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PRACTICAL POLYPHONY: THEORIES OF THE STATE AND FEMINIST JURISPRUDENCE

Carol Weisbrod*

Polyphony: "The harmonious combination of two or more melodies, *i.e.* composition considered horizontally as distinct from Homophony, which is vertical in the principle of its structure."¹

It may be that some people call themselves "liberal," "radical" or "Marxist" with full confidence that the terms have common definitions which will describe all of their views and all of their actions. It seems equally possible, however, that the views of many people are less perfectly matched to common political theories, and that their actions are in less than perfect conformity with their theories, whatever they may be. Individual feminists—whether or not they are publishing feminists—may similarly hold positions derived from various identified types of feminism as well as from sources which have no explicit reference to feminist concerns.

Feminist jurisprudence, as a movement within the American le-

* Professor of Law, University of Connecticut. J.D., 1961, Columbia University. Many people have provided help of various kinds in connection with this article. I would particularly like to thank Kathryn Abrams, Elizabeth Clark, Leslie Harris, Philip Hamburger, Carolyn Jones, Richard Kay, James Lindgren, Leon Lipson, Hugh Macgill, Martha Minow, Jeremy Paul, Pamela Sheingorn and Aviam Soifer for their assistance.

The piece takes its title from Milner Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2288 (1989), as well as from a collection of vocal pieces called "Practical Polyphony: Five Easy Anthems of the 16th Century." Professor Ball invokes Mikhail Bakhtin's use of polyphony and relates it to American law:

Polyphony in narrative is the representation "of human 'languages' or 'voices' that are not reduced into, or suppressed by, a single authoritative voice: a representation of the inescapably dialogical quality of human life at its best." This affective representational capacity accounts for the fundamental sympathetic relation between the aesthetics of narrative and the dynamics of the American legal order.

Ball, *supra*, at 2290 (quoting Booth, *Introduction*, in M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS* at xxii (C. Emerson trans. 1984)).

¹ 4 GROVE'S DICTIONARY OF MUSIC AND MUSICIANS 220 (3d ed. 1927).

gal academic environment, has in it ideas derived both from feminism and from American legal academic conversation generally.² This paper first notes the difficulties which surface when a conventional theory of the state and law associated with liberalism is combined with two particular themes in feminist jurisprudence—the theme of subordination and the theme of groups. Initially, difficulties arise because the description of women suggested by dominance or oppression theories is not the description of freely choosing individuals that participation in the liberal state generally requires.³ Further difficulties surface because the emphases in some feminist jurisprudence on the importance of group life and authority and on the importance of individual narrative and experience generally—though often in fact narrative of the experience of group membership—have no similar priority in conventional theories about law and the state.

The paper then suggests that feminist jurisprudence has certain affinities with psychological and pluralist theories of law and the state. These theories are useful for feminist jurisprudence not because of what they say about women but because of what they say about law and society. It is not that one cannot think about feminist issues without these theories; it is simply that it is easier to think about at least some problems using them, for psychological and pluralist theories, more directly than others, seem to spell out jurisprudential consequences of the idea that the personal is political.

I. THE CENTRALITY OF STATE AND LAW

M. Rameau contends that comparatively simple trebles naturally suggest their basses, and that a person with a true but untrained ear will naturally sing this bass. That is a musician's prejudice, contradicted by all experience. A person who has never heard either bass or harmony will not only fail to find them on his own, he will even

² For this reason, in part, an attack on the marginality of feminist jurisprudence is misplaced. For a general discussion of the non-marginality of feminist jurisprudence, see Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115.

³ Earlier descriptions of women led to the conclusion that women were not appropriate participants in the public world. See C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION: A CRITIQUE OF LIBERAL THEORY* (1979).

dislike them if he should hear them, and he will very much prefer simple unison.⁴

While some feminist jurisprudence looks to a new theory of the state,⁵ much of the writing done under the banner of feminist jurisprudence uses what is a recognizably liberal theory of the state, with conventional monist Austinian assumptions. Here, as a basic reference point, is Alison Jaggar's version of the liberal theory of the state, with an emphasis on legitimacy derived from consent, offered in the context of a discussion of liberal feminism:

Within liberal political theory, the state is the only permanent, legitimate and socially inclusive form of human association. Of course, liberals recognize that people form other sorts of associations: families, businesses, churches, clubs, etc., but they see these as differing from the state in ways that are politically significant.⁶

"[L]iberals," Jaggar continues, "view the state as the only association that is non-exclusive, that is founded on the consent of its members and that is concerned with protecting the basic rights of all."⁷ The state is thus seen as the "only association that is justified in using physical coercion, although even that coercion must be used in accordance with carefully specified procedures and for certain very limited purposes."⁸ That state is sovereign and, de-

⁴ ROUSSEAU, *ESSAY ON THE ORIGIN OF LANGUAGES* 281 (V. Gourevitch trans. 1986). Rousseau's discussion focuses on harmonic relations. For a comment on gender and harmony, see M. GAGE, *WOMAN, CHURCH AND STATE* (2d ed. 1893).

When part singing was first introduced into the United States, great objection was made to women taking the soprano or leading part, which by virtue of his superiority it was declared belonged to man. Therefore woman was relegated to the bass or tenor but nature proved too powerful, and man was eventually compelled to take bass or tenor as his part, while woman carried the soprano

Id. at 58 n.18 (citation omitted).

