

FEMINIST DISAGREEMENT (COMPARATIVELY) RECAST

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Critical issues of gender justice are frequently analyzed in the American legal academy without meaningful attention to the insights of newer feminist theories. To some degree this is understandable, as newer feminisms have added substantially to the overall complexity of feminist scholarship and have employed a less accessible argumentative style than older feminist theories. Selective “tuning out” of this kind also has real costs, as it tends to lead legal actors to systematically overestimate the likely benefits of legal change aimed at achieving gender justice. This Article seeks to re-explain the insights of more recent feminist theories to broader legal actors, in ways that connect them to the insights of older feminist theories. To do this, the Article looks to comparative constitutional case law for guidance. It identifies three understandings of gender justice in this context, which it labels “disruptive,” “ameliorative,” and “transformative.” It then shows how more recent feminist theories can be re-explained in terms of these concepts, in ways that make them more intelligible within existing understandings in the legal academy.

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I. INTRODUCTION

Critical issues of gender justice are frequently analyzed in the American legal academy without meaningful attention to most, if not all, of the insights of feminist legal theory. Leading academic sources pay some attention to the insights of older feminist theories, such as liberal, cultural, and dominance feminism. They give almost no attention, however, to more recent theories such as sex-positive, intersectional, and post-structural/post-modern feminism.

To some degree, this kind of selective “tuning out” to more recent feminist theories is understandable. These theories have added substantially to the overall complexity of feminist scholarship and have employed a far less accessible argumentative style than older feminist theories. Selective tuning out has very real downsides, however, when it comes to the insights gained from feminist theory as a whole. Among other things, it means that legal actors may systematically overestimate the likely benefits of legal changes aimed at achieving gender justice.

This Article responds to this problem by seeking to re-explain the insights of recent feminist theories to broader legal actors by connecting them to older feminist theories. To do this, the Article looks to comparative constitutional case law as a source of guidance as to how older feminisms have been conceptualized in contexts where they have been most successful in entering the legal mainstream. It identifies three understandings of sex and gender justice in this context, which it labels “disruptive,” “ameliorative,” and “transformative.” It then shows how more recent feminist theories can be re-explained in terms of these concepts, making them more intelligible within existing understandings in the legal academy.

The Article is divided into six parts. Part II outlines the six basic schools of feminist thought in the American legal academy today and their genesis in different waves of feminist writing in the legal academy. Part III examines the treatment of these different feminisms in the mainstream legal academy, by way of a case study of the treatment of feminist legal theory in leading American constitutional law casebooks. It suggests that there is some evidence of attention to older liberal, cultural, and dominance feminist

perspectives in these texts, but almost no attention to newer feminist perspectives, especially intersectional and post-structural/post-modern feminist perspectives, despite the very real insights they had the potential to offer. Part IV explores likely explanations for this pattern of selective attention to older rather than newer feminisms, based in the complexity of feminist critique post-1990, and the relative inaccessibility of the argumentative style of newer feminist writing. It argues that selective tuning out to newer feminisms represents a predictable, and even understandable, response to these phenomena. At the same time, it also suggests that selective tuning out of this kind diminishes the capacity of legal actors to anticipate the full range of potential limits to legal reform from a feminist perspective. Part V considers how one might respond to this problem, and its apparent cause, by re-explaining newer feminist perspectives in ways that make them more accessible to the mainstream legal culture. Part V(A) first considers existing “strategic essentialist” approaches, which attempt to find common ground among feminists in their concern to promote the interests of women or females, and argues that such approaches will be wholly unsatisfactory as a response to the problem of selective tuning out, because they can never hope to capture the insights of either intersectional or post-structural/post-modern feminism. Part V(B) then turns to comparative constitutional case law as a potential source of insight into the way in which older feminisms have been understood in contexts where they have succeeded in entering the legal mainstream. In the United States, where liberal feminist understandings have been influential, it identifies a “disruptive” conception of gender justice. In South Africa, where cultural and dominance feminist arguments have had more influence, it identifies two additional conceptions of gender justice, which are “ameliorative” and “transformative” in focus. Part V(C) then shows how these concepts help point to important areas of commonality between older and newer feminisms in ways that can make these newer perspectives much more intelligible within existing legal understandings. Finally, Part VI considers the benefits of this recasting of newer feminisms for the promotion of more careful and effective legal interventions in the name of gender justice.

II. LEGAL FEMINIST VOICES: OLD(ER) AND NEW(ER)

Today, feminist legal theory can be divided into six broad schools of thought, or theories: liberal, cultural, dominance, sex-positive, intersectional, and post-structural/post-modern feminism.¹ Of these theories, the

¹ Note, however, that some of these theories are known by more than one name. Cultural feminism, for example, is often referred to as “difference feminism,” dominance feminism as “radical” feminism, and intersectional feminism as “anti-essentialist” feminism. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2d ed. 2003), at 18–19 (referring to dominance feminism as radical feminism), 53 (referring to cultural feminism as “different voice” feminism), 78–82 (noting connection between in-

first three represent an older generation of feminist legal scholarship, which first developed in the late 1970s to early 1980s,² while the latter three represent a newer generation of scholarship that developed between the mid-to late-1980s and the early 1990s.³ Individual feminists have often come to embrace elements of more than one school of thought.⁴ As theories, however, the six schools remain distinct, and offer quite different insights about the nature and sources of gender injustice.

In liberal feminist theory, the primary source of gender injustice in American social life lies in the way in which those in positions of power tend to link a person's biological sex with particular gender roles, without attention to individual capacities to perform such roles, or individual prefer-

tersectional and anti-essentialist feminisms). Sex-positive feminism is closely related to, and is sometimes referred to as, "partial agency" feminism. See *infra* note 17 and accompanying text. Liberal feminism is also sometimes labeled "sameness" feminism, though this characterization is less accurate in light of the commitments of many leading liberal feminist theorists to substantive rather than formal equality. See, e.g., MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 67–70 (1998); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000). Some theorists would exclude the last three of these feminisms from the scope of feminist legal theory. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 16–26 (2006), for an argument that feminist theories necessarily make three claims: (i) that two broad types or categories, "m" and "f" (or men/women, males/females, masculine/feminine, etc.) structure the system of sex-gender relations; (ii) that the relationship between m and f is one of subordination (m > f); and (iii) that feminism means "carrying a brief for f." This Article takes a broader definition of the scope of feminism, however, as comprising all theories which claim "that sex/gender is one important social structure or axis of social differentiation and is hence likely to characterize and influence the shape of law" and that "the ways in which sex/gender has shaped the world, including through law, have been unjust." Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in *GENDER AND HUMAN RIGHTS* 16 (Karen Knop ed., 2004). Cf. Brenda Cossman, *Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject*, 49 *MCGILL L.J.* 847, 853–54 (2004) (arguing that feminism had an important place as an "analytic lens on gender as an axis of power" that "can and should be supplemented, challenged, and confused by other theoretical and analytic frames").

² For early liberal, cultural, and dominance feminist work, see, for example, Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 *TUL. L. REV.* 451 (1978) (liberal feminism); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (cultural feminism); Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS: J. WOMEN CULTURE & SOC.* 515 (1983) [hereinafter MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*] (dominance feminism).

³ For early statements of sex-positive, intersectional, and post-structural/post-modern feminist work, see, for example, Sylvia Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955, 1019 (1984) [hereinafter Law, *Rethinking Sex and the Constitution*] (sex-positive feminism); Martha Minow, *The Supreme Court Term 1986, Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987) [hereinafter Minow, *Foreword*] (intersectional feminism); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (post-structural/post-modern feminism). Post-structural feminism as applied to law was to some degree pre-figured by Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983) [hereinafter Olsen, *The Family and the Market*].

⁴ See, e.g., ROBIN WEST, *CARING FOR JUSTICE* (1997) (combining cultural and dominance feminist arguments); Christine Littleton, *Reconstructing Sexual Equality*, 75 *CAL. L. REV.* 1279, 1296 (1987) (combining cultural and dominance feminist arguments).

ences in respect of these roles.⁵ Liberal feminists also recognize that they will need to challenge stereotypical linkages of this kind by directly addressing the linkage of biology with particular social domains or spheres. A central aim of liberal feminist scholarship has thus been to challenge society's "separate spheres" ideology,⁶ or the way in which jurisdictional boundaries have traditionally been drawn to demarcate certain harms as of private, local, or domestic concern, rather than public, national, or international concern.⁷

In a cultural feminist account, the key source of gender injustice is understood to be the way in which "feminine" roles and modes of thinking are devalued, compared to roles and ways of thinking that are identified as masculine.⁸ Cultural feminists further suggest that this devaluation has two key costs. First and most immediately, they argue that it has serious distributional consequences for women when it comes to the value placed on their labor.⁹ Second, they argue that it can lead to a broader loss to society because of its tendency to lead to an under-emphasis on feminine values, especially in contexts where such values—or ways of thinking and interacting—could be extremely valuable.¹⁰

⁵ See generally Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate Over Special Versus Equal Treatment for Women*, 4 LAW & INEQ. 143 (1986); Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. CHI. LEGAL F. 9; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

⁶ Ginsburg & Flagg, *supra* note 5, at 15, 17; Williams, *supra* note 5, at 197.

⁷ For a summary of the liberal feminist challenge to the public/private divide, see Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319–27 (1993). For the liberal feminist critique of traditional jurisdictional boundaries between international and national and federal and state law, see, for example, HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); Judith Resnik, "Naturally" Without Gender: *Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991) [hereinafter Resnik, "Naturally" Without Gender]; Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393 (2002) [hereinafter Resnik, *Reconstructing Equality*]; Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2002) [hereinafter Resnik, *Categorical Federalism*].

⁸ For leading cultural feminist works, see, for example, GILLIGAN, *supra* note 2; WEST, *supra* note 4.

⁹ See, e.g., WEST, *supra* note 4, at 100–38.

¹⁰ See, e.g., GILLIGAN, *supra* note 2, at 174; WEST, *supra* note 4, at 88. For some cultural feminists, the link between femaleness and modes of care encoded feminine will be more natural or inevitable than for others. Robin West, for example, argues that the experience of pregnancy, child-birth, and breast-feeding will inevitably lead women (or at least those women who give birth) to internalize values such as other-centeredness, particularism, and care. See WEST, *supra* note 4, at 18, 108–09. Other cultural feminists are more agnostic about the durability or inevitability of the linkage between gender and biology, or the feminine and femaleness, in a way which makes their work closer to liberal feminism. See, e.g., MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); Littleton, *supra* note 4, at 1296–97. Other feminists outside the cultural feminist tradition also support the value of care, distinct from its connection to 'mothering' or gender. See, e.g., Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 78, 102–05 (1995) (making an argument for increased valuation of feminine

Dominance feminists directly contest both of these understandings.¹¹ They argue that liberal feminist attempts to empower women (or females), and cultural feminist attempts to revalue the feminine, are both misguided because female identity and the feminine as we know it are the pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects, via pornography and other systematic practices of male-to-female rape, prostitution, battering, and harassment.¹² Pornography, for dominance feminists such as Catharine MacKinnon and Andrea Dworkin, is the essence of this sexist social order because it socializes males to regard masculinity, sex, and sexual desire in terms of the objectification and sexual subordination of their opposite type, namely females, or to equate masculinity with being on top of a female, bound and gagged.¹³ Rape, prostitution, battering, and sexual harassment also play an integral role in a dominance feminist account, however, in establishing and perpetuating a system of sexual subordination.¹⁴

Sex-positive feminists challenge the premises of dominance feminism.¹⁵ They argue that while sex might in some cases be a source of danger for women, it is also a potentially important site of pleasure, fulfillment, and even power.¹⁶ In this sense, they share the approach of other “partial agency” feminist theorists, who emphasize the possibilities for, rather than simply constraints on, female agency.¹⁷ A key source of injustice, for sex-positive feminists, is the way in which women’s sexual agency is limited by prevailing ideologies, particularly “repronormative” ideologies, i.e., those that valorize reproduction over other socially productive activities and casts non-reproductive sex for women as dangerous and illegitimate.¹⁸ This ap-

traits from a more critical, and distributional, rather than cultural, feminist perspective); Joan Williams, *From Difference To Dominance To Domesticity: Care As Work, Gender As Tradition*, 76 CHI.-KENT. L. REV. 1441 (2001).

¹¹ For the leading statement of dominance feminism, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

¹² *Id.* at 161.

¹³ *Id.* at 204 (describing pornography as the “essence of a sexist social order, [and] its quintessential social act”); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981).

¹⁴ See, e.g., MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 11, at 204; Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13–16 (1993).

¹⁵ See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

¹⁶ See, e.g., Law, *Rethinking Sex and the Constitution*, *supra* note 3 (confronting biological differences between the sexes and identifying women’s reproductive abilities as a source of power); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087 (2003) (disputing an essentialist view of sex and sexuality as being always harmful to women in the workplace).

¹⁷ See Abrams, *supra* note 15, at 348–76 (discussing such approaches, and coining the term ‘partial agency’ feminism); see also Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (urging democratic theorists to incorporate the insights of feminist theorists about the real but bounded nature of individual agency).

¹⁸ See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 205 (2001).

proach to reproductive activity is multidimensional for sex-positive feminists.¹⁹ First, sex-positive feminists cite sociological evidence about women's reproductive decisions that suggests that women do not, in fact, tend to have children out of altruism or concern for the species, but rather "because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectations, to experience pregnancy, or to pass on the family name, genes or silver" or to provide benefits to existing children.²⁰ Second, they suggest that the line drawn between production, in this context production of new members of society, and recreational activities that are characterized as consumption, is an extremely artificial one because almost all consumption in a market economy has some positive flow-on effect in terms of its capacity to stimulate demand for further productive activity.²¹ And third, they argue that the notion that reproduction by American women is somehow necessary to reproduce the species—or maintain the American population—simply ignores immigration-based solutions to these problems in a way that raises serious questions of racism and xenophobia.²² Repronormative ideologies of this kind are also likely, in a sex-positive account, to constrain disproportionately female, as compared to male, sexuality and autonomy.²³

In intersectional feminist theory, it is impossible to make even these more limited generalizations about the nature or sources of gender injustice.²⁴ In an intersectional feminist account, both sex and gender hierarchies circulate and intersect with other hierarchies in ways that make gender injustice deeply contextual in nature. Both the sources and nature of gender injustice must therefore always be considered with close attention to the way in which sex and gender intersect with race and class and other axes such as

¹⁹ Compare *id.* at 208 (noting that male plaintiffs in tort actions disproportionately claim, and receive, damages for sexual dysfunction, indicating the lower value society places on female sexual enjoyment) and Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, in *American Booksellers Association v. Hudnut*, 21 U. MICH. J.L. REFORM 69, 71 (1988) (criticizing conservative attempts to restrict female enjoyment of sexuality to marital, reproductive contexts) with Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001) [hereinafter Case, *How High the Apple Pie?*] (offering a powerful related critique of repronormativity with a more distributional rather than "pro-sex" focus).

