.* at 238.

153. Steven Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 1002 (1991).

154. Young, *supra* note 139, at 307.

155. Nedelsky, *supra* note 65.

156. See Ilene Philipson, *What's the Big I.D.? The Politics of the Authentic Self*, *TIKKUN*, Nov./Dec. 1991, at 51.

Worse, to the extent that the 'authentic self' is defined by identification with the group, the process of Balkanization may also result in the shattering of the self.¹⁵⁷ Young argues that a post-modern sensibility would, instead, recognize and accept difference and reject exclusion on the grounds of homogeneity.¹⁵⁸

It is in the post-modern position exemplified by Young that we begin to see the contingency of the individual within the community. The post-modern position rejects any one clear definition of community in favor of a "transformative program" comprised of "healthy debate, respectful disagreement, and continual reappraisal."¹⁵⁹ Process once again transcends any unitary vision of a just society. Feminist thought has contributed much to this dialectic by insisting on the primacy of the subjective experience of women and by developing the critique of liberalism through the recognition of difference.

We now need to redefine both autonomy (to create strong authentic selves) and community (to establish a freely chosen, shared construct). It is the project for the next stage of feminist legal thought.

III. AFTERWORD

This essay presents an argument for autonomy that is transformative. I conclude that it is much easier to construct a theory of autonomy than to describe a feminist vision of community which does not sound superficial or oppressive. I am convinced that feminist thought and the process of shared experience are dynamically situated to propose alternatives as the opacity between individual and community dissolves.

But I share Martha Fineman's concern that feminist legal thought "seems unanchored." Or more particularly, it seems anchored in many different directions: "[i]t drifts between the extremes of 'grand theory,' which is totalizing in its scope and ambitions, and personal narratives, which begin and end with the presentation of one individual's unique experience."¹⁶⁰ With the failure of grand theory to capture the spirit of the

157. *Id.* at 55.

158. Young, *supra* note 139, at 312.

159. Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)* (Book Review), 89 MICH. L. REV. 1549, 61 (1991).

160. Fineman, *supra* note 12, at 25.

movement and the attack on essentialism which deterred the exploration of common ground among women in favor of presentation of differences, she argues that “[t]his disunity impedes the aggregation of power necessary for women of all groups to push back the barriers excluding most of us and our experiences.”¹⁶¹

My own support for a reconceived autonomy stems from the sense I have about the level of energy needed to push back the barriers. That energy needs to be grounded both in a solid sense of judgment about ultimate social values and strong self identity. In fact, the very questions that are impacted at the juncture of autonomy and community.

161. *Id.* at 40.