⁵ MacKinnon suggests that we must find a new theory since "feminism has no theory of the state." C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 159-60 (1989). Professor MacKinnon further notes that feminist practice has "oscillated" between liberal and left theories of the state. *Id.* The left theory of the state, identified as Marxist, calls for abandonment of the state as an arena. "Marxism applied to women is always on the edge of counseling abdication of the state as an arena altogether—and with it those women whom the state does not ignore, or who are in no position to ignore it." *Id.* at 160.

⁶ A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 200 (1983).

⁷ *Id.*

⁸ *Id.* In law, we may take J. Willard Hurst's summary as a statement of the conventional

spite federalist theory, is conceived as unified.⁹

This approach is the one we¹⁰ learned in law school and the one which we teach. Unlike, for example, Masonic jurisprudence¹¹ or Jewish jurisprudence,¹² feminist jurisprudence does not concern itself with the legal theory of a particular group. It is not about the law of women. Rather, it is about the ideas of feminism applied to legal materials, traditionally understood.¹³ Thus, feminist jurisprudence often concerns itself with law and legal institutions.¹⁴ In a sense, this critical or even oppositional movement exists comfortably with the mainstream professional assumptions of academic le-

wisdom on the questions of the state's relation to other groups: "Possession of the legitimate monopoly of violence within a territory was the most distinctive attribute of our law." J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 267 (1960). Of course, [l]aw shared rule making and the imposition of penalties with other institutions. [Thus,] [p]rivate clubs, trade associations, labor unions, and religious congregations fixed terms of admission, made regulations for the behavior of members, and fined violators or withdrew their privileges, or suspended or expelled them. [So, too,] [i]ndividuals governed much of their everyday relations by social customs which they enforced by recognized signs of social disapproval or by ostracism. But to take life, inflict physical pain, or confine the body were ways of enforcing rules which this legal order recognized as properly held only at the command of law.

Id. at 267-68.

⁹ Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). Frug notes that "the need for a single unified sovereign has become a fundamental premise of Western political thought." *Id.* at 1126. Federalism has not replaced the notion of unified sovereignty because the American version of federalism retains sovereignty and places it in the people. In the twentieth century, "[f]or all practical purposes, the unified sovereign has become the federal government (absent a constitutional convention), exercising power by virtue of the commerce clause, § 5 of the 14th amendment, the spending power, or, if necessary, another source." *Id.* at 1127 n.301.

¹⁰ On who is we, "we" in this article has a shifting reference.

¹¹ See D. LIPSON, *FREEMASONRY IN FEDERALIST CONNECTICUT* (1977); R. POUND, *MASONIC ADDRESSES AND WRITINGS* (1953); 2 R. POUND, *JURISPRUDENCE* 301 (1959) (distinguishing legal and social sanctions).

¹² See E. QUINT & N. HECHT, *JEWISH JURISPRUDENCE* (1980).

¹³ There is of course a problem of what we mean by feminist jurisprudence. How is work called feminist jurisprudence distinguished from work called feminist, or work identified as dealing with women and the law, or women's studies? Who decides if there is a difference between a comment on feminist jurisprudence and an exercise in feminist jurisprudence? Who decides, in short, when a question is addressed from the inside? For a discussion of MacKinnon's "arrogance" on this point, see Bartlett, Book Review, 75 CALIF. L. REV. 1559, 1564 (1987) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

¹⁴ See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

gal writing regarding the primacy of the state and the linkage of law and the state.

Arguments focused on rights and law reform necessarily accept to some degree the premises of conventional legal analysis. For this reason some have questioned whether such agendas can ever result in more than legitimation of existing patterns.¹⁵ Yet it is also true that feminist jurisprudence, like other movements, "can be viewed both as a critique *within* legal education and scholarship and as a direct challenge *to* their very structure."¹⁶ Thus, feminist jurisprudence contains ideas which are not so comfortably professional. Feminist writers have suggested, for example, that law and the state are fundamentally male;¹⁷ that rationality—if not in general, at least as understood in the law school classroom—is male;¹⁸ and that males and females are substantially different, so that males are aggressive while females are nurturing, males are objective while females are subjective, and their experiences of legal education and legal practice are therefore entirely different.¹⁹ These approaches reclaim the traditional dichotomies once used to exclude women from the public sphere and use them to criticize the public forum. Use of these dichotomies, however, aside from presenting an awkward illustration of (formally rejected) dichotomous think-

¹⁵ See Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1 (1987). Other efforts suggest that because legal strategies are likely to be ineffective, other, non-legal strategies ought to be pursued. See also Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1233 (1989) (discussing "non-litigated means of transforming workplace norms" and suggesting that "much of the task of reformulation probably will take place outside the context of litigation").

¹⁶ Littleton, *supra* note 15, at 2.

¹⁷ Simmel had already seen this. G. SIMMEL, ON WOMEN, SEXUALITY AND LOVE 68 (G. Oakes trans. 1984) (noting male law is the only law we have). The vision of human interaction which animates much work in feminist jurisprudence is not, of course, unique to women. As Resnik has noted "other traditions demand understanding of individuals in the context of the communities of which they are a part." Resnik, *supra* note 14, at 1921 n.18 (citing J. NOONAN, JR., PERSONS AND MASKS OF THE LAW (1976)); J. VINING, LEGAL IDENTITY (1978); Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B.F. RES. J. 1).

¹⁸ See, however, Luria's 1931 account of the rejection of syllogistic reasoning among presumptively male Uzbek peasants: "If a man was sixty or eighty and had seen a white bear and had told about it, he could be believed, but I've never seen one and hence I can't say. That's my last word. Those who saw can tell, and those who didn't can't say anything!" A. LURIA, THE MAKING OF MIND 79 (1979), quoted in Birmingham, *Teaching Contracts: Coming Home to Roost* (Book Review), 69 B.U.L. REV. 435, 446-47 (1989) (reviewing P. ATTIAH, ESSAYS ON CONTRACTS (1986)).