²⁰ Franke, *supra* note 18, at 190 (quoting Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 48 (1992)).

²¹ *Id.* at 189–90 (discussing the relationship between consumption and the ways in which communities define and legitimate themselves and concluding that "consumption is society-preserving work").

²² *Id.* at 193–95.

²³ See *id.*; Hunter & Law, *supra* note 19, at 71.

²⁴ See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598 (1990) (accusing MacKinnon's dominance feminist understanding of rape, which focuses on a generalized male/female hierarchy, as "shelv[ing] racism").

religion, age, disability, sexual orientation, and immigrant status.²⁵ Intersectional feminists also argue that feminists should be extremely cautious about attempting to identify sources of commonality across women's diverse experiences, understanding the act of foregrounding sex or gender as axes of subordination as exercising power that depends upon and reflects the race and class privilege of the speaker.²⁶ Claims of commonality are treated as deeply suspect unless they arise from broadly mobilized forms of feminist coalitional politics in which all women have the opportunity to speak for themselves in describing the nature of their experiences and making claims for redress.²⁷ Subject to this qualification, however, intersectional feminists generally go on to emphasize the way in which different women's experiences of injustice are linked to deep social and legal hierarchies or structural sources of subordination, and not simply to individual sources of bias or prejudice. Kimberlé Crenshaw suggests, for example, that both racial and gender injustice in America are often the products of supremacist ideologies that "that convince[] one group that the coercive domination of another is legitimate," and further, that this kind of racial and gender domination operates at both a symbolic and physical or material level.²⁸ Intersectional feminists thus often share dominance and cultural feminists' concerns about the role played by both sexual violence and gendered notions of economic worth in maintaining a system of gender subordination. Intersectional feminists also emphasize the way in which the experience of both sexual violence and economic disadvantage are conditioned by racialized hierarchies, which mean that poor women and women of color are more vulnerable to violent crime than white, middle-class women; black women are routinely paid less than white women for the same or comparable work; black women have much greater difficulties in accessing decent housing and health-care than white women; and black women also have substantially lower life expectancy compared to white women.²⁹

Post-structural and post-modern feminists take yet another approach to the nature of gender injustice in America.³⁰ Rather than focusing on sex and gender stereotypes or hierarchies, post-structural/post-modern feminists focus on sex-based categories as a key source of gender injustice. They argue that our understandings of sex-based differences are highly contingent and

²⁵ See Minow, *Foreword*, *supra* note 3; Martha L. Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1632–33 (1990); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 656 (1996).

²⁶ ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 133–59 (1988).

²⁷ *Id.* at 185–86.

²⁸ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*].

²⁹ See *id.*

³⁰ See, e.g., BUTLER, *supra* note 3; Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) [hereinafter Frug, *A Postmodern Feminist Legal Manifesto*].

that sex as we know it is entirely “performatively produced” rather than real.³¹ Post-structural feminists, in particular, argue that the binary construction of sexual difference is both the product of, and necessary condition for, heterosexuality as the dominant sexual norm in our society.³² Heterosexuality *produces* sex-based binaries, according to post-structural feminists such as Judith Butler, because it conditions individuals to perform their sex-gender identity in a strictly binary and univocal way, which conforms to the notion that there are in fact two opposite sexes/genders – “m” and “f.”³³ Heterosexuality *requires* a binary, univocal definition of sexual biology and gender because it is premised on the existence of two polar sex and gender categories.³⁴ Post-modern feminists suggest that the ideological underpinnings to our current definition of sexual difference are even more complex. Mary Joe Frug, for example, argued that the construction of the female body depends on at least three distinct but overlapping forces or ideologies that she labeled “terrorizing,” “maternalizing,” and “sexualizing.”³⁵ According to Frug, the terrorization of the female body means that female bodies were trained “to scurry, to cringe[,] and to submit;” the maternalization of the female body signifies that female bodies are encoded “‘for’ maternity” or mothering, and the sexualization of the female body denotes that female bodies are defined as “‘for’ sex with men, a body that is ‘desirable’ and also rapable, that wants sex and wants raping”.³⁶ In this sense, post-modern feminists have placed far more emphasis than post-structuralists on the importance of both sexual violence and repronormativity—or the kinds of practices highlighted by dominance and sex-positive feminists—in constitut-

³¹ BUTLER, *supra* note 3, at 33.

³² *Id.* at 30 (arguing that “institutional heterosexuality both requires and produces the univocity of each of the gendered terms that constitute the limit of gendered possibilities within an oppositional, binary gender system”).

³³ *Id.* See *supra* note 1 for a discussion of Janet Halley’s sex/gender definitions.

³⁴ Imagine, for example, that one used the insights provided by Butler to construct an alternative, provisional typology of sex and gender difference, in which sexual biology encompassed at least the categories of m (or male), mf (male-female), x (intersex), fm (female-male), and f (female); and that gender roles and aesthetics could also be understood in terms of a continuum rather than a binary—in which individuals could be seen in their role as m (wholly individuated and universalistic), mf (largely self- rather than other-focused, but with some particularistic commitments and responsibilities for care), x (a true hybrid), fm (largely care- and connection-focused, with some sense of individual agency and universalistic perspective) or f (entirely focused on care and inter-connection), or seen in their sense of style or aesthetics, in terms as m (macho), mf (masculine-feminine), x (metro-sexual), fm (feminine-masculine), or f (femme). If these axes were understood to be arranged in a fluid relationship to one another, this typology of sex and gender would imply that there were in fact 125 different sex-gender types, in which case it would then be entirely incoherent to talk about *opposite* sex-gender identification (how, after all, does one define an opposite in three dimensional space?). Rather, it would only make sense to think of sexual desire or sexuality as defined in much more fluid terms, as a spectrum of attraction to types that may be distant or close, rather than opposite or same.

³⁵ Frug, *A Postmodern Feminist Legal Manifesto*, *supra* note 30, at 1049–50.

³⁶ *Id.* at 1050.

ing the current sex-gender system.³⁷ Like post-structuralists, however, they argue that there is a close link between the legal rules and discourses that constructs sexual difference and the treatment of heterosexuality as the legal and social norm (heteronormativity).³⁸

III. SELECTIVE TUNING OUT TO NEWER FEMINISMS

Despite the richness of the contributions made by these different feminist theories, many seem to have limited influence on the way in which the rest of the legal academy analyzes questions of gender justice. Older, more familiar feminist theories are sometimes cited in broader academic contexts. Newer feminist theories, by contrast, are rarely, if ever, cited even in discussions of those areas at the core of the feminist theoretical project as applied to law: namely, the meaning of concepts such as liberty, privacy, or equal protection under the Constitution. The mainstream legal academy—as typified by the constitutional law academy—seems rather to be selectively tuning out to the contributions of these newer feminisms.³⁹

Consider, for example, the way in which the six different feminisms are analyzed and discussed by three leading constitutional law casebooks used at Harvard Law School in 2007.⁴⁰ The index to the casebook edited by Jesse Choper, Richard Fallon, Yale Kamisar, and Steve Shiffrin lists only eight works by feminist legal theorists as appearing in the text of the casebook.⁴¹

³⁷ The complexity of Frug's account also finds resonance with the account of sex-gender injustice provided by other post-structural feminists such as Frances Olsen, who emphasizes the role of both male hegemony *and* liberal "separate spheres ideology" in producing and reproducing sex-gender binaries, *and* parallel dualisms such as state/civil society, public/private, market/family, objective/subjective, rational/irrational. See Olsen, *The Family and the Market*, *supra* note 3, at 1567, 1575–77.

³⁸ Frug, *A Postmodern Feminist Legal Manifesto*, *supra* note 30, at 1066 (suggesting in an unfinished part of the manuscript that the same legal rules that enforced marital monogamy and maternalization for females also served to enforce the selection of a male rather than female intimate partner for females, in ways that were deeply connected to heteronormativity).

³⁹ For the importance of constitutional law as a litmus test for how the rest of the legal academy/culture treats questions of gender justice, see, for example, Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN'S L.J. 273 (1998). For previous works noting lack of attention to feminism in the Constitutional law scholarship or theory, see Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989), on the failure to incorporate feminist accounts of the structural sources of inequality, and Higgins, *supra* note 17, on the failure of constitutional theory and feminist theory to learn lessons from each other.

⁴⁰ See CONSTITUTIONAL LAW (Jesse H. Choper et al. eds., 10th ed. 2006); CONSTITUTIONAL LAW (Geoffrey R. Stone et al. eds., 5th ed. 2005); CONSTITUTIONAL LAW (Kathleen Sullivan & Gerald Gunther eds., 16th ed. 2007).

⁴¹ CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40 (listing in the Table of Authorities: Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Catharine A. MacKinnon, *Reflections on Sex Equality Under*

Two of these eight works explain the basic difference between liberal and cultural feminist perspectives,⁴² one explains the objection of sex-positive feminists to anti-pornography laws,⁴³ and four advance a dominance feminist perspective.⁴⁴ The remaining work cited is an article by Frances Olsen on statutory rape containing both sex-positive and post-structural/critical legal studies (CLS) arguments.⁴⁵ The article is quoted, however, in a way that makes no mention of post-structural feminist arguments, so that there is no explanation whatsoever of post-structural or post-modern feminism in the text of the casebook.⁴⁶ The casebook also makes no mention of intersectional feminist perspectives at all in the body of its discussion; the only reference to work by an intersectional feminist author (Martha Minow) is made

Law, 100 YALE L.J. 1281 (1991); Catharine A. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (Jay L. Garfield & Patricia Hennessey eds., 1984); Carlin Meyer, *Sex, Sin and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994); Martha Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1 (1989) [hereinafter Minow, *Finding Our Paradoxes*]; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) [hereinafter Olsen, *Statutory Rape*]; Williams, *supra* note 5). Four additional citations are listed to works by feminist scholars, but they are not used on a way that includes a sex/gender focus. *Id.* (listing in the Table of Authorities: SUSAN H. WILLIAMS, *TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT* (2004); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 90 N.Y.U. L. REV. 1108 (2005); Susan Estrich & Kathleen Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Martha Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1998)). The casebook includes additional feminist sources, but they are merely in footnotes or suggested as further reading. *Id.* at 723, 1318, 1321 (citing Hunter & Law, *supra* note 19, and providing citations "for collections of feminist perspectives" including the intersectionalist work of Crenshaw, Harris and Spelman as well as cultural feminist works such as GILLIGAN, *supra* note 2, and WEST, *supra* note 3).

⁴² *Id.* at 1318 (citing Minow, *Finding Our Paradoxes*, *supra* note 41); *id.* at 1321 (citing Wendy W. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989)).

⁴³ *Id.* at 724 (citing Meyer, *supra* note 41). A closer reading of the casebook reveals one additional brief citation to sex-positive arguments in the text of the casebook. *Id.* at 725 (citing Susan Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195 (1993), and quoting Mary Joe Frug, *The Politics of Postmodern Feminism: Lessons from the Anti-Pornography Campaign*, in *FEMINISM AND PORNOGRAPHY* (Drucilla Cornell ed., 2000)) [hereinafter Frug, *The Politics of Postmodern Feminism*].

⁴⁴ *Id.* at 724–25 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2005), Langton, *supra* note 41). This view accords with the treatment of feminism in *THE CANON OF AMERICAN LEGAL THOUGHT* (David Kennedy & William W. Fisher III eds., 2006) (excerpting two works by MacKinnon: MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, *supra* note 2; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC. 635, 869 (1983)).

⁴⁵ *Id.* at 1317 (citing OLSEN, *Statutory Rape*, *supra* note 41).

⁴⁶ Although the casebook cites an article by Frug, *The Politics of Postmodern Feminism*, it is cited in a way that does not make clear the nature of the post-modern feminist position in this context. CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 725 (citing Frug, *The Politics of Postmodern Feminism*, *supra* note 43).

for the purposes of explaining the difference between liberal and cultural feminism.⁴⁷

The index to the casebook by Geoffrey Stone, Louis Seidman, Cass Sunstein, Mark Tushnet, and Pamela Karlan cites approximately twenty-eight sources that can be identified as having been written by feminist theorists or having a potential feminist theoretical dimension.⁴⁸ A closer analysis of the way in which these sources are cited, however, reveals that, like the Choper casebook, the Stone casebook ultimately cites these sources in a way that makes only brief mention of liberal, cultural, and sex-positive feminist perspectives and gives detailed attention only to dominance feminist perspectives.⁴⁹ For example, the casebook quotes the work of Catharine MacK-

⁴⁷ CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 1318 (citing Minow, *Finding Our Paradoxes*, *supra* note 41).