¹⁹ Discussion of this point continues. See Teitelbaum, Lopez & Jenkins, *Gender Legal Education and Legal Careers*, 41 J. LEGAL EDUC. (forthcoming 1991).

ing,²⁰ reopens for discussion at least two quite difficult questions. The first question concerns role-socialized women as participants in the social contract; the other centers on the more general problem of groups and difference in the political structure.

One tension between feminist jurisprudence and liberal theory is rooted in the fact that the dominance perspective, at least in its most extreme form, invites a generalized attack on female capacity. Liberal theory recognizes participation only by competent actors. Children, the insane and other incompetents cannot participate because they cannot, or cannot be permitted to, choose.²¹ Only if the consequences of subordination or suppression are viewed as essentially moderate—as a remediable injustice rather than a total annihilation of the autonomous self²²—can one go in the direction of immediate public participation by women within liberalism,²³ and if the consequences of subordination are merely moderate, the evil cannot be so great as is sometimes suggested. If we start with the idea that the evil is that great, however, and if female consciousness is almost entirely controlled,²⁴ then serious issues exist as to women and choice. Why should sexual activity initiated by women, for example, be any more voluntary than that initiated by men and consented to by women?²⁵ Why should the "I do" of the

²⁰ See Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51 (1988) (discussing why we make the mistakes we identify in others).

²¹ See 4 R. POUND, JURISPRUDENCE 124-27 (1959) (reviewing the law of persons).

²² The annihilation of self in whole or part, together with modes of response, is sometimes discussed in the psychological context without special emphasis on social or cultural factors. See L. SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILD ABUSE AND DEPRIVATION (1989). One question, of course, is whether there is such a thing as an autonomous self, or whether the self is entirely social and a totality of roles.

²³ See A. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920 (2d ed. 1981); Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986).

²⁴ MacKinnon concedes that female consciousness is not entirely conditioned and notes that this point requires explanation. She does not, however, seem to believe that it makes any difference. Olsen suggests that MacKinnon's focus on dominance rather than (limited) freedom may be strategic. Olsen, *Feminist Theory in Grand Style* (Book Review), 89 COLUM. L. REV. 1147 (reviewing C. MACKINNON, FEMINISM UNMODIFIED (1987)). MacKinnon realizes, of course, that under her view, feminism could not have happened. She writes:

Feminism criticizes this male totality without an account of women's capacity to do so or imagine or realize a more whole truth. Feminism affirms women's point of view, in large part, by revealing, criticizing and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation

C. MACKINNON, *supra* note 5, at 115.

²⁵ "A person is not required to deal with another unless he so desires, and, ordinarily, a

marriage ceremony count? Why, as Carole Pateman formulates it, should a woman's "yes" be any more privileged, or any less open to invalidation, than her "no"?²⁶ If everything becomes a false consciousness problem²⁷—but somehow exclusively for women and not for men—we would seem to be in deep trouble.²⁸

Some writing presented in the specific context of consent to sexual intercourse is, in effect, about taking women's consent (or lack of consent) seriously. *No* means *no*.²⁹ Other writing, however, suggests, in effect, that women in this society are unable to consent

person should not be required to become an obligor unless he so desires." RESTATEMENT OF RESTITUTION § 2 comment a (1936). The Restatement does not describe the world of necessity, which is to say it does not describe the real world. There is a flatness and formalism in the legal treatment of consent which parallels the treatment of consent in some feminist jurisprudence, particularly those arguments about taking "yes" and "no" seriously. In context, these are necessary and important arguments. In general, they offer a simpler view of human interaction and communication than that to which we are (otherwise) committed. One commentator, for example, notes that "[i]mplicit in [Susan Estrich's] position is a model of how people should conduct their sexual relations, a model which is quite intellectualized and verbal." Harris, *New Perspectives on the Law of Rape* (Book Review), 66 TEX. L. REV. 905, 915 (1988) (reviewing S. ESTRICH, *REAL RAPE* (1987)).

²⁶ Pateman, *Women and Consent*, 8 POL. THEORY 149, 162 (1980). See also Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. PHIL. 619 (1987) (arguing that traditional socialization of women does not justify conclusion that women altogether lack autonomy). For a discussion of spousal consent (given in the context of socially constructed roles), see Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

²⁷ A serious problem, as Elshtain noted, is that we have no way to deal with the problem of false consciousness—to determine, as she put it, what is altogether false and ascribed, what is partly true but distorted, and what is altogether true. J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* 250 (1981).

For a view of conventional feminine behavior as "tact" and a question of meeting expectations rather than subordination, see E. GOFFMAN, *PRESENTATION OF SELF IN EVERY DAY LIFE* 18 n.2 (1959) (citing Harry Stack Sullivan, *Socio-Psychiatric Research*, 10 AM. J. PSYCHIATRY 987-88 (1954), on the same issue with reference to the insane pretending to be sane).

Some feminist writing does acknowledge the impact of culture on men. See, e.g., Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice* (Book Review), 96 YALE L.J. 914 (1987) (reviewing D. KIRP, M. YUDOF & M. FRANKS, *GENDER JUSTICE* (1986)). Finley notes that "[m]en, of course, are forced into masculine roles by the process of socialization and the obligations of social and economic dominance." *Id.* at 935 n.99. Goffman quotes a description by Simone de Beauvoir of the culturally induced artifice of women and indicates that it is a universal problem. "Through social discipline, then, a mask of manner can be held in place from within. But as Simone de Beauvoir suggests, we are helped in keeping this pose by clamps that are tightened directly on the body, some hidden, some showing" E. GOFFMAN, *supra* note 27, at 57.