⁴⁸ CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40 (listing in the Table of Authorities: DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, *supra* note 13; SUSAN ESTRICH, REAL RAPE (1987); GILLIGAN, *supra* note 2; TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, (Laura Lederer ed., 1980); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 44; Becker, *supra* note 39; Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Mary Ann Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369 (1995); Lorene M.G. Clark, *Liberalism and Pornography*, in PORNOGRAPHY AND CENSORSHIP 45 (David Copp and Susan Wendell eds., 1983); Ruth Colker, *Anti-Subordination Above All Else: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913 (1983); Ginsburg, *Sexual Equality under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) [hereinafter Ginsburg, *Autonomy and Equality*]; Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000); Jill E. Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755 (2002); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Law, *supra* note 3; Littleton, *supra* note 4; Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 41; MacKinnon, *Roe v. Wade: A Study in Male Ideology*, *supra* note 41; Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, *supra* note 41; Martha Minow, *Foreword*, *supra* note 3; Olsen, *The Family and the Market*, *supra* note 3; Olsen, *Statutory Rape*, *supra* note 41; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681 [hereinafter West, *Anti-Pornography Alliance*]. The casebook also lists several works by feminist academics that have a squarely historical or empirical rather than normative focus, such as ROSALIND P. PETCHESKY, *ABORTION AND WOMEN'S CHOICE* (rev. ed. 1990); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

⁴⁹ For the two citations to liberal feminist sources, see CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 658, 865 (citing Brown et al., *supra* note 48; Ginsburg, *Autonomy and Equality*, *supra* note 48). For the three references to cultural feminist sources, see *id.* at 656 (citing Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP.

innon six times, in some places at length, and refers to her work on at least one other occasion.⁵⁰ It also quotes extensively from an article and a law review note that are sympathetic to MacKinnon and refers the reader to Andrea Dworkin's work on pornography and to an anthology of almost entirely dominance feminist writing on pornography.⁵¹ At another point, the casebook also cites work by Andrew Koppelman about gay and lesbian rights that is sympathetic to dominance feminism, and from work by Ruth Colker in a way that appears to endorse dominance feminism by focusing on Colker's arguments about gender-based subordination.⁵² Intersectional feminism receives far less attention in the casebook. Intersectional authors, such as Martha Minow and Angela Harris, are mentioned in passing by the casebook, but not in a way that explains their work or connects it to issues of gender justice.⁵³ Similarly, while the casebook mentions work by Dorothy E. Roberts, for example, it does so in a way that focuses almost entirely on her doctrinal due process arguments rather than her more normative critical race or intersectional arguments.⁵⁴ The sole substantive mention of intersectional feminism in the casebook is thus a reference to the argument made by Jill Hasday (writing largely as a constitutional historian) that we should pay attention to race and class as well as sex and gender when thinking about the effects of single-sex education.⁵⁵

CT. REV. 201 (1987), and suggesting Littleton, *supra* note 4, as further reading); *id.* at 988 (citing GILLIGAN, *supra* note 2). For the three references to sex-positive feminist sources or arguments, see *id.* at 658, 949, 1287 (citing Law, *Rethinking Sex and the Constitution*, *supra* note 3; Law, *Homosexuality and the Social Meaning of Gender*, *supra* note 48 (as suggested further reading); West, *Anti-Pornography Alliance*, *supra* note 48). The casebook also makes passing reference to one additional article by Ginsburg and to a work by Ann Freedman that combines liberal, cultural, and feminist perspectives. See *id.* at 636 (citing Ginsburg, *Sexual Equality and the Constitution*, *supra* note 2); at 657 (citing Freedman, *supra* note 48). For a critique of earlier versions of the casebook, for its failure to incorporate even most of these perspectives, see Becker, *supra* note 39.

⁵⁰ CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 654, 1287 (citing MacKinnon, *FEMINISM UNMODIFIED*, *supra* note 48); *id.* at 663 (citing MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 44); *id.* at 1285 (citing MacKinnon, *Not A Moral Issue*, *supra* note 48); *id.* at 1286 (citing MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 41); *id.* at 866 (citing MacKinnon, *Reflections on Sex Equality under Law*, *supra* note 41); *id.* at 865 (citing MacKinnon, *Roe v. Wade: A Study in Male Ideology*, *supra* note 41).

⁵¹ CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 1285 (citing DWORKIN, *supra* note 48; TAKE BACK THE NIGHT, *supra* note 48; Clark, *supra* note 48).

⁵² *Id.* at 949 (citing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); *id.* at 539 (citing Colker, *supra* note 48).

⁵³ *Id.* at 540 (citing Harris, *supra* note 48); *id.* at 656 (citing Minow, *Foreword*, *supra* note 3).

⁵⁴ *Id.* at 928 (citing Roberts, *supra* note 48). For intersectional feminist work by Roberts, see, for example, Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 MIAMI L. REV. 855 (1999).

⁵⁵ CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 647 (citing Hasday, *supra* note 48).

Like the Choper casebook, the Stone casebook also makes almost no mention of post-structural/post-modern feminist perspectives. The casebook does not cite work by leading post-structural/post-modern scholars such as Judith Butler or Mary Joe Frug at any point, and makes only very limited mention of early post-structural work by Frances Olsen on the family and the market.⁵⁶ A reference to Olsen's article on statutory rape is made simply for the purpose of noting the argument, also noted by Susan Estrich, about the potential for statutory rape laws to punish coercive sex, in circumstances where coercion is very difficult to establish.⁵⁷ Further, the casebook's citation of other scholarship on gender and sexuality, by Andrew Koppelman, Edmund Stein, and Taylor Flynn, is limited to a discussion of the need to pay attention to transgender rights, and contains no reference to the more post-structural approach to transgender issues advocated by feminists such as Butler.⁵⁸

A similar pattern can also be observed in the 2007 edition of the casebook by Kathleen Sullivan and Gerald Gunther, which cites twenty works by feminist legal authors in its Table of Authorities.⁵⁹ Close attention to the way in which these twenty works are cited reveals brief discussion of both liberal and cultural feminist perspectives,⁶⁰ together with a somewhat more detailed exposition of dominance and sex-positive feminist perspectives. For example, Sullivan and Gunther quote or summarize MacKinnon's and Dworkin's arguments in four places, cite MacKinnon on two other occa-

⁵⁶ *Id.* at 664 (citing Olsen, *The Family and the Market*, *supra* note 3).

⁵⁷ *Id.* at 650 (citing ESTRICH, *supra* note 48; Olsen, *Statutory Rape*, *supra* note 41).

⁵⁸ *Id.* at 655 (citing Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual-Orientation Equality*, 101 COLUM. L. REV. 392, 294 (2001)); *id.* at 688 (citing Edmund Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L. REV. 471 (2001)); *id.* at 687, 949 (citing Koppelman, *supra* note 52).

⁵⁹ CONSTITUTIONAL LAW, Sullivan & Gunther eds., *supra* note 40 (listing in Table of Authorities: GILLIGAN, *supra* note 2; MACKINNON, FEMINISM UNMODIFIED, *supra* note 48; CATHARINE A. MACKINNON, ONLY WORDS (1993); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995); Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); Brown et al., *supra* note 48; Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); Freedman, *supra* note 48; Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263 (1997); Ginsburg, *Autonomy and Equality*, *supra* note 48; Ginsburg & Flagg, *supra* note 5; Hunter & Law, *supra* note 19; Law, *Rethinking Sex and the Constitution*, *supra* note 3; MacKinnon, *Not a Moral Issue*, *supra* note 48; MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 41; MacKinnon, *Roe v. Wade: A Study in Male Ideology*, *supra* note 41; Meyer, *supra* note 41; Olsen, *Statutory Rape*, *supra* note 41; West, *Anti-Pornography Alliance*, *supra* note 48; Williams, *supra* note 5).

⁶⁰ For the four mostly very brief references to liberal feminist arguments, see *id.* at 428 (citing Ginsburg, *Autonomy and Equality*, *supra* note 48); *id.* at 573 (citing Brown et al., *supra* note 48; Ginsburg & Flagg, *supra* note 5); *id.* at 593 (citing Williams, *supra* note 5); *id.* at 590 (citing GILLIGAN, *supra* note 2) (the one reference to cultural feminism).

sions,⁶¹ and cite other writers sympathetic to dominance feminism, such as Koppelman and Cynthia Bowman, on two other occasions.⁶² Sullivan and Gunther also make more extensive reference to sex-positive writing than the other casebooks, quoting both from Nan Hunter and Sylvia Law's brief opposing the Dworkin-MacKinnon anti-pornography ordinance, an article by Robin West summarizing sex-positive arguments, and citing articles by Carlin Meyer, Nadine Strossen, and Sylvia Law as suggested further reading.⁶³ Like the other casebooks, however, the Sullivan and Gunther casebook makes almost no reference to intersectional or post-structural/post-modern feminist perspectives. The casebook refers in passing to Frances Olsen's article on statutory rape, but it does not seek to explain, summarize or quote from it.⁶⁴ Nor does it make any other mention of post-structural/post-modern feminism. Perhaps even more striking, the index to the casebook contains no mention whatsoever of any intersectional feminist work.⁶⁵

This selective inattention to certain feminist theories could, of course, have numerous explanations. One possibility could be that relevant feminist perspectives have been internalized, or "mainstreamed," by legal decision-makers in ways that make ongoing citation to particular feminist theoretical writing unnecessary.⁶⁶ Alternatively, feminist perspectives may simply be irrelevant in some legal contexts, in ways that make their citation distracting rather than helpful. Neither of these explanations seems adequate, however, when it comes to explaining the absence of citations of newer, rather than older, feminist perspectives.

There is certainly some evidence of the mainstreaming of older feminist perspectives. Consider the discussion in these casebooks of prominent gender justice cases such as *United States v. Virginia* ("VMI"),⁶⁷ *United States v. Morrison*,⁶⁸ and *Nevada Department of Human Resources v. Hibbs*.⁶⁹ In *VMI*, the Supreme Court addressed the question of whether Virginia was

⁶¹ *Id.* at 866 (citing MACKINNON, *FEMINISM UNMODIFIED*, *supra* note; MACKINNON, *ONLY WORDS* *supra* note 59; Dworkin, *Against the Male Flood*, *supra* note 59; MacKinnon, *Not a Moral Issue*, *supra* note 48); *id.* at 868 (citing MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 41); *id.* at 429 (citing MacKinnon, *Roe v. Wade: A Study in Male Ideology*, *supra* note 41).

⁶² *Id.* at 795 (citing Bowman, *supra* note 59); *id.* at 624 (citing Koppelman, *supra* note 52).

⁶³ *Id.* at 428, 597 (citing Law, *Rethinking Sex and the Constitution*, *supra* note 3); at 681, 866 (citing West, *supra* note 3); *id.* at 866 (citing Hunter & Law, *supra* note 19; Meyer, *supra* note 41; STROSSEN, *supra* note 59).

⁶⁴ *Id.* at 593 (citing Olsen, *Statutory Rape*, *supra* note 41).

⁶⁵ There is a reference to work by Martha Minow on religion, but not on broader issues of contextualism or feminist method. *Id.* at 1363 (citing Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003)).

⁶⁶ For both the advantages and pitfalls of mainstreaming of this kind, see Carol Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992).

⁶⁷ *United States v. Virginia*, 518 U.S. 515 (1996).

⁶⁸ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁹ *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

entitled to categorically exclude female cadets from its adversative training program at the Virginia Military Institute, and ruled that it was not in fact entitled to do so.⁷⁰ In *Morrison*, the Supreme Court considered the constitutionality of provisions of the Violence Against Women Act (“VAWA”)⁷¹ creating a civil rights remedy for the victims of gender-motivated crimes of domestic and sexual violence, ultimately holding that that VAWA was beyond the reach of congressional power under both the Commerce Clause and Section 5 of the Fourteenth Amendment.⁷² In *Hibbs*, the Court considered the constitutionality of provisions of the Family and Medical Leave Act (“FMLA”)⁷³ requiring state employers to provide twelve weeks of unpaid parental leave to male and female employees following the birth or adoption of a child, holding that Congress *did* have power to enact these provisions under Section 5 of the Fourteenth Amendment.⁷⁴ In discussing these cases, the casebooks make almost no explicit mention of feminist scholarship.⁷⁵ Only the Sullivan casebook expressly mentions cultural feminism, in conjunction with a more implicit reference to liberal feminist understandings, in discussing the future of single-sex education after *VMI*.⁷⁶ All, however, make at least some implicit reference to liberal or cultural feminist perspectives in some context. In discussing *VMI*, the Choper and Stone casebooks, for example, implicitly refer to cultural feminist understandings by asking whether *VMI*’s policy might be justified on the basis that men and women may have a “different voice,” or different way of thinking or learning.⁷⁷ In discussing *Hibbs*, the Stone casebook also refers to the debate between liberal and cultural feminists about sameness- versus difference-based approaches to equality: whether to emphasize the need to dispel stereotypes about female roles or the need to make accommodations for feminine or mothering roles.⁷⁸

⁷⁰ *VMI*, 518 U.S. at 546–47.

⁷¹ 42 U.S.C. § 13981 (1994) (passed as title IV, § 400001–703 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796 (1994)).

⁷² 529 U.S. 598, 627 (2000).

⁷³ 29 U.S.C. §§ 2601–54 (2000) (passed as The Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993)).

⁷⁴ 538 U.S. 721, 740 (2003).

⁷⁵ For discussion of *VMI*, see CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 1306–13, 1321, 1530, 1540; CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 637, 640–44; CONSTITUTIONAL LAW, Sullivan & Gunther eds., *supra* note 40, at 583-90. For discussion of *Morrison*, see CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 91–102, 1540–42; CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 184, 185, 222–25, 328, 1587, 1589; CONSTITUTIONAL LAW, Sullivan & Gunther eds., *supra* note 40, at 116–19, 727–30. For discussion of *Hibbs*, see CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 1529–33, 1536, 1540; CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 320–24, 656, 714; CONSTITUTIONAL LAW, Sullivan & Gunther eds., *supra* note 40, at 736–40.

⁷⁶ CONSTITUTIONAL LAW, Sullivan & Gunther eds., *supra* note 40, at 590.

⁷⁷ CONSTITUTIONAL LAW, Choper et al. eds., *supra* note 40, at 1329; CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 648–49.

⁷⁸ CONSTITUTIONAL LAW, Stone et al. eds., *supra* note 40, at 656.

No equivalent express or implied reference is found in any of the casebooks to newer feminist theories, despite the important arguments these theories could offer, as theories, about the practical desirability of the Court's decision in these cases.⁷⁹ This is not to say that all such arguments were explicitly advanced by feminist scholars, in distinct scholarship about each and every one of these cases. Nor is it to suggest that particular feminist theorists as individuals would necessarily have made such arguments. One does not generally expect a critical or theoretical legal project to proceed in this way. Legal theory is supposed to provide arguments which transcend the particular examples used by proponents, and the pragmatic orientation of proponents on particular issues, and become part of the broader analytic tool-kit of lawyers and legal scholars.