²⁸ Katherine O'Donovan noted that Catherine MacKinnon must face the problem of accounting for the authenticity of her own view. O'Donovan, *Engendering Justice: Women's Perspectives and the Rule of Law*, 39 U. TORONTO L.J. 127, 139 n.61 (1989).

²⁹ See, e.g., S. ESTRICH, *REAL RAPE* (1987).

freely, having been so molded by the culture that it is impossible for them to refuse certain options. Under this view, the problem is nothing so limited as, for example, how women who value "X" are to function in a "Y" professional world; the answer to that might well be to change the professional world, and indeed some feminist writing is addressed exactly to that issue.³⁰ Instead, the problem is women's inability to value or to make choices at all.³¹ The current version of this view suggests that women are molded to be what they are; earlier political theorists believed that women fit this model naturally.³² Whatever its basis, however, the point here is that the dominance views—in effect an explanation of women's condition rather than a rejection of the traditional descriptions—are drawn so sharply that they seem to echo earlier debates over, for example, whether women had souls (a subject which Keith Thomas tells us was "half frivolously, half seriously" debated by theologians for many centuries³³) or could be held to full criminal accountability.³⁴ The question sometimes seems to be once again the one Dorothy Sayers saw: Are women human?³⁵

This problem, however, is of interest here largely because of its

³⁰ Frug, *Securing Job Equality for Women*, 59 B.U.L. REV. 55 (1979); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

³¹ That these choices are complex and difficult is given. Embry provides one example of the reality behind the yes and no of the franchise. As part of the anti-polygamy campaign, the federal government insisted that the Woodruff Manifesto, renouncing polygamy, be ratified by the church membership. One plural wife said:

I was there in the Tabernacle the day of the Manifesto and I tell you it was an awful feeling. There President Woodruff read the Manifesto that made me no longer a wife and might make me homeless. I sat there by my mother and she looked at me and said, "How can you stand this?" But I voted for it because it was the only thing to do. I raised my hand and voted a thing that would make me a unlawful wife.

J. EMBRY, *MORMAN POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE* 12 (1987). See also Sunstein, *Feminism and Legal Theory* (Book Review), 101 HARV. L. REV. 826 (1988) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987) and suggesting that term "adaptive preference" is more generally useful than term "false consciousness").

³² But see J. MILL, *THE SUBJECTION OF WOMAN* 23 (W. Carr ed. 1970) (London 1869) (arguing it is impossible in present state of society to obtain "complete and correct knowledge" of natural differences between the sexes).

³³ K. THOMAS, *MAN AND THE NATURAL WORLD* 43 (1983). See also M. GAGE, *supra* note 4, at 56; Thurston, *Has a Council Denied That Women Have Souls?*, *THE MONTH*, Jan. 1911, at 559.

³⁴ See F. LIEBER, *On Penal Law*, in *CONTRIBUTIONS TO POLITICAL SCIENCE* 491 (1881) (arguing that women were entitled to full accountability).

³⁵ D. SAYERS, *ARE WOMEN HUMAN?* (1971).

connection to another issue. That is, the consent/capacity issue relates both to the general situation of all women as members of a group and to the individual situation of each woman as a person self-identified in particular ways, including some not limited by gender socialization. The first tension between feminist jurisprudence and liberal theory relating to capacity thus leads to the second, relating to liberalism's view of the state and groups.

If we take as the question: "How did women arrive at a description of women's situation that is so incapacitating?"³⁶ we find the conventional answer that radical feminism adopts essentially male descriptions of reality as altogether descriptive. Thus Joan Cocks writes that radical feminism "took the ugly word of phallicentric culture for the truth of the world."³⁷ MacKinnon's version is that: "Consciousness raising has revealed that male power is real. It is just not the only reality, as it claims to be. Male power is a myth that makes itself true . . ."³⁸ Some of the dangers of this description have been noted. Jaggar wrote, for example, that overemphasis on the relative power of men "not only distorts reality but also depreciates the power the women have succeeded in winning and minimizes the chances of further resistance."³⁹ The point here is neither to respond to the description of women offered by the male

³⁶ The idea that women have no choice, or no self who can choose, offers a description which seems sometimes to intensify (rather than teaching women to repudiate) masochism. For a discussion of the need to repudiate subordination and masochism, see C. MACKINNON, *FEMINISM UNMODIFIED* at 176, 283 n.42 (1987) (citing A. DWORKIN, *OUR BLOOD* 111 (1976)).

³⁷ J. COCKS, *THE OPPOSITIONAL IMAGINATION: FEMINISM CRITIQUE AND POLITICAL THEORY* 136 (1989).

³⁸ C. MACKINNON, *supra* note 36, at 104. It seems to be this description by MacKinnon which rings true for so many people—including women lawyers and law students—in spite of the progress of the recent past. As Joan Cocks suggests, radical feminism describes the world as men have told women it really is. J. Cocks, *supra* note 37, at 136. I would suggest, however, that radical feminism describes with considerable power *not* the total experience of women in the world, but our worst experiences in the most oppressively sexist environments in which we have lived or worked. The description is true without being the only thing that is true. And what is true is not necessarily the truth of women's oppression, but the truth of how women are often viewed. Women teachers are reminded of it in the details of our materials. Recall, for example, Llewellyn's cute reference to the footbinding of the little lady in China. Llewellyn, *Our Case Law of Contract: Offer and Acceptance*, 48 *YALE L.J.* 1, 32 (1938). Compare the tone of Mary Daly's discussions—"a thousand year-long horror show"—and note her analysis of male responsibility and "the use of women as token torturers": a serious attempt to deal with the issue of female collaboration. M. DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 134 (1978).