Consider, for example, the potential insights offered by post-structural/post-modern feminism about the remedial question facing the Court in *VMI*, by sex-positive, intersectional, and post-structural/post-modern feminism about the desirability of the Court's decision in *Morrison*, or by sex-positive and intersectional feminism about the (un)desirability of the Court's decision in *Hibbs*. In *VMI*, a post-structural/post-modern feminism would point to interesting additional arguments in favor of the Court's decision to reject the remedial solution proposed by the Commonwealth of Virginia in the case, namely, the creation of a separate women's leadership academy at Mary Baldwin College (the Virginia Women's Institute for Leadership).⁸⁰ Post-modern/post-structural feminism would suggest that a separate women's leadership academy would be far less desirable than an integrated VMI because of the capacity of female cadets at VMI to challenge rigid male-female dichotomies, or notions of sex difference, by creating space for a form of "cross-dressing."⁸¹ It might also suggest that requiring an integrated VMI to make accommodations designed to preserve sexual modesty or male-female aesthetic differences (such as different showering and sleeping arrangements, or a different hair-length requirement) would be counter-productive rather than helpful to the project of gender justice because it would serve to reinstate rather than break-down existing gender boundaries.⁸²

⁷⁹ For arguments about the importance of including such perspectives in constitutional law casebooks, see Becker, *supra* note 39, at 269 (arguing "it is the essence of formalism to confine analysis to legal doctrine. Good pedagogy goes beyond the presentation of doctrine to explore the relationship between doctrine and sound policy.").

⁸⁰ The latest edition of *CONSTITUTIONAL LAW*, Sullivan & Gunther eds., *supra* note 40, in fact removed from earlier editions a passing reference in this context to post-structural/post-modern work by Mary Joe Frug, discussing cultural feminist perspectives. See *CONSTITUTIONAL LAW* 793 (Kathleen Sullivan & Gerald Gunther eds., 15th ed. 2004) (citing Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 *HARV. WOMEN'S L.J.* 37 (1992)).

⁸¹ See *supra* note 30 and accompanying text.

⁸² Cf. BUTLER, *supra* note 3, at 84–85 (arguing that feminist attempts to re-value the feminine "reinforce precisely the binary, heterosexist framework that carves up genders into masculine and feminine and forecloses adequate description of the kinds of subversive and parodic convergences that characterize gay and lesbian cultures.").

In *Morrison*, newer feminisms would also have provided arguments in at least partial defense of the Supreme Court's decision to strike-down VAWA, which were clearly not canvassed in the opinion itself. While sex-positive feminism would support the remedial structure adopted by VAWA because of its capacity to empower women to bring actions on their own behalf, it would also point to broader dangers implicit in the statute, in terms of its capacity to "pla[y] into the hands of those who regard" female sexuality as dangerous, or as "something to be indulged in [by women] only for the purposes of reproduction."⁸³

Intersectional feminism would point both to limits on the likely upside to a statute such as VAWA, and to potential downsides it might have, which in turn could affect an overall assessment of the ultimate cost of the Supreme Court's decision to strike down the statute. Intersectional feminists in fact expressly argued, prior to the Supreme Court's ruling in *Morrison*, that the decentralized nature of the enforcement structure contemplated by the Act would likely mean that it had little capacity to protect poor women, or other women subject to forms of educational, linguistic, or psychological disadvantage.⁸⁴ An intersectional feminist perspective would also point to the potential limits to the capacity of a facially "race-neutral" statute such as VAWA to help change outcomes for women of color.⁸⁵ Rape, in an intersectional feminist account, is an inherently racialized experience for black women in the United States, in part because it has historically been associated with the victimization—through false accusation and lynching—of black men.⁸⁶ Domestic violence is also an experience that implicates both gender and race for most women of color because of the capacity of the prosecution of domestic violence to contribute to the stigmatization of the minority community to which they belong.⁸⁷ By failing to address this specific, racially fraught experience of rape and domestic violence, and instead insisting on an essentialist notion of "gender motivated" violence, a statute such as VAWA would, in an intersectional feminist account, tend to do little actually to en-

⁸³ Franke, *supra* note 18, at 199–202 (on the general dangers of legal reforms, led by liberal and dominance feminists, aimed at protecting women from the harms of sexual violence).

⁸⁴ Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 498–500 (1996) (raising concerns about the prospect of meaningful access to federal court under the Act for women of color and women from non-English speaking backgrounds). For broader discussion of the danger that 'race-blind' changes to domestic violence law will have radically differential effects on white women and women of color, see Holly Maguigan, *Wading Into Professor Schneider's 'Murky Middle Ground' Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 428 (2003).

⁸⁵ See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1275 (1991) [hereinafter Crenshaw, *Intersectionality*].

⁸⁶ Harris, *supra* note 48, at 599–601; Crenshaw, *Intersectionality*, *supra* note 85.

⁸⁷ ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 63–64 (2000).

courage women of color to come forward in greater numbers to report and “prosecute” offenses against them.⁸⁸ It would also create a real danger of use for racially discriminatory ends.⁸⁹

Post-structural/post-modern feminism would also point to serious concerns about the Act’s requirement that violence be “gender motivated,” although for somewhat different reasons. For post-structural/post-modern feminists, the basic disadvantage to such a requirement, at least when read in conjunction with the Act’s title, would lie in its assumption of a binarized notion of sex or gender: that men rape or assault women because they are women.⁹⁰

Conversely, in *Hibbs*, newer feminisms would point to potential practical downsides to the Court’s decision to uphold the basic provisions of the FMLA, which could affect assessment of the ultimate desirability of the decision. Sex-positive feminism, for example, would point to the dangers, as well as benefits, of requiring employers to devote additional resources to accommodating reproductive activity over and above other activities individuals regard as personally rewarding. It would suggest that such a requirement could serve to reinforce repronormative attitudes, and thereby further constrain female sexuality and agency, unless accompanied by a much broader commitment to accommodating individual employees’ needs for different forms of leave.⁹¹ Intersectional feminists, on the other hand, would likely raise doubts about the desirability of more specific aspects of the

⁸⁸ See 42 U.S.C. § 13981 (1994) (passed as the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. 103-322, 108 Stat. 1941–42 (1994) (requiring a showing of a clear gender motive for crimes to be actionable under the Act)). For a similar critique of the way in which international prosecutions of gender violence have fallen into this kind of essentialist trap, see, for example, Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 EUR. J. INT’L L. 697 (2002).

⁸⁹ The potential for VAWA to be used overwhelmingly by white women against black men would create real potential costs for black women. It would thus be important for intersectional feminists to at least note that the most prominent case brought under VAWA involved a white female plaintiff against black male defendants, against a background of serious racial tension on the Virginia Tech campus where the sexual assault was alleged to have occurred. See, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 144 (2001); Caroline Joan S. Picart, *Rhetorically Reconfiguring Victimhood and Agency: The Violence Against Women Act’s Civil Rights Clause*, 6 RHETORIC & PUB. AFF. 97, 111 (2003); A Timeline of Black History at Virginia Tech, <http://spec.lib.vt.edu/archives/blackhistory/timeline/misc.htm> (last visited Apr. 22, 2008).

⁹⁰ Cf. BUTLER, *supra* note 3, at 30 (highlighting the link between binarized notions of sex, gender and *desire* in constituting and maintaining the “unity” of our experience of gender).

⁹¹ For some feminists sympathetic to sex-positive feminists’ critique of repronormativity, the provision for some forms of non-parental leave under the FMLA was such that it was worthy of support, on balance. See, e.g., Case, *How High the Apple Pie*, *supra* note 19, at 1766. Sex-positive theoretical arguments point, however, to the dangers, or need for a careful cost-benefit analysis in this context. See, e.g., Franke, *supra* note 18, at 199–201 (warning generally against legal reforms that reinforce repronormative attitudes toward female sexuality instead of creating a “viable positive domain of nonreproductive sexuality”). I am indebted to Mary Anne Case for pointing out this distinction to me.

FMLA, such as its provision for unpaid parental leave.⁹² In an intersectional account, this dimension of the Act would also create a strong likelihood that, in seeking to address gender inequality, the Act would simply serve to compound the subordination of poor women, an overwhelming number of whom are women of color. From an intersectional feminist perspective, not only would this aspect of the FMLA mean that it had the potential to increase the gap between socio-economically privileged and poor women when it came to the capacity to successfully combine work and family life, or market and non-market labor. It would also mean that it had the potential to actively contribute to narratives of blame that exist in our society surrounding poor women's inability to combine work and family responsibilities.⁹³

None of these insights or arguments are referred to, even in passing, in any of the casebooks.⁹⁴ The lack of *explicit* attention in these texts to newer feminist theories thus ultimately seems far more consistent with the broader legal culture tuning out the insights of legal feminism, than with it absorbing or mainstreaming those insights.

IV. TUNING OUT: CAUSES AND CONSEQUENCES

A. Causes

To a large degree, this kind of selective tuning out to newer feminisms is a predictable, and even understandable, approach on the part of the broader legal academy. More recent feminist theories have not only doubled the number of different feminist accounts of the nature of gender injustice, but have also added substantially to the complexity of feminist explanations of the sources of that injustice.⁹⁵ For example, while older feminisms have generally focused on either gender-based stereotypes or hierarchies as the key source of gender injustice,⁹⁶ intersectional feminists have radically expanded the range of stereotypes and hierarchies to which feminists must pay attention in order to understand the nature and source of gender injustice. They have called attention to the way in which sex and gender intersect with race, religion, class, disability, sexuality, and citizenship to create invidious

⁹² FMLA, 29 U.S.C. § 2612(c) (2000). For further discussion of the structure of the Act, and the unpaid nature of the relevant leave, see Michael Selmi, *The Limited Vision of the Family Medical Leave Act*, 44 VILL. L. REV. 395, 406–07 (1999).

⁹³ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1383 (on the potential for 'race-blind' liberal legal reforms, in combination with free markets, to contribute to narratives of blame against women of color).

⁹⁴ See *supra* Part III.

⁹⁵ See *supra* Part II.

⁹⁶ Liberal feminists have focused on sex-based stereotypes as the key source of gender injustice, cultural feminists have emphasized the role of both individual biases and deeper structural inequalities in creating a hierarchical relationship between masculine and feminine values and roles, and dominance feminists have emphasized sex-based hierarchies as the key to gender injustice. See *supra* Part II.

stereotypes and social hierarchies and, consequently, to the importance of considering all of these factors together with sex and gender as part of any feminist analysis of problems such as rape, domestic violence, sexual harassment, and economic inequality.⁹⁷ Newer feminisms have also placed much greater emphasis than older feminisms on the role of complex ideologies in producing gender injustice. In intersectional feminist theory, supremacist ideologies play a crucial role in legitimizing hierarchical structures or forms of domination.⁹⁸ In sex-positive feminist theory, in turn, repronormative ideologies play a central role in constraining female autonomy and agency, while in post-structural/post-modern feminist theory, the origins of gender injustice lie in repronormative *and* heteronormative ideologies.⁹⁹

TABLE 1: THE SOURCES OF GENDER INJUSTICE IN DIFFERENT FEMINIST THEORIES

<i>different feminisms</i>	<i>Liberal</i>	<i>cultural</i>	<i>dominance</i>	<i>sex-positive</i>	<i>intersectional</i>	<i>post-structural/post-modern</i>
<i>key source of sex / gender injustice</i>	sex stereotypes	gender hierarchies	sex-gender hierarchies	repronormative ideology	race-gender hierarchies, and supremacist ideology	repronormative and heteronormative ideologies

This added complexity has made it much more difficult, or costly, for broader legal actors to engage in detail with the whole of feminist thought, and thus also more likely that the broader legal culture will need to rely on some kind of rule-of-thumb or heuristic about with which feminist sources to engage, rather than engage with the entirety of feminist thought. There is a well-known body of work in behavioral law and economics that suggests that as the quantity of information a decision-maker faces increases, the decision-maker will experience a sense of “information overload” that leads him/her to adopt some sort of rule of thumb for reducing the amount of information the decision-maker actually processes.¹⁰⁰ Such theories also

⁹⁷ See generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 62–65 (2000) (on domestic violence); Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, *passim* (on economic inequality in particular); Crenshaw, *Intersectionality*, *supra* note 85 (on rape and domestic violence); Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992) (on rape and sexual harassment); Harris, *supra* note 19.

⁹⁸ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1352–54.

⁹⁹ See *supra* Part II.

¹⁰⁰ See Jacob Jacoby et al., *Brand Choice Behavior as a Function of Information Load*, 1 J. CONSUMER RES. 33 (1974). For a useful summary of the subsequent scholarship in psychology and behavioral economics on the problem of information overload, see Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment*, 21 PSYCHOL. & MARKETING 159, 161–65

suggest that, for cost-benefit reasons, these kinds of rules of thumb can be based on familiarity, or the ease with which a decision-maker can understand particular material.¹⁰¹

Given the costs of processing new information, it is both predictable, and also to a large degree understandable, that the broader legal academy has chosen to focus on older rather than newer feminisms. Older feminists are not only more familiar to the broader legal culture, but they are also much more accessible from an argumentative perspective. Liberal feminists, for example, have almost all adopted a writing style and structure that mirrors the traditional style of public law scholarship in America. (It is no accident, in this sense, that one of the leading early liberal feminist theorists in America, Ruth Bader Ginsburg, is now on the Supreme Court.) Cultural feminists have also adopted a fairly simple and accessible writing style based on either traditional public law models,¹⁰² or more social-scientific models (as, for example, in the case of Carol Gilligan's foundational cultural feminist text, *In a Different Voice*¹⁰³). Dominance feminists have used a somewhat different, more "rhetorical and polemical" writing style.¹⁰⁴ This style has, however, also had close parallels with other social and political theoretical writing on topics other than gender justice.¹⁰⁵

Newer feminisms, by contrast, not only are less familiar to mainstream legal scholars as a result of their recency, but also have tended to employ a style that is much less familiar, direct, or accessible to legal scholars. Intersectional feminists, for example, have relied on both poetry and personal narrative as both a source of feminist insight and a way of presenting their arguments.¹⁰⁶ Sex-positive feminists have used parody as an integral part of their argumentative structure,¹⁰⁷ while post-structural/post-modern feminists have relied on both parody and a highly post-modern literary style as a self-conscious statement about their approach to feminist method.¹⁰⁸ The costs to

(2004). For the application of this theory in other legal contexts, see, for example, Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Security Regulation*, 81 WASH. U. L.Q. 417 (2003).

¹⁰¹ See, e.g., Paredes, *supra* note 100, at 457–58 (discussing overconfidence and availability biases).

¹⁰² See, e.g., Martha Fineman, *Contract and Care*, 76 CHICAGO-KENT L. REV. 1403 (2001).

¹⁰³ GILLIGAN, *supra* note 2.

¹⁰⁴ See Lacey, *supra* note 1, at 17 (discussing the writing style of Catharine MacKinnon).

¹⁰⁵ *Id.* (comparing MacKinnon's writing style to the style used by Patricia Williams in her writings on racial justice).

¹⁰⁶ See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (writing in auto-biographical, narrative style); Harris, *supra* note 19, at 581–82 (providing an examination of Jorge L. Borges's "Funes the Memoriosus").

¹⁰⁷ See, e.g., Franke, *supra* note 18, at 188–90 (adopting a highly ironic style, comparing arguments for the social value of children to arguments for the social value of Porsches).

¹⁰⁸ Post-structural/post-modern feminists are aware, in this context, that these aspects of their work make them more inaccessible. They argue that this is a cost worth bearing, however. See, e.g., BUTLER, *supra* note 3, at xviii–xix (defending the "difficulty" of the

traditional public law scholars of engaging with newer feminisms have thus been significantly higher than the costs of engaging with older feminisms.

B. Consequences

No matter how understandable it may be, there will be very real downsides to this kind of selective tuning out by the broader legal culture to newer feminisms. Tuning out of this kind means that the legal academy and those it teaches (namely the law students of today, and the policy-makers and attorneys of the future) lose out on an extremely rich and varied set of insights about the nature and sources of gender injustice.¹⁰⁹ The breadth of those insights will also often be essential to legal actors' capacity to understand gender injustice in its full complexity.¹¹⁰

Additionally, selective tuning out to newer feminisms means that legal actors will often tend to overestimate the likelihood that legal reform will help achieve gender justice. Older feminisms all place significant faith in the capacity of law to help achieve feminist change. For liberal feminists, law—particularly constitutional and civil rights law—has an important potential to challenge stereotypical linkages between biology and gender roles, both by denouncing such linkages at a symbolic level and by imposing concrete, material penalties on individual actors who make such linkages.¹¹¹ Cultural feminists also place a strong emphasis on law as a vehicle for achieving feminist change. They argue that law can help redress the systematic under-valuing of feminized work in the market (by insisting, for example, on a requirement of comparable pay for comparable work) and help compensate women for the reproductive and domestic labor they perform.¹¹² They also suggest that law can be used to increase the symbolic and practical value given by society to feminine values such as care, empathy, and contextualism, as important complements to more traditional masculine values such as universalism, independence, and abstraction, to help advance cul-

style of GENDER TROUBLE as a complex political choice to reject the “received grammar” that can itself naturalize gender norms); Frug, *A Postmodern Feminist Legal Manifesto*, *supra* note 30, at 1047–48 (defending postmodernists’ use of irony and arguing that “[s]tyle is important in post-modern work [because t]he medium *is* the message in some cases”).

¹⁰⁹ For the importance of the academy’s role in making students aware of the complexity of issues surrounding gender justice, see Becker, *supra* note 39, at 269–70.

¹¹⁰ Implicit in this paper is the idea that all of the six different feminisms have something of value to offer. The insights they offer may be of more or less value in particular cases. Their prescriptions will also conflict in ways that require us to choose between them. Wherever possible, however, an approach that synthesizes, or at least appreciates, the insights of different schools of feminist thought before choosing between them will be far richer than an approach that simply privileges one single theory from the outset. I am indebted to Martha Nussbaum for pressing me on this point.

¹¹¹ See generally Ginsburg, *Sex Equality and the Constitution*, *supra* note 2; Ginsburg & Flagg, *supra* note 5.

¹¹² See *supra* notes 8–10 and accompanying text.

tural feminist goals.¹¹³ For example, some cultural feminists view *Brown v. Board of Education*¹¹⁴ as epitomizing the way in which law may embrace broad-reaching cultural feminist goals.¹¹⁵

In a dominance feminist account, law has an even closer relationship to feminist change. It is not simply an important vehicle for achieving legal change, but is, in fact, an essential one if feminists are to have the agency necessary to contest the conditions of their subordination. Without legal reforms that increase the costs, and thus reduce the frequency, of practices such as the traffic in pornography, male-to-female rape, prostitution, battering, and harassment, dominance feminists see no meaningful prospect of long-term feminist change or of women enjoying the agency necessary to contest the conditions of their subordination.¹¹⁶ For example, MacKinnon was a leading advocate in the 1980s of using the law to target sexual harassment.¹¹⁷ In addition, both MacKinnon and Dworkin worked in the 1990s to persuade various American cities to introduce anti-pornography ordinances that banned the production, supply, and traffic in materials that depicted women in a dehumanizing or objectifying way.¹¹⁸

Newer feminist theories are, by contrast, consistently more skeptical of the capacity of law to act as a vehicle for achieving feminist change. Intersectional feminists do regard law and legal rights as important means by which those disadvantaged by the current social and legal order may resist and challenge the conditions of their subordination.¹¹⁹ The very act or process of rights-based claiming and activism can, according to Kimberlé Crenshaw, help challenge the “images of complacency and docility” that help support an ideology of white supremacy, or, analogously, the images of black women’s bodies as simply manipulable objects.¹²⁰ Successful forms of rights-claiming can also help highlight the existence of injustice and redress the material disadvantage experienced by poor women in ways which make

¹¹³ For some cultural feminists, the capacity of the law to help revalue the feminine in a manner that does not depend entirely on assigning it a market value will tend to be particularly useful, since revaluing the feminine might well involve changing the basic currency by which we assess social value and not simply assigning a greater market value to feminine roles or ways of thinking. See Littleton, *supra* note 4, at 1303, 1322–23.

¹¹⁴ *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

¹¹⁵ WEST, *supra* note 4, at 93.

¹¹⁶ Otherwise, the pervasiveness of women’s domination would logically prevent space for feminist agency. For discussion and critique, see HALLEY, *supra* note 1, at 33–35.

¹¹⁷ See generally MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 44.

¹¹⁸ See, e.g., Indianapolis, Ind., Code § 16-3 (1984); discussion in MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 11, at 246–47.

¹¹⁹ See generally WILLIAMS, *supra* note 106.

¹²⁰ See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1359, 1364–65; Crenshaw, *Intersectionality*, *supra* note 85, at 1291 (describing rhetorical “manipulation of Black women’s bodies” in popular understandings of race and rape).

a very real difference in their daily lives.¹²¹ At the same time, intersectional feminists also point to the danger that legal change may compound the disadvantage of poor women and women of color by adding to the *perceived* legitimacy of the social order.¹²² Where this is the case, intersectional feminists suggest that legal change may then serve to shatter collective consciousness and encourage self-blame on the part of those disadvantaged by race and sex-based supremacist ideologies.¹²³

Even more than intersectional feminists, sex-positive feminists generally see feminist-led legal change as having a significant tendency to reinforce, rather than challenge, existing sources of gender injustice. This is in part because of the historical tendency of law to reflect—and thereby reinforce—repronormative ideologies.¹²⁴ Sex-positive feminists are also extremely wary of the tendency for more recent feminist-led attempts at law reform to empower the kinds of conservative social forces that treat sex outside of a reproductive context as inherently inappropriate, dangerous, and immoral for females, and for laws of this kind to be interpreted and enforced by lawyers and judges in ways that demand that female plaintiffs and witnesses conform to traditional narratives of passivity and victimhood.¹²⁵ In most instances, sex-positive feminists thus reject treating law as a direct vehicle for achieving sex-positive aims and approach questions relating to the regulation of sex and sexuality in strongly libertarian terms.¹²⁶

Post-structural and post-modern feminists are also highly skeptical of the capacity of law directly to challenge the current sex and gender order, at least in any far-reaching or comprehensive way. For post-structural feminists, legal reforms tend simply to redeploy existing sex/gender binaries, even while seeking to challenge or undermine them.¹²⁷ As a result, post-structural feminists suggest that both feminist and queer theoretic activism should focus on parodying rather than seeking directly to alter existing sex

¹²¹ Cf. Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1382 (discussing rights-claiming strategies used by the civil rights movement).

¹²² *Id.* at 1380–83.

¹²³ *Id.* at 1383.

¹²⁴ See, e.g., Franke, *supra* note 18, at 195–96 (discussing immigration law as a quintessential example of repronormative and xenophobic attitudes being reflected in law).

¹²⁵ See Hunter & Law, *supra* note 19, at 71; Picart, *supra* note 89.

¹²⁶ Abrams, *supra* note 15, at 348–49. This does not mean that sex-positive feminists reject any role for law in facilitating or creating space for feminist change. Sex-positive feminists generally acknowledge, for example, the importance of guaranteed legal access to contraception and abortion, and at least some laws against rape, as necessary for the kind of sexual play that is pleasurable rather than reproduction-oriented, or a site of agency rather than victimhood. See *id.* at 339, 349; Law, *Rethinking Sex and the Constitution*, *supra* note 3, at 1019–20. Similarly, in opposing the Dworkin-MacKinnon anti-pornography ordinances, sex-positive feminists have placed strong reliance on the first amendment as a source of legal protection for the use and distribution of pornography for sex-positive aims. See Hunter & Law, *supra* note 19 (introducing amicus brief, arguing for use of the first amendment by the Supreme Court to invalidate anti-pornography laws).

¹²⁷ See Olsen, *The Family and the Market*, *supra* note 3, at 1577 (discussing the capacity of all reform strategies, which depend on binary definitions of sex and gender, to reinforce rather than subvert hierarchy and injustice); see also BUTLER, *supra* note 3.

and gender categories via legal or other means.¹²⁸ Similarly, for post-modern feminists, legal change is inevitably constrained by the limits of existing legal discourse and, therefore, feminist resistance should focus on processes of literary and analytic deconstruction, rather than the kind of political mobilization aimed at achieving legal change.¹²⁹

These differences mean that older and newer feminist theorists will take very different approaches to assessing the likely benefits of various practical efforts at feminist “reform,” such as those considered by the Supreme Court in *Morrison* or *Hibbs*. Older feminist theories would suggest very real advantages to VAWA and the FMLA. Dominance feminism in particular would support both the basic desirability of VAWA and the doctrinal argument for upholding VAWA as within Congress’ power under the Commerce Clause.¹³⁰ It would highlight both the connection between rape and domestic violence and women’s inequality across all spheres, including the workplace, and the capacity of VAWA to empower women to challenge the sources of that inequality.¹³¹ Liberal feminist theory would also support federal attention to issues such as rape and domestic violence, which overwhelmingly affect women rather than men, because of the capacity of such action to challenge the kind of stereotype that equates harm to women as a matter of private or local, rather than public and national, concern.¹³² Cultural feminism would provide additional, more indirect support for a statute such as VAWA and its attempt to combat sexual and domestic violence. For cultural feminists, an important consequence of the devaluation of the feminine is that many women are placed in a position of serious financial dependency and insecurity vis-à-vis their male partners in a way that makes them vulner-

¹²⁸ See BUTLER, *supra* note 3, at 94, 174–75.

¹²⁹ It is worth noting that in her *Postmodern Feminist Manifesto*, Mary Joe Frug also treated law as having at least some liberatory or reconstructive potential in a post-modern approach, suggesting that “[w]hat law (at least in part) constructs, law reform projects can re-construct or alter,” and, in particular, that “if the legal rules . . . were different, female sexuality could be different.” Frug, *A Postmodern Feminist Legal Manifesto*, *supra* note 30, at 1048, 1063. To some extent, this may have been because Frug treated post-modern feminism as an invitation to “bricolage,” or to combine the deconstructionist impulse of post-structuralism with an approach to law that was much more strongly reconstructive and connected to dominance and intersectional feminist approaches. For an explanation of bricolage and the link between it and post-modernism, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228–29 (1999). The broader connection between Frug’s arguments and a post-modern method, however, suggests that even post-structural/post-modern feminists do not necessarily dismiss the relevance of law *tout court*, but rather, like sex-positive feminists, generally see at least some role for law in creating space for the subversion of the current gender order, if not the recreation of that order.

¹³⁰ See *United States v. Morrison*, 529 U.S. 598, 609–19 (2000) (discussing and rejecting the argument that VAWA was authorized by the Commerce Clause of the US Constitution, U.S. Const. art. I, § 8, cl. 3).

¹³¹ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 48, at 242–43 (noting the link between systems of sexual subordination and women’s economic inequality).

¹³² See, e.g., Resnik, *Reconstructing Equality*, *supra* note 7, at 398–99, 408.

able to a variety of physical and emotional harms.¹³³ If VAWA were able to address those harms, it would have an important capacity to remedy the current distributional consequences of the devaluation of the feminine, as well as, in some cases, to help reclaim relationships as a source of intimacy and pleasure, rather than violence and pain.

Older feminisms, particularly liberal and cultural feminism, would also point to real advantages to a statute such as the FMLA, and consequently support the Court's decision in *Hibbs* to uphold the Act, as a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.¹³⁴ A liberal feminist perspective, in fact, seems largely to have been implicit in the Justices' own approach to the FMLA, given the focus of the Justices in the majority on the link between sex-based assumptions about parental responsibility and broader gender inequality.¹³⁵ In upholding the FMLA's provision for parental leave, the Court held that the gender-neutral nature of these provisions helped redress prior patterns of state action that allocated or denied such leave on the basis of sex-based stereotypes.¹³⁶ Cultural feminism would also point to additional advantages to the Act. From a cultural feminist perspective, the capacity of the FMLA to affirm the importance of care-work as an activity worthy of respect and accommodation, or as having some real economic value, would deliver real benefits both for women and society as a whole.¹³⁷

On the other hand, as the discussion in Part II highlighted, attention to the insights of newer feminist theories would suggest that statutes such as VAWA and the FMLA had a much more complex, even potentially problematic relationship to gender justice. Attention to sex-positive feminism would point to the clear symbolic dangers, as well as benefits, to VAWA's addition of another layer of regulation, over and above state criminal and tort law, in the area of sexual violence. It would also point to potential dangers, as well as benefits, to the requirement in the FMLA that employers devote additional resources to accommodating reproductive activity, unless such a requirement were accompanied by a broader commitment to accommodating individual employees' needs for different forms of leave. Intersectional feminism would point to serious potential downsides to specific aspects of VAWA and the FMLA, such as VAWA's facially race-neutral character and gender-motive requirement and the FMLA's provision for unpaid parental

¹³³ WEST, *supra* note 4, at 100–138.