³⁹ A. JAGGAR, *supra* note 6, at 115.

perspective nor to attempt to solve the problem of legal capacity in a world of gender socialization. The effort is, rather, to call attention to another aspect of what is taken as the male description of reality.

Like the male description of women, the dominant description of the state and law—state-centered, power-centered and official-law-centered—is often incorporated in the feminist view. This suggests a second problem with the use of conventional legal theory by feminist jurisprudence, for the perspective on groups and the state which that part of conventional liberal theory⁴⁰ imposes, tends to cut us off from intellectual possibilities offered by other theories.

On the issues of law and the state as the center of power, however, feminist jurisprudence, to its credit, is more than simply an expositor of conventional assumptions. Its mind, one might say, has not been totally shaped by its professional education. Feminist jurisprudence, in fact, sees both the reality of the state and other realities. Thus, the recognition that the family is itself a sphere often regulated by men and that "the assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives"⁴¹ is a kind of recognition of pluralist regulation, albeit one which often continues to imply the primacy of state authority.⁴² Moreover, statements in feminist writing on the significance of law are tempered by the realization that the dominant view of law is not the only significant view. The importance of official law is evident, for example, in Resnik's comment that "judges hold awesome powers in this society. Their judgments change lives, transfer as-

⁴⁰ Liberalism includes traditions which are not Austinian such as Libertarian or individualist anarchism. See RITTER, *ANARCHISM, A THEORETICAL ANALYSIS* 180 (1980) (identifying the American libertarian anarchists as liberals). Joan Cocks observes that "[i]n asserting that men wield power as a monolithic bloc, radical feminism denied the only sources of complexity in social life for which liberalism has had any special affection: the fact of a vast plurality of authors and agents in the world." J. Cocks, *supra* note 37, at 133. Further, because of its focus on sovereign nation-states (which have rules different from the rules of other nation-states) it might be said that Liberalism has notably horizontal elements. In some ways Liberalism makes room for group life, but one is not, I think, much encouraged to think about these.

⁴¹ Olsen, *supra* note 30, at 1510.

⁴² A major emphasis, of course, is on the role of state law in empowering men in the context of the family. On decentralization as a theme in 19th century feminism, see E. CLARK, *RELIGION, RIGHTS AND DIFFERENCE: THE ORIGIN OF AMERICAN FEMINISM, 1848-1860* (Institute for Legal Studies Working Papers Series 2:2, 1987).

sets, imprison individuals, and even determine life and death."⁴³ Significantly, however, Resnik also suggests that a part of the goal of feminist jurisprudence is to pull back from the official stance, to "try not to speak from an imperial position."⁴⁴

It is very difficult not to speak from an imperial position while using conventional definitions of law. Behind the feminist insistence that the state hear other voices and take alternative visions of life seriously,⁴⁵ lie deep-rooted assumptions about the supremacy of the state and its legal system and about the singular authority and importance of official life and the public sphere.⁴⁶ This link between law and the state and this emphasis on the centrality of law⁴⁷ are ideas we share with the rest of the legal profession which, of course, concentrates on questions relating to official law. For lawyers at least, "the state is the legal system."⁴⁸ As Jo-

⁴³ Resnik, *supra* note 14, at 1885.

⁴⁴ Resnik, *Complex Feminist Conversations*, 1989 U. CHI. LEGAL F. 1, 6.

⁴⁵ Note here the relevance of the idea that law is a place in which alternative visions of the world compete. As Martha Minow refers to the judicial arena: it is a "forum for contests over competing realities." Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 93-94 (1987). The courts must make their choices self-consciously, soliciting "information about contrasting views of reality without casting off the moorings of historical experience" *Id.* at 94.

⁴⁶ Other theorists uphold the primacy of the private sphere inasmuch as the virtues they attribute to women are essentially private sphere virtues. As is often pointed out, however, these virtues may themselves be culturally induced. "If women do sometimes speak in a different voice, it may be one that is more ascribed than intrinsic." Rhode, *Woman's Point of View*, 38 J. LEGAL EDUC. 44 (1988).

One question here is surely that the differences which are identified may not exist at all. Most obviously, one can raise questions about the assumption of non-competitiveness and non-aggression of female behavior. For example, Margaret Atwood's novel, *Cat's Eye*, provides a striking picture of the domination of one young girl by another. Focusing for a moment on the issue of the source of the desire to dominate, we find in that novel the suggestion that Cordelia (the original dominant) is playing out in relation to her victim-friend a situation originally involving Cordelia and her dominant father. M. ATWOOD, *CAT'S EYE* 263 (1989). But what is the source of the father's wish to dominate? The Prince beats the peasant who beats his wife who beats the children. But the Prince had a mother. And the mother, a father. On the power of the mother, see D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 176 (1976) ("[T]he essential fact about paternal authority, the fact that makes both sexes accept it as a model for the ruling of the world, is that it is under prevailing conditions a sanctuary from maternal authority.").

⁴⁷ The question "How important is law?" is frequently discussed by those studying the intersection of law and society. See L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (2d ed. 1977); Weisbrod, *On the Expressive Functions of Family Law* 22 U.C. DAVIS L. REV. 991 (1989).