¹³⁴ Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

¹³⁵ *Id.* at 730.

¹³⁶ *Id.* at 721, 729–35.

¹³⁷ This implicit valuation of care-work derives from the fact that the FMLA requires state-employers to bear certain additional economic costs in order to accommodate care-work (for example, the costs associated with replacing workers taking leave under the FMLA on a temporary basis). *But see* Selmi, *supra* note 92, at 409 (detailing evidence as to the modest extent of those costs).

leave.¹³⁸ Post-structural/post-modern feminist would raise distinct but parallel concerns to intersectional feminism about the latter aspect of VAWA.

Selective attention to older, as opposed to newer, feminist perspectives in cases such as these will thus have a very real potential to distort assessment by the broader legal culture of the likely benefits of legal reforms, both at the drafting stage, and when judging the merits of the decisions of the Supreme Court to strike-down and uphold the two statutes.

V. RECASTING FEMINIST CRITIQUE

Given these costs to current patterns of tuning out, a clear need arises for those concerned about gender justice to find ways to increase the attention given by the rest of the legal academy and legal culture to newer feminist perspectives. The selective nature of existing patterns of tuning out itself also helps suggest the beginnings of an answer, namely, that the most promising way to counter tuning out to newer feminisms will be to connect their insights to those of older feminisms, which have had more success in entering the legal mainstream.

A. *Why Not Strategic Essentialism?*

To some degree, the existing feminist literature already points in this direction, by calling for a form of “strategic essentialism” on the part of newer feminist theorists, or a strategic emphasis on their shared concern with older feminists to promote the interests of women or females (or to use Janet Halley’s phrase, on “carrying a brief for f”¹³⁹).¹⁴⁰

Older feminist theorists clearly all share a commitment to advancing the interests of women, or females. For liberal feminists, females, in the purely biological sense, rather than women, are the proper focus of analysis because the way in which we define “women” is often the product of inappropriate or stereotypical linkages between sex and gender.¹⁴¹ For cultural and dominance feminists, women, rather than females, are the more appropriate focus of analysis and activism. For cultural feminists, biology and gender roles are sufficiently closely linked in the current legal and social

¹³⁸ See *supra* note 88 and accompanying text.

¹³⁹ HALLEY, *supra* note 1, at 17–20; see also discussion *supra* note 1.

¹⁴⁰ For a sophisticated rendering of this argument, see Christine Littleton, *Does it Still Make Sense to Talk About Women?*, 1 UCLA WOMEN’S L.J. 15 (1991).

¹⁴¹ This focus may be obscured by the fact that liberal feminists made a clear strategic decision in the 1970s to use the term “gender” rather than “sex” to describe the focus of their equality-based claims. As Mary Anne Case has explained, however, this was a purely strategic decision that did not in any way reflect the basic understanding of liberal feminists that they should focus on females in the biological sense, as the basic focus of analysis. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 9–10 (1995).

order that it will be impossible to improve the distribution of resources between males and females without also revaluing feminine gender roles.¹⁴² Equally, for dominance feminists, it will be impossible to understand the actual source of gender injustice without first acknowledging the way in which to be female in the current context is inevitably to be gendered in a very particular way, namely to be defined as the object of pornography, rape, battering, and other forms of sexual violence, rather than as a self-directing agent and subject.¹⁴³ In each case, however, feminists share at least some form of abstract concern to carry a brief for f.¹⁴⁴ By calling for newer feminists to emphasize this same concern, strategic essentialists thus seek to re-explain newer feminisms to the broader culture in terms of the old.

While this approach may successfully integrate some newer feminist insights, it can never hope to capture the full range of insights offered by newer feminisms, particularly those newer feminisms that are currently *most* neglected in broader legal academic discourse, namely, those of intersectional and post-structural/post-modern feminism.¹⁴⁵ In a sex-positive feminist account there is some shared concern with liberal feminists to promote the interests of females. Sex-positive feminists generally focus on the disproportionate constraint imposed by repronormative ideologies on female rather than male sexual pleasure and agency.¹⁴⁶ Like liberal feminists, sex-positive feminists are also concerned with avoiding inappropriate linkages between biology, gender, and sex/sexual desire, and have thus generally relied on the axis male/female rather than man/woman as the basis of their analysis. In an intersectional or post-structural/post-modern account, however, it will be deeply problematic to treat *either* females or women as the focus of feminist analysis.

For intersectional feminists, treating women or females—in the abstract—as the focus of feminist concern will be problematic for at least three reasons. First, as a symbolic matter, such an approach treats women of color as secondary participants in both the existing culture *and* the social movements designed to challenge that culture (symbolic exclusion).¹⁴⁷ Second, strategic essentialism also tends as a practical matter to favor the experience of white, privileged women in the feminist project in a way that means that the experiences of poor women, or women of color, are only ever ad-

¹⁴² See WEST, *supra* note 4; Littleton, *supra* note 4. For some cultural feminists, gender rather than sex or biology is in fact the key focus of analysis and not simply a necessary corollary of a concern for female equality. Thus, while all cultural feminists tend to focus on women as a key part of their project, some cultural feminists treat the feminine—or feminine roles, ways of thinking and styles—as the ultimate focus of claims for equality. See, e.g., FINEMAN, *supra* note 10.

¹⁴³ See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 11, at 113–14.

¹⁴⁴ HALLEY, *supra* note 1.

¹⁴⁵ While largely neglected, sex-positive feminism does receive some explicit attention in the three casebooks cited. See *supra* notes 49, 63 and accompanying text.

¹⁴⁶ See *supra* Part II.

¹⁴⁷ SPELMAN, *supra* note 26, at 167

dressed—if at all—at a much later day (deferred justice).¹⁴⁸ Third, such an approach also has the potential to impose real psychic costs on women of color, and poor women, by requiring them to suppress the divided, ambivalent nature of their experience of existing identity categories (psychic pain).¹⁴⁹ For black women in particular, it will require the denial of a deep political and personal connection to black men. This denial means “black women’s experience will always be forcibly fragmented before being subject to analysis,” leaving their sense of selves “fragmented beyond recognition.”¹⁵⁰ For some intersectional scholars, strategic essentialism will also inflict a further form of psychic harm by betraying the promise of the feminist project itself, as a project of inclusion.¹⁵¹ For these intersectional feminists, *any* binary definition of identity (male/female, man/woman, or black/white) will tend to reinforce rather than challenge the deeply supremacist ideology that underpins current gender- and race-based hierarchies in America.¹⁵²

Post-structural and post-modern feminists also strongly reject the idea of relying on existing sex or gender categories as the focus of activism and analysis, though for somewhat different reasons. For these feminists, reliance on existing sex and gender categories as a starting point for feminist analysis will be problematic because it will serve to co-opt feminists into affirming instead of challenging the source of their own constraint by reinforcing rather than challenging the way in which the female body is terrorized, sexualized, and maternalized by existing legal discourses and ideologies.¹⁵³

The downsides to feminists carrying a brief for women will be present in an intersectional and post-structural/post-modern account no matter how “strategic,” provisional, or “non-foundational” the invocation of essentialist concepts is made.¹⁵⁴ In an intersectional account, the harm of deferred justice cannot be avoided by the purely contextual, provisional nature of what it means to carry a brief for women. Deferring feminist legal reform aimed at black women or poor women not only leads to pain and death for those women,¹⁵⁵ it can also legitimate the elements of the current race and class

¹⁴⁸ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1334, 1366–68; SPELMAN, *supra* note 26, at 167.

¹⁴⁹ Harris, *supra* note 24, at 588–89, 592.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 613–15.

¹⁵² See Harris, *supra* note 24, and accompanying text.

¹⁵³ Olsen, *The Family and the Market*, *supra* note 3, at 1577.

¹⁵⁴ For discussion of the best way in which to understand the arguments for strategic essentialism in this context, see Nancy Fraser, *False Antitheses: A Response to Seyla Benhabib and Judith Butler*, in *FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE* 59, 70–71 (1995); BUTLER, *supra* note 3, at 7–9.

¹⁵⁵ Cf. Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1382 (arguing that critics of legal change often fail to appreciate that, if properly directed, such change can have real, material benefits for women of color, as well as costs, sometimes even making the difference between life and death).

system that lead to their subordination in ways that make that injustice more difficult to contest.¹⁵⁶ Similarly, the harms of psychic pain and feminist betrayal are harms that are experienced in the here and now by black women in ways that cannot be remedied by future feminist reforms that take a different contextual focus that is more sensitive to black women's experience. In fact, the sense of psychic pain inflicted on black women by strategic essentialism may be sufficiently acute as to lead black women to sever their connection to the feminist legal project permanently.¹⁵⁷ For post-structural/post-modern feminists, strategic essentialism will also have long-lasting effects, because "strategies always have meanings that exceed the purposes for which they are intended."¹⁵⁸ Most importantly, post-structural feminists suggest that strategic essentialism will co-opt feminists and their allies into actively legitimating the binarized sex and gender framework that they, more than anyone else, must resist if they are ever to succeed in subverting the current sources of gender injustice.¹⁵⁹

Strategic essentialism thus not only fails to connect intersectional and post-structural/post-modern feminisms to older feminisms in an effective way, but also actively ignores the insights they offer in a way which compounds the current pattern of tuning out to feminism. New ways of connecting newer and older feminist theories are therefore required, if current patterns of selective tuning out to feminism are to be countered via this method.

B. *Comparative Practice: Three Concepts of Gender Justice*

In searching for new ways to make such connections, this Part turns to comparative constitutional law—specifically, to American and South African constitutional decisions—as a potential source of insight as to the way in which different feminisms might be reconceptualized.¹⁶⁰ Both the United States Supreme Court and South African Constitutional Court ("SACC") have to some degree been influenced by different feminisms in their interpretation of constitutional commitments to gender justice. In the United States, liberal feminist understandings have been the most influential, whereas in South Africa, cultural and dominance feminist arguments have had more influence. Together, however, constitutional jurisprudence in the two countries offers potentially valuable insights as to how all three older feminisms have been understood in those contexts where they have had most

¹⁵⁶ *Id.* at 1334, 1366–68; SPELMAN, *supra* note 26, at 167.

¹⁵⁷ On the "brain drain" from feminism more generally, see HALLEY, *supra* note 1, at 340–41.

¹⁵⁸ BUTLER, *supra* note 3, at 8.

¹⁵⁹ *Id.* at 163.

¹⁶⁰ For the benefits of constitutional comparison in shedding light on gender justice issues in particular, see Vicki C. Jackson, *Transnational & Discourse, Relational Authority and the U.S. Court: Gender Equality*, 37 *LOY. L.A. L. REV.* 271 (2003).

success in entering the legal mainstream. It points to three distinct conceptions of gender justice, which are, respectively, disruptive, ameliorative, and transformative, in focus, as underpinning older feminist theoretical understandings.

1. *The United States: A Disruptive Conception of Gender Justice*

*Disruption: The action of rending or bursting asunder; violent dissolution of continuity; forcible severance.*¹⁶¹

In the United States, constitutional jurisprudence points overwhelmingly to a conception of gender justice which is disruptive in nature, or which defines gender equality as involving the severance of certain kinds of (inappropriate) linkages between biology and gender. This conception is particularly clear in cases decided by the Court in the 1970s, such as *Weinberger v. Wiesenfeld*,¹⁶² *Califano v. Goldfarb*,¹⁶³ and *Craig v. Boren*,¹⁶⁴ where the Court was still struggling to define the appropriate standard of scrutiny applicable to classifications on the basis of sex. In *Weinberger*, for example, the Court held that it was unconstitutional for Congress to deny survivor benefits to widowers with minor children in their care while granting them to widows, because such a distinction rested on impermissibly “archaic and overbroad generalization[s]” about the link between femaleness and dependency or maleness and bread-winning.¹⁶⁵ More implicitly, it also held that the role of the Constitution was to dissolve the making of these kind of generalizations by state actors.¹⁶⁶ In *Goldfarb*, the Court held that it was unconstitutional for Congress to grant old-age survivor benefits to only those widowers who were receiving half of their income from their deceased wife, while granting benefits to all widows regardless of their financial dependency on their husbands.¹⁶⁷ It did so because such a distinction again rested on overly broad generalizations about the relationship between sex and gender roles (namely, maleness and the masculine gender role of bread-winner rather than primary care-giver), in a way that the Equal Protection Clause prohibited.¹⁶⁸ In *Craig*, the Court held that it was unconstitutional for Oklahoma to prohibit the sale of low-alcohol beer to males aged 18–21 while allowing it to females of the same age because such a differential

¹⁶¹ “disruption, n.1,” in *THE OXFORD ENGLISH DICTIONARY* (2d ed. 1989), available at <http://dictionary.oed.com/cgi/entry/50066976>.

¹⁶² *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

¹⁶³ *Califano v. Goldfarb*, 430 U.S. 199 (1977).

¹⁶⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁶⁵ *Weinberger*, 420 U.S. at 643 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

¹⁶⁶ *Id.*

¹⁶⁷ *Califano*, 430 U.S. at 216–17.

¹⁶⁸ *Id.*

prohibition rested on stereotypical assumptions about the greater maturity or responsibility of females aged 18–21 as drivers.¹⁶⁹

This same kind of disruptive understanding of gender equality is also strongly implicit, however, in modern constitutional cases involving questions of gender justice under the Equal Protection Clause. All of these modern cases, which apply intermediate scrutiny to classifications based on sex, seek to disrupt the construction of inappropriate or stereotypical linkages between biology and gender roles or ways of thinking, while respecting so-called “real” differences between the sexes.¹⁷⁰

The development of a disruptive conception of gender justice in the United States has also been closely connected to liberal feminist understandings. Early Supreme Court cases involving questions of gender equality were all shaped in important ways by the litigation strategy of Ruth Bader Ginsburg, the first head of the American Civil Liberties Union Women’s Rights Project (WRP) and counsel and amicus in many of the early gender equality cases before the Court.¹⁷¹ That strategy, in turn, strongly reflected Ginsburg’s own liberal feminist philosophy, which attacked sex-based differentiations that had previously been understood to be protective of women as simply reflecting outmoded and inappropriate stereotypes about women’s roles and capacities.¹⁷² The strategy also focused on cases involving state action with a “double-edged” character, or a capacity to harm both men and women, and sought to persuade the Court to apply the same standard of scrutiny to these cases as it applied in those where a distinction simply appeared to harm women.¹⁷³ It thus ran directly contrary to the kind of difference-based or anti-subordination approaches advocated by emerging cultural and dominance feminist theories.¹⁷⁴

¹⁶⁹ *Craig*, 429 U.S. 190, 198–202 (Brennan, J., plurality opinion); *id.* at 214 (Stevens, J., concurring).