⁴⁸ D'Entreves notes that if we look for the state we find officials: "For the jurist, the State can be nothing other than the body of laws in force at a given time and place. The State

seph Tussman observed, "Taking law as central we develop theories of the state as a legal order or as the 'rule of law.'"⁴⁹ As a result, feminist legal scholars, like others in legal academic life, tend to address the powerful⁵⁰ and to translate the question "What is to be Done?" into the question "What should the State, acting through its judges, do?" As already noted, feminist jurisprudence is not alone in this regard, even among reform or critical movements. Kathryn Abrams has noted, for example, the odd focus on the judiciary in legal writing on republicanism.⁵¹ It is a major effort for law teachers to focus on other parts of government or even on the influence of lower courts.

This emphasis on law and the state influences the reading of material to which we are in some ways sympathetic. The linkage between republicanism and communitarianism,⁵² for example, has tended to reduce our focus on the possibilities suggested by the last paragraph of MacIntyre's *After Virtue*, suggesting a position which can probably be described as anti-statist.⁵³ This position

itself is created by the law. State and law coincide; the State is the legal system." D'ENTREVES, *THE NOTION OF THE STATE* 5 (1967) (emphasis in original).

⁴⁹ J. TUSSMAN, *OBLIGATION AND THE BODY POLITIC* 73 (1960).

⁵⁰

If it is presumptuous for me to address judges and justices, and to expect them to hear me, that is the presumption of the substantive argument: that people in power should at least try to hear contrasting points of view, not necessarily so that my view will prevail, but so that we can pursue what happens in the back and forth. Moreover, I am responsible for what I do, and see, and given that, what else should I say here but what I see?

Minow, *supra* note 45, at 71 n.283.

⁵¹ "The legal foray into republicanism has been sidetracked by its intellectual premises. Straitened by the distinctive problems and perspectives of liberal legalism, it has produced a muted hybrid, oddly focused on the role of the courts." Abrams, *Law's Republicanism* 97 *YALE L.J.* 1591, 1591 (1988) (urging recovery of the "popular strain in republican theory").

⁵² For discussions of civic republicanism, see Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 *HARV. L. REV.* 4, 17 (1986) (discussing treatment of republicanism in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1986)). As one commentator has noted, "[I]n legal and political scholarship, the terms 'communitarianism' and 'civic republicanism' are often used interchangeably." Note, *A Communitarian Defense of Group Libel Laws*, 101 *HARV. L. REV.* 682, 682 n.1 (1988). But this misses a dimension of what is sometimes termed "Sandelianism" concerning the problem of pluralism and the state and the argument that we live in multiple communities, no one of which has an obvious first claim on our loyalties. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 146 (1982).

⁵³ MacIntyre writes:

It is always dangerous to draw too precise parallels between one historical period and another; and among the most misleading of such parallels are those

sees the answer to the question "What is to be Done?" as "Reject the State, form communities."⁵⁴ But as Kathleen Sullivan has noted, the tradition of decentralized communitarianism is not the tradition which generally animates the present discussions of Civic Republicanism.⁵⁵ Those interested in community often seek it politically and on a national scale.⁵⁶

The impulse to reform law and the state takes a specific form in legal academic writing—the normative component of the typical law review article with a discrete law reform agenda.⁵⁷ To the extent that legal scholarship focuses on judicial opinions, feminist jurisprudence seems often to assume, in common with the general legal academy, that the question of how to get from here to there is to be analyzed and answered in terms of law, law reform and better reasoned and more sensitive judicial opinions.⁵⁸

which have been drawn between our own age in Europe and North America and the epoch in which the Roman empire declined into the Dark Ages. [Still there are certain parallels.] A crucial turning point in that earlier history occurred when men and women of good will turned aside from the task of shoring up the Roman *imperium* and ceased to identify the continuation of civility and moral community with the maintenance of that *imperium*. . . . [And finally] [t]his time, . . . the barbarians are not waiting beyond the frontiers; they have already been governing us for quite some time. And it is our lack of consciousness of this that constitutes part of our predicament. We are waiting not for a Godot but for another—doubtless very different—St. Benedict.

A. MACINTYRE, *AFTER VIRTUE* 245 (1981).

⁵⁴ The modern sources of this are various, and include Proudhon, late Jefferson and De Toqueville. "Man made the State; but the commune comes direct from the hand of God." HOCKING, *MAN AND THE STATE* 265 (1926) (quoting De Toqueville).

⁵⁵ Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713 (1988).

⁵⁶ The risks here are often discussed in terms of Hegel's state understood as a "God-state." L. HOBHOUSE, *METAPHYSICAL THEORY OF THE STATE* (1918). For a different view of Hegel, see S. AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* (1972).

⁵⁷ The demand for law reform and normative conclusions in academic writing is more specific, I suspect, than the general assertion, common in the New Historicism, that work has/must have a political agenda.

Kathryn Abrams suggests one law reform program: "Many crucial problems remain: formal equality prevents many women from attaining fair divorce and custody settlements, the feminization of poverty continues unabated, and outdated sexual stereotypes impede our society's ability to prosecute rape." Abrams, *supra* note 15, at 1184.

⁵⁸ MacKinnon rejects this, stating that her

book is not an idealist argument that law can solve the problems of the world or that if legal arguments are better made, courts will see the error of their ways. It recognizes the power of the state and the consciousness and legitimacy conferring power of law as political realities that women ignore at their peril. It recognizes the legal forum as a particular but not singularly powerful one.

C. MACKINNON, *supra* note 5, at xiii.

Something is lost, however, in discussing problems of power as if the state monopoly of power were in fact truly and fully descriptive. Feminism recognizes this point first in analysis of issues relating to the role of women in the family or in the church⁵⁹ and, second, by way of a sense that law and law reform may not solve all of the problems that feminism addresses.⁶⁰ But this awareness points the way to a more general consideration of the issue. If a discussion is framed in terms of a spectrum of power relationships and of differing strengths in different contexts, then it might be immediately clear, for example, that in addressing the power (or violence) of judges and the law, we must also acknowledge the existence of limiting factors in the counter-violence and counter-power of other groups.⁶¹ As Robert Cover said, these groups create their own law, and their law is as entitled to the name "law" as the official law of the state.⁶² Further, considerations of various forms of power lead us directly to questions of the limits of official law, or the problem of self-help (individual law enforcement), or gender dominance as the unofficial law of particular groups—whether the family, the church or the union. It is easier, I would suggest, to consider questions of gender and relative power, or of gender, choice and role construction, in the context of legal theories which do not start with assumptions of state sovereignty and individual citizenship or with definitions of law which center on the state. Other theories of law and the state are available which might prove more useful. These theories, however, while congenial at some levels, leave certain difficulties which might well be addressed by feminist jurisprudence. Part II discusses two alternative theories and the difficulties they raise.

⁵⁹ Again, a concern in feminist writing will be about use of state law to change the allocation of power within a group. See C. MACKINNON, *Whose Culture: A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED 66 (1987); Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 66 U. CHI. L. REV. 671 (1989).

⁶⁰ Compare the historical issue of whether the emphasis on suffrage should be allowed to entirely replace other points on the 19th century women's agenda.

⁶¹ On the power of the family, see Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801 (1989).

⁶² Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For a review of pluralist theory, see Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1987) (citing material from English political pluralism and from legal anthropology, and distinguishing these ideas from American interest group pluralism or cultural pluralism).

II. OTHER THEORIES, OTHER PROBLEMS

The only texture in music that poses real listening problems is . . . polyphonic texture. Music that is polyphonically written makes greater demands on the attention of the listener, because it moves by reason of separate and independent melodic strands, which together form harmonies. The difficulty arises from the fact that our listening habits are formed by music that is harmonically conceived, and polyphonic music demands that we listen in a more linear fashion⁶³

It was once conventional to see power in terms of a spectrum of different kinds of force and/or authority in society. Thus Hocking, discussing the problem of the state as force in 1926, noted that the state was not the only group in society which used force and that, "in strictness, the monopoly of force is something which the state approaches rather than enjoys" ⁶⁴ He cited as examples, again entirely conventionally, the family, the school and the clan. Feminist jurisprudence insists on the importance of group narratives,⁶⁵ but it is as if we believe in relative power only in principle. Traditional hierarchical jurisprudence—with a view of women at the low end of that hierarchy—makes it difficult to actually see the world in terms of relative power.⁶⁶

Feminist jurisprudence, therefore, is generally accustomed to vertically constructed harmony, which is to say, hierarchy. For lawyers, it is a hierarchy in which state and official law are primary. As moderns, we start roughly with the position of Ernest Gellner who notes that "[t]here are some traditions of social thought—anarchism, Marxism—which hold that even, or especially, in an industrial order the state is *dispensable*, at least under favourable conditions or under conditions due to be realized in the

⁶³ A. COPLAND, WHAT TO LISTEN FOR IN MUSIC 62 (1939).

⁶⁴ W. HOCKING, *supra* note 54, at 56 (1926). See generally MERRIAM, POLITICAL POWER (1934).

⁶⁵ See *supra* text accompanying note 73-76. But all voices may not have the same claims. See Yudof, "Tea at the Palaz of Hoon": The Human Voice in Legal Rules, 66 TEX. L. REV. 589, 602 (1988).

⁶⁶ Economic argument, in asserting the existence of strategic bargaining chips in various places, comes closer to realizing the possibilities of countervailing power.

fullness of time."⁶⁷ Gellner insists, though, that "[t]here are obvious and powerful reasons for doubting this It is clear that industrial societies depend for the standard of living to which they have become accustomed (or to which they ardently wish to become accustomed) on an unbelievably intricate general division of labour and co-operation."⁶⁸ Gellner acknowledges that "[s]ome of this co-operation might under favourable conditions be spontaneous and need no central sanctions."⁶⁹ Nevertheless, he concludes, "[t]he idea that all of it could perpetually work in this way, that it could exist without any enforcement and control, puts an intolerable strain on one's credulity."⁷⁰ The state exists: it is necessary and sovereign; the law is its voice; and that voice is single⁷¹ and authoritative.

Feminist jurisprudence has begun looking in a different direction.⁷² This new perspective is manifest in the feminist interest in law and literature as well as in the feminist focus on group context, personal experience and individual narrative. As Resnik has written: "Feminist theories share a view that much of women's experiences of their lives has been omitted in the standard scholarly and popular descriptions of the world."⁷³ Further, Resnik writes, "[K]nowledge of the world is constructed from one's viewpoint and

⁶⁷ E. GELLNER, *NATIONS AND NATIONALISM* 5 (1983). While as moderns, then, we tend to assume the importance of the state, it has been said that as political theorists, we were for some time disinterested in the theory of the state.

While the concept of the state was a central focus of modern political thought from Hobbes through Weber, many theorists have observed that the advent of behavioralism in political science led to the decline of the state as an object of theoretical inquiry. . . . [T]he concept of the state was an early casualty of "scientific rigor."

J. ISAAC, *POWER AND MARXIST THEORY, A REALIST VOICE* 157 (1987) (referring also to a recent revival of interest in the theory of the state). See also Lindblom, *Another State of Mind*, 76 AM. POL. SCI. REV. 9 (1982) (analyzing failure of conventional political science to incorporate radical thought).