¹⁷⁰ For cases developing the idea of real differences in this context, see, for example, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding, as a bona fide occupational qualification, the requirement that only men could hold contact guard positions at maximum-security male prisons); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding statutory rape law that criminalized only men who had sex with underage women); and *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding federal law requiring only men to register for the draft).

¹⁷¹ See generally AMY LEIGH CAMPBELL, *RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN’S RIGHTS PROJECT* (2003).

¹⁷² *Id.* at 29–30 (discussing *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding provisions exempting women from mandatory jury service); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding limits on women’s ability to work as bartenders); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding working hours legislation for women but not men)).

¹⁷³ *Id.* at 44–62 (discussing cases such as *Coffin v. Califano*, 430 U.S. 924 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); and *Frontiero v. Richardson*, 411 U.S. 677 (1973)). See discussion in CAMPBELL, *supra* note 171, at 63–79.

¹⁷⁴ See, e.g., CHAMALLAS, *supra* note 1, at 49–50, 59 (noting tension between the Court’s interpretation of equality and dominance and cultural feminist theory).

2. *South Africa: Ameliorative & Transformative Conceptions of Gender Justice*

*Amelioration: The action of making better; or the condition of being made better; improvement.*¹⁷⁵

*Transformation: A complete change in character, condition etc; Change . . . from one form into another.*¹⁷⁶

In South Africa, the South African Constitutional Court (“SACC”) has adopted a much less disruptive focus when defining the meaning of gender equality.¹⁷⁷ Instead, the SACC has focused on two alternative conceptions of gender justice, which can be classified as ameliorative and transformative in nature. Both of these conceptions were first developed by the SACC in *President of the Republic of South Africa v. Hugo*,¹⁷⁸ which upheld the decision by President Mandela to release female, but not male, prisoners with dependent children under the age of 12. In the course of its decision, the SACC placed clear reliance on an ameliorative—or gap-narrowing—understanding of equality, noting that the President’s decision took place against a background of serious inequality between the sexes in their enjoyment of a range of social benefits.¹⁷⁹ It also articulated a more transformative understanding of gender justice based on a more long-term, ambitious vision for social change and a more radical set of tools for achieving such change. It suggested that equality was an inherently long-term project that simply

¹⁷⁵ “amelioration, n.,” in THE OXFORD ENGLISH DICTIONARY, *supra* note 161, available at <http://dictionary.oed.com/cgi/entry/50007088>.

¹⁷⁶ “transformation, n.2; 3(e),” in THE OXFORD ENGLISH DICTIONARY, *supra* note 161, available at <http://dictionary.oed.com/cgi/entry/50256220>.

¹⁷⁷ *But see Jordan v. State* 2002 (11) BCLR 1117 (CC) at 1135–40 (S. Afr.) (O’Regan & Sachs, JJ., dissenting) (holding that the imposition of criminal penalties on prostitutes, but not clients of prostitutes, violated constitutional commitments to equality, because of its link to a sexual double-standard, linking femaleness to certain notions of appropriate sexual behavior). In contrast, the SACC has adopted a more disruptive approach in its jurisprudence on sexual orientation. See *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39 (CC) at 67 (S. Afr.) (striking down restrictions on the rights of South African permanent residents to obtain a residency visa for their same-sex partners, on the grounds that such restrictions were based on over-broad generalizations about the link between sexual orientation and gender roles, or sexuality and family structures and roles, suggesting that the assumption that “a same-sex couple cannot procreate in the same way as a heterosexual couple” was based on grossly over-generalized assumptions, given the capacity of same-sex couples both to adopt a child and love and care for it in a way that fulfilled both masculine and feminine parental roles).

¹⁷⁸ 1997 (6) BCLR 708 (CC) (S. Afr.).

¹⁷⁹ *Id.* at 731–32 (Goldstone, J.) (the pardon “confer[s] an advantage upon [women] as an act of mercy at a time of great historical significance” and noting that the classes of prisoners who were released were historically disadvantaged and victims of discrimination); *id.* at 728 (contrasting an “opportunity [afforded] to mothers” with classifications that “impos[e] disadvantages” on women); *id.* at 732 (noting the “opportunity . . . afforded [to] women”).

could not be realized immediately, and, therefore, that greater flexibility was required in the short-term in assessing the constitutionality of various laws.¹⁸⁰ A similarly transformative conception of gender justice—as a long-term, radical, and goal-oriented project—is also implicit in other decisions of the SACC, such as *S. v. Baloyi*.¹⁸¹ In that case, the court suggested that one of the central purposes of the South African Constitution’s gender equality guarantee was to convert the prior South African social order, based on “systemic, pervasive and overwhelmingly gender-specific . . . [forms of] violence,” into a system that was free from such violence.¹⁸²

This same understanding of gender justice also finds more general support in South Africa, in the broader commitments of the 1994 and 1996 South African constitutions. The 1994 interim constitution, for example, explicitly described its own role as

a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.¹⁸³

Further, the drafters of the Constitution of South Africa of 1996 (“SA Constitution”) also clearly envisaged a similar role for the constitution as a vehicle for achieving a new kind of social order or state of the world, in which, to quote Albertyn and Goldblatt, “systemic forms of domination and material disadvantage based on race, gender, class” are eliminated.¹⁸⁴ As certain features of the SA Constitution, such as its strong socio-economic rights guarantees, make clear, realizing this kind of transformation is also understood in South Africa to compel wide-ranging changes to the existing legal and social order. It requires the state to go far beyond an attempt simply to narrow or close the gap between those who are more and less privileged in the current system.¹⁸⁵

¹⁸⁰ *Id.* at 728–29 (S. Afr.).

¹⁸¹ *S. v. Baloyi* 2000 (1) BCLR 86 (CC) (S. Afr.).

¹⁸² *Id.* at 93.

¹⁸³ S. AFR. (Interim) CONST. 1993 postamble. See also generally Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31 (1994).

¹⁸⁴ Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. ON HUM. RTS. 248, 249 (1998) (arguing that “[j]ust as the interim Constitution commits itself to the creation of a new order in South Africa, so too does the final text take up the cudgels of transformation,” and defining transformation in these terms).

¹⁸⁵ See, e.g., S. AFR. CONST. 1996 §§ 9, 25(5), 26–27, 29 (providing for right to equality, and rights to the reasonable and progressive realization of rights to equitable access to land, housing, health-care, food, water, social security, and education); see also Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998) (defining transformative constitutionalism as “a long-term project of constitutional enactment, interpretation and enforcement committed . . . to transforming a country’s political and social institutions and power relationships in a

This broader definition of gender justice also corresponds to a wider form of feminist influence in South Africa than in the United States. The structure of the SA Constitution has created much greater space for feminist understandings other than liberal feminism to play a role in shaping understandings of gender equality. In the United States, the general structure of constitutional argument makes it extremely unlikely that the Supreme Court will adopt even cultural or dominance feminist understandings as part of their analysis of constitutional equality requirements. Breaches of the Equal Protection Clause¹⁸⁶ require a showing of state action and purposeful discrimination on the part of the state, and thus underlying social hierarchies that value the masculine over the feminine or subordinate women to men are almost entirely outside the scope of the Court's focus.¹⁸⁷ There is also strong pressure when making claims for gender equality under the Equal Protection Clause to draw analogies to claims based on race.¹⁸⁸ This, in turn, creates pressure for the Supreme Court to focus on arguments, made by liberal feminists, about the desirability of "sex-blindness" (by analogy to arguments for color-blindness).¹⁸⁹ It makes it much less likely that the Court will be recep-

democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law").

¹⁸⁶ U.S. CONST. amend. XIV, §1, cl. 3.

¹⁸⁷ For a description of the way in which the state action doctrine limits the influence of feminisms other than liberal feminism on constitutional thinking, see, for example, Higgins, *supra* note 17, at 1673–76.

¹⁸⁸ See CAMPBELL, *supra* note 171, at 36. The force of this pressure can be seen in early briefs seeking to persuade the Court to apply a standard above rational basis review and the Court's justification for adopting a standard of intermediate scrutiny when considering classifications on the basis of sex. See, e.g., Craig v. Boren, 429 U.S. 190, 213 n. 5 (1976) (Stevens, J., concurring) (suggesting that "[h]abit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"); Frontiero v. Richardson, 411 U.S. 677, 685–86 (1976) (suggesting that the kind of stereotypical distinctions that had been made on the basis of sex for most of the Nineteenth Century had put women in a position that in many ways was "comparable to that of blacks under the pre-Civil War slave codes," as "neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children," and suggesting that gender was an inherently suspect axis of classification or differentiation because "sex, like race . . . is an immutable characteristic determined solely by the accident of birth"); discussion in CAMPBELL, *supra* note 171, at 36. Similar analogies can also be observed in more recent decisions on gender and the Equal Protection Clause. See, e.g., United States v. Virginia, 518 U.S. 515, 553 (1996) (Ginsburg, J.) (citing Sweatt v. Painter, 339 U.S. 629 (1950), and suggesting that "Virginia's [Women's Institute for Leadership] solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African-Americans could not be denied a legal education at a state facility").

¹⁸⁹ For reflections on the strength of the link between commitments to racial equality and color-blindness in contemporary American constitutional culture, see Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004) [hereinafter Michelman, *Reasonable Umbrage*]; Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737 (2004).

tive to the more gender-conscious arguments made by cultural and dominance feminists about the feminine as a distinctly valuable role or way of thinking, or about woman's experience of systemic subordination, and intersectional feminists are almost certain to be ignored.

In South Africa, neither of these limits applies. In sharp contrast to the Fourteenth Amendment's Equal Protection Clause, the guarantee of equality in Section 9(3) of the SA Constitution expressly applies to indirect as well as direct discrimination and has been interpreted by the SACC as prohibiting action that has an unfair discriminatory impact as well as purpose.¹⁹⁰ The SA Constitution also lacks the kind of state action requirement of the kind which would limit the constitutional expression of cultural or dominance, as opposed to liberal feminist understandings.¹⁹¹ More surprisingly, there is also little pressure in South Africa, relative to the United States, to frame gender justice claims by way of analogy to claims for racial justice, because sex discrimination is equally explicitly prohibited in its own right.¹⁹² In addition, *Fraser* and *Hugo*, the first constitutional equality cases to come before the SACC, were cases involving a claim of gender equality.¹⁹³ Thus, gender was central to the original framing of the South African Constitutional Court's equality jurisprudence.¹⁹⁴

The case law in South Africa also shows much clearer *actual* support for, not just openness to, cultural and dominance feminist theories in prevailing constitutional understandings than in the United States. Early litigators of gender justice claims before the SACC did not simply draw on liberal feminist understandings, but also relied on a much broader, more eclectic range of older and newer feminist understandings.¹⁹⁵ The SACC, in turn, proved receptive to these arguments, particularly drawing on older feminist perspectives. In *Hugo*, for example, the SACC largely accepted the cultural feminist argument made by the President that "mothers play [a special role]

¹⁹⁰ S. AFR. CONST. 1996 § 9(3); see *Pretoria v. Walker* 1998 (3) BCLR 257 (CC) 115 (S. Afr.) (interpreting analogously worded § 8(2) of S. AFR. (Interim) CONST. 1993).

¹⁹¹ S. AFR. CONST. 1996 § 7(2) (imposing affirmative obligation on the South African government to take measures to "respect, protect, promote and fulfill the rights in the Bill of Rights,"; § 8(2), 9(4) (providing that even in absence of state action, constitutional guarantees, such as § 9(3) may apply "horizontally" to "bin[d] a natural or a juristic person").

¹⁹² S. AFR. CONST. 1996 §§ 1(b), 9(3).

¹⁹³ *Fraser v. Children's Court*, 1997 (6) BCLR 708 (CC) (S. Afr.); *Hugo* (6) BCLR 708.

¹⁹⁴ In developing that jurisprudence, the SACC has also declined to give South Africa's history of racial oppression a dominant role in defining the scope of the constitutional guarantee of equality, preferring instead to look to comparative law, and Canadian equality jurisprudence in particular, in articulating a dignity-based interpretation to § 9: *Hugo* (6) BCLR 708 at 728–29. For discussion, see Michelman, *Reasonable Umbrage*, *supra* note 189.

¹⁹⁵ See generally Saras Jagwanth & Christina Murray, *Ten Years of Transformation: How Has Gender Equality in South Africa Fared?*, 14 CAN. J. WOMEN & L. 255, 273–86 (2002).

in the care and nurturing of younger children.”¹⁹⁶ The court held that “mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers,” and that while these responsibilities were a source of both “enormous human satisfaction and pleasure,” they were also burdensome, and a cause of potential hardship from an economic perspective.¹⁹⁷ And in *Baloyi*, the SACC placed strong reliance on dominance feminist understandings about the link between domestic violence and women’s inequality in upholding the constitutionality of a new domestic violence regime.¹⁹⁸ It also endorsed a dominance feminist understanding of the way in which sexual violence helped enforce the subordination of women, suggesting that

[t]he ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. [It] also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorization of the individual victims is thus compounded by a sense that domestic violence is inevitable.¹⁹⁹

In South Africa, therefore, constitutional case law not only points to a broader understanding of gender justice than in the United States, but it also links this broader—ameliorative or transformative—understanding to those older feminisms outside the liberal mold.

C. *Connecting the Old and the New*

1. *Feminist Disruption: Connecting Liberal & Newer Feminisms*

As Parts II and III suggested, liberal feminism has, on its face, little in common with newer feminisms. In a liberal feminist account, the primary source of gender injustice in the current social order lies in individual stereotyping, or the way in which those in positions of power tend to assign gendered roles to individuals based on biological sex without attending to individuals’ actual capacities or preferences in respect to these roles.²⁰⁰ In

¹⁹⁶ *Hugo* (6) BCLR 708 at 726.

¹⁹⁷ *Id.* at 726–28.

¹⁹⁸ *S. v. Baloyi*, 2000 (1) BCLR 86 (CC) at 93–94 (S. Afr.) (holding that “[t]o the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form,” and that “[t]he non-sexist society promised in the foundational clauses of the [SA Constitution], and the right to equality and non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy impunity”).

¹⁹⁹ *Id.* at 94.

²⁰⁰ For further discussion of the liberal feminist account, see *supra* Part II; notes 5–7 and accompanying text.

newer feminist accounts, broader social structures of subordination and ideological constraints are the key source of gender injustice.²⁰¹

By focusing on the concept of disruption developed in U.S. constitutional jurisprudence, however, it becomes possible to identify connections between liberal feminism and these newer feminisms. In a liberal feminist account, the feminist project is aimed at disrupting—or bursting asunder—the historical linkage between sex and gender, or between biological sex and particular roles or ways of thinking associated with particular genders. In newer feminist accounts, the focus of concern is on a much broader range of linkages and identity categories. Intersectional feminists are concerned with disrupting both stereotypical and hierarchical linkages between sex, gender, race, and class.²⁰² Sex-positive feminists seek to disrupt the linkage between biological sex, gender, and sexuality, or between femaleness, women's role as mother, and women's limited sexual and political agency.²⁰³ Post-structural/post-modern feminists work to disrupt sex and gender categories themselves, via acts such as literary parody and cross-dressing. In each case, however, the same concern with disrupting—or bursting asunder—various identity linkages and categories can be found.²⁰⁴

As a conception of gender justice, the idea of disruption thus provides a way of re-explaining newer feminisms to broader legal actors, as simply involving a *broadening* and *deepening* of the liberal feminist commitment to unsettling current expectations and understandings about gender. Sex-positive feminism broadens the focus of liberal feminism to include a focus on the link between sex, gender, *and* sexuality, while intersectional feminism expands the feminist focus further still, to interrogate the link between sex, gender, and other identity axes. Post-structural/post-modern feminism deepens the commitment of liberal feminists to disruption, by turning it to the very identity categories with which liberal feminists start their analysis.

TABLE 2: DISRUPTION – CONNECTING LIBERAL, SEX-POSITIVE, INTERSECTIONAL, AND POST-STRUCTURAL/POST-MODERN FEMINISMS

<i>different feminisms</i>	<i>liberal</i>	<i>sex-positive</i>	<i>intersectional</i>	<i>post-structural/post-modern</i>
<i>focus of disruptive aims/concerns about reinforcement</i>	biology-gender linkages	biology-gender-sex linkages	gender-race hierarchies	biology-gender categories

²⁰¹ See *supra* Part II.

²⁰² For further discussion of the intersectionalist feminist account, see *supra* notes 24–29 and accompanying text.

²⁰³ For further discussion of the sex-positive feminist account, see *supra* Part II; notes 15–23 and accompanying text.

²⁰⁴ For further discussion of the post-modern/post-structuralist feminist account, see *supra* notes 30–38 and accompanying text.

2. *Feminist Amelioration & Transformation: Connecting Cultural, Dominance, and Intersectional Feminism*

The concepts of amelioration and transformation developed in South African constitutional jurisprudence can also play a similar role in relation to additional insights offered by intersectional feminist theory—by connecting them to the insights offered by cultural and dominance feminism.

There are potentially vast differences between cultural and dominance feminists on the one hand and intersectional feminists on the other.²⁰⁵ Feminists in these different schools strongly disagree about the nature and source of gender justice. (Recall that cultural feminists focus on the devaluation of the feminine as the key to gender injustice; dominance feminists focus on the systematic sexual subordination of women to men; and intersectional feminists insist on the importance of context and intersecting axes of identity in understanding gender injustice in all its forms.) They are also directly critical of the approach taken by each other's schools of thought. Dominance feminists, for example, have been sharply critical of attempts to celebrate or revalue 'the feminine' in the face of a system of sexual subordination which itself defines the feminine as we know it,²⁰⁶ while intersectional feminists have criticized both cultural and dominance feminists for their failure to take proper account of race and other identity factors.²⁰⁷

Even in the face of these differences, the concepts of amelioration and transformation help point to some real continuity between these different feminisms in their underlying conception of the feminist project. When it comes to concerns about amelioration, the three different feminisms will adopt a somewhat different approach to defining the benchmark for amelioration or the particular gap to be narrowed. In a cultural feminist account, the focus will be on the gap between men and women when it comes to the rewards they enjoy for their different forms of labor, or alternatively, on the gap between the symbolic and practical value placed on masculine versus feminine gender roles. In a dominance feminist account, the focus will be on the gap between men and women in terms of the sexual and political agency they enjoy. In an intersectional feminist account, the focus will be on narrowing the gap between a wider range of more and less privileged groups such as white, privileged women and poor women and women of color. All three feminisms, however, treat the gap between the benefits enjoyed by the subordinating and the subordinated groups as the benchmark for change, or at least as a useful first step in a broader feminist project.

By viewing cultural and dominance feminism through the lens of amelioration, it thus becomes possible to re-explain intersectional feminism to

²⁰⁵ For further discussion of dominance and intersectionalist feminist accounts, see *supra* Part II; notes 11–14, 24–29 and accompanying text.

²⁰⁶ See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 48, at 53.

²⁰⁷ See, e.g., Harris, *supra* note 24, at 592–96.

broader legal actors as simply a broadening of these older feminists' concerns about hierarchy-based inequality to a wider range of hierarchies.

TABLE 3: AMELIORATION – CONNECTING CULTURAL, DOMINANCE, AND INTERSECTIONAL FEMINISMS

<i>different feminisms</i>	<i>cultural</i>	<i>dominance</i>	<i>intersectional</i>
<i>group that is benchmark for gap-narrowing/concerns about gap-widening</i>	men	men	white, middle-class men or women
<i>gap to be narrowed/benefits to redistributed</i>	symbolic and material value given to current role/way of thinking/style	political and sexual subjectivity	symbolic and material privilege generally

When it comes to commitments to transformation, each feminism will also adopt a somewhat different vision of the long-term goal to be realized. For cultural feminists, the project of feminist transformation will focus on the equal valuation of the feminine and masculine or the integration of feminine approaches into areas traditionally dominated by the masculine. For dominance feminists, transformation will involve creating a world in which men and women enjoy equal power, sexual agency, and bodily integrity and security.²⁰⁸ For intersectional feminists, it will involve creating a world in which all forms of structural subordination and supremacist ideology are eliminated.²⁰⁹ All three feminisms, however, adopt an approach that attempts to define what a world with gender justice would look like, and what (potentially radical) steps would be necessary to create and sustain such a world.

The concept of transformation thus helps re-explain the more radical dimensions of intersectional feminism to broader legal actors as a profound but also logical broadening of both the anti-subordination commitments of dominance feminism and the commitment to the ultimate “integration” or revaluation of both masculine and feminine in cultural feminism.

²⁰⁸ See MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 11, at 247–49.

²⁰⁹ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 28, at 1383.

TABLE 4: TRANSFORMATION – CONNECTING CULTURAL, DOMINANCE,
AND INTERSECTIONAL FEMINISMS

<i>different feminisms</i>	<i>cultural</i>	<i>dominance</i>	<i>intersectional</i>
<i>ultimate goal of feminist transformation</i>	equal valuation of the masculine and feminine	equal subjectivity for males and females	elimination of all supremacist ideologies

VI. CONCLUSION

Legal reforms aimed at promoting gender justice are inevitably subject to limitations. Statutes such as VAWA or the FMLA, which aim to use the power of the federal government to help tackle problems such as rape, domestic violence, and gender inequality in the workplace, are no exception. In the case of VAWA, the civil rights remedy, while in effect, simply proved too costly and made it too difficult for women to bring action in federal court against a rapist or batterer.²¹⁰ Similarly, in the case of the FMLA, experience shows that the provision for unpaid parental leave has had limited capacity to increase the number of women actually able to combine work and mothering.²¹¹ VAWA and the FMLA also have, or had, real potential downsides. VAWA had the potential to contribute to social conservative forces that portray (non-reproductive) sex for women as dangerous, thereby constraining female sexuality and reinforcing essentialist understandings about gender hatred and inequality. The FMLA, in turn, has had the potential to further privilege reproduction over other socially valuable activities in a way that imposes even greater constraints on female agency.²¹²

These limitations and downsides to legal reforms aimed at achieving gender justice are largely obscured in older feminist theories.²¹³ The focus of these theories is almost always on the advantages, or promise, of legal reform when informed by their particular feminist perspective. As theories, newer feminist perspectives have much greater capacity to predict and account for these kinds of failures. Intersectional feminist theory helps draw attention to the differential impact of feminist-led legal reforms on poor women, women of color, and women subject to other forms of disadvantage. Sex-positive feminist theory points to the capacity of legal reforms aimed at protecting women from dangers such as rape, domestic violence, or inequality in the workplace to ultimately strengthen repronormative ideologies or

²¹⁰ See Picart, *supra* note 89, at 118–21.

²¹¹ For an exploration of the use and effects of the FMLA, see Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65 (2004).

²¹² For a discussion of the realized and potential reactions of different feminisms to these statutes, see *supra* Part III.

²¹³ See *supra* Part II, III.

increase the constraints experienced by women in their pursuit of sexual and political agency. Post-structural/post-modern feminist theory offers insights about the capacity of legal change to re-inscribe existing sex and gender binaries, and thereby also reinforce heteronormative ideologies. Together, the three theories therefore offer important insights as to the full range of potential limits and downsides, as well as upsides, to statutes such as VAWA and the FMLA in terms of their capacity to create practical change.

By re-explaining the insights of newer feminist theories in ways that connect them to those of older feminisms, this Article does more than simply redress a theoretical imbalance in the legal academy. It also speaks directly to new and pressing debates about gender justice in the United States today, such as those surrounding the question of whether non-citizens who are victims of sexual or domestic violence abroad should be entitled to asylum in the United States if foreign governments fail to provide them with legal redress;²¹⁴ or whether American non-governmental organizations should be required to oppose prostitution as well as involuntary trafficking into prostitution in foreign countries, or adopt an “anti-prostitution pledge.”²¹⁵ Currently, one would expect the broader legal culture to pay almost exclusive attention in these contexts to older feminist theoretical arguments in favor of the relevant policies. Accordingly, one would also expect those sympathetic to feminist arguments to support the relevant policies. Liberal feminism, for example, would give particular support to a gender asylum policy for similar reasons to those that lead them to support a statute such as VAWA, namely, reasons relating to the capacity of such a policy to challenge gendered jurisdictional boundaries.²¹⁶ Cultural feminists would support both policies: a gender-asylum policy because of its capacity to increase access on the part of female-headed households to the benefits of U.S. citizenship, relative to the access enjoyed by single men unburdened by care responsibil-

²¹⁴ For further reading on this emerging issue, see, for example, Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771 (1995); Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997); Marissa Farrone, *Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law*, 50 ST. LOUIS U. L.J. 661 (2006). For a related debate about whether non-citizens who experience sexual or domestic violence within the United States and are willing to cooperate with U.S. law enforcement should be entitled to some form of exceptional leave to remain, see Karly Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557 (2005).

²¹⁵ See, e.g., Edi C.M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158 (2006).

²¹⁶ For arguments about the gendered nature of the boundary between international and domestic law, or the “international,” national, and local level, see CHARLESWORTH & CHINKIN, *supra* note 7; Resnik, “Naturally” Without Gender, *supra* note 7; Resnik, *Reconstructing Equality*, *supra* note 7; Resnik, *Categorical Federalism*, *supra* note 7.

ities;²¹⁷ and an anti-prostitution pledge because of its capacity to promote sexuality as a site of intimacy and connection rather than market-based exchange. Dominance feminists, on the other hand, would support both policies because of their capacity to increase women's bodily security and integrity, and thereby enhance their social and political agency.

If, however, newer feminisms are made more accessible in the way this Article proposes, the hope is that broader legal culture will pay greater attention to the likely limits—or downsides—to such policies when it comes to their capacity to negatively affect women by: depicting women as victims, rather than agents; compounding existing economic disadvantage for poor women by decreasing political pressure to address gender injustice at its origins or removing last-resort employment opportunities; and compounding the notion of gender differences as “real.” The costs to the broader legal culture of engaging with these newer feminist arguments will be substantially less than is currently the case, because these arguments or concerns will be understandable as a simple extension and deepening of existing liberal feminist commitments to disruption, or cultural and dominance feminist commitments to amelioration. The payoffs to doing so will also be much clearer in advance, given the mapping of the relationship between older—more familiar—feminist perspectives and newer feminist perspectives that the Article provides.

Where the legal academy identifies these limits, or downsides, to feminist led reform, they will help decision-makers craft better laws and policies. At least some of these downsides can be addressed by careful attention to the design of policies, so as to redress symbolic dangers or offset bad effects. Imagine, for example, an asylum policy or anti-prostitution pledge linked to foreign aid funding directed toward addressing gender-based violence and economic inequality in the South. In other cases, they will point to limits or downsides which are more difficult to avoid. Identifying such limits will still be important, however, because real-world decision-makers have far from an infinite commitment to promoting issues of gender justice. Legislators in particular face both real constraints on their time and resources and competing policy priorities, which mean that they generally give only limited, sporadic attention to gender justice issues.²¹⁸ If the legal academy draws attention to the limits of a given gender-justice reform, it therefore implicitly gives decision-makers the chance pursue potentially more effective reform proposals.

²¹⁷ For the differential rates at which single men without dependents seek and are granted asylum compared to women with dependents, see Howard Adelman, *Refuge or Asylum: A Philosophical Perspective*, in *REFUGE OR ASYLUM? A CHOICE FOR CANADA* 12 (Howard Adelman & C. Michael Lanphier eds., 1990).

²¹⁸ Cf. Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 A.J. COMP. L. (forthcoming 2008) (on file with author) (discussing priority-driven burdens of inertia in the legislative process); Rosalind Dixon, *Designing Constitutional Dialogue: Bills of Rights and the New Commonwealth Constitutionalism* (Apr. 10, 2008) (unpublished S.J.D. Thesis, Harvard University Law School) (on file with author).

In recasting newer feminist critique, this Article thus seeks not only to encourage greater attention to the full range of critical feminist perspectives at a theoretical level. It also seeks to encourage more careful and effective forms of practical legal intervention aimed at achieving gender justice, both now and in the future.