⁶⁸ E. GELLNER, *supra* note 67, at 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Our idiom as teachers reinforces the singleness of the vision: as in "You/they have missed the point," as if there were no other point. Our texts stress the authority of the vision. They are the work of people important in the political state of their own time. We have little tradition in law of neglected geniuses and starving artists, voices outside the official voice.

⁷² The broadened view is not limited, of course, to works identified with feminist jurisprudence.

⁷³ Resnik, *supra* note 14, at 1906.

that what has been assumed (by some) as a universal viewpoint is, in fact, a viewpoint of some men, who have articulated a vision of reality and claimed it to be true for us all."⁷⁴ This means that a "shared enterprise of feminism is to bring those viewpoints forward for exploration and consideration."⁷⁵ From this position, feminism has gone on to consider the voices of groups other than women or voices in which a female voice is a component but not the whole—that is, the issue of multiple membership.⁷⁶ But it has not yet, as far as I can tell, considered systematically the work of those who have thought about problems of groups in society from the perspective of a vision in which multiple authorities are the starting point.⁷⁷ It has not yet been notably interested in the ideas of the English pluralists, the theories of law associated with psychological jurisprudence⁷⁸ or other theories focused on the operations of small legal systems within the larger state system.

What follows, then, is an introduction to the English political pluralists and the thought of Leon Petrazycki—an introduction based not on expertise (indeed, in the case of Petrazycki, I cannot even claim access to the relevant material⁷⁹) but on interest and a sense that these ideas have relevance to questions discussed by feminist jurisprudence.

* * *

We can look to the writing of the English pluralists and try to pick up where they left off in their discussion of the role of the state. The tradition was invoked by Michael Walzer when he said that "unless the state deliberately inhibits the normal processes of group formation, and does so with greater success than has ever

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *E.g.*, Scales-Trent, *Black Women and the Constitution: Finding Our Place; Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

⁷⁷ That is, as a group women are seen by feminist jurisprudence as they would be seen in conventional interest group pluralism: women constitute a group seeking access to the public process or decisions favoring women's interests. The concepts of state sovereignty, official law as the regulator and the state as the source of rights are all assumed.

⁷⁸ *See, e.g.*, L. PETRAZYCKI, *LAW AND MORALITY* (H. Babb trans. 1955); *SOCIOLOGY AND JURISPRUDENCE OF LEON PETRAZYCKI* (J. Gorecki ed. 1975).

⁷⁹ *Law and Morality*, a translation of Petrazycki's work written in the first decade of the 20th century, was published in 1955. The translation is "an abridged version—approximately one fifth—of the original works and unfortunately is not fully representative of Petrazycki's life's work." Sadurska, *Jurisprudence of Leon Petrazycki*, 32 AM. J. JURIS. 63, 64 n.4 (1987).

yet been achieved, it will always be confronted by citizens who believe themselves to be, and may actually be, obligated to disobey."⁸⁰ Walzer then quoted Figgis:

The theory of sovereignty . . . is in reality no more than a venerable superstition. . . . As a fact it is as a series of groups that our social life presents itself, all having some of the qualities of public law and most of them showing clear signs of a life of their own.⁸¹

English pluralism is conventionally understood to include the theories of such figures as early Laski, Cole and Figgis. Their work, aimed largely at doctrines relating to the sovereignty of the state, also built upon the observations of Maitland, who, as translator of Gierke, had noted that there "seems to be a genus of which state and corporation are species."⁸² This focus on groups and group life led the pluralists to a view of groups and the state in which the state could no longer be said to be the sole location of what the jurists had called "sovereignty." Not only was there not a single sovereign, as Austin had maintained, but there were in fact many sovereignties operating in a parallel way in any given society.

English pluralism was thus seen as a direct attack on the conventional theory of the state. Laski wrote:

The medieval worship of unity in fact is inherited by the modern state; and what changes in the four centuries of its modern history is simply the place in which the controlling factor of unity is to be found. To the Papacy it seemed clear that in medieval times that the power to bind and loose had given it an authority without limit or question. The modern state inherits the papal prerogative. It must, then, govern all; and to govern all there must be no limit to the power of those instruments by which it acts.⁸³

⁸⁰ M. WALZER, OBLIGATIONS 15-16 (1970).

⁸¹ *Id.* at 16 (quoting J. FIGGIS, CHURCHES IN THE MODERN STATE 224 (1914)).

⁸² Maitland, *Translator's introduction* to O. GIERKE, THE POLITICAL THEORIES OF THE MIDDLE AGES at ix (1922).

⁸³ H. LASKI, AUTHORITY IN THE MODERN STATE 23 (1919). American political federalism, as early Laski saw it, did little to change this picture. "The multiplicity of governmental powers demanded by the federal system makes no difference; it is merely a question of administrative convenience." *Id.* at 25-26.

Although in America there was no "immediately sovereign body"⁸⁴ as in England or France, the idea of the sovereignty of the people, operating through the device of representation, came to roughly the same point. But, said Laski, echoing Maitland, once it becomes clear that "the state is only a species of a larger genus,"⁸⁵ other issues emerge. Churches deny the state absolute sovereignty, "by which they mean that the canons of [the church's] life are not subject to the control of [the state's] instruments."⁸⁶ Because of this, Laski said, "there will be instances in which the state may find it wise to forego its claim to supremacy. Acts of authority are thus limited by the consciences that purposes different from that of the state can command."⁸⁷

An easy adjunct to English political pluralism was the rejection of the definition of law as commands emanating from the state, in favor of a definition seeing Austinianism only as a form of prejudice or convention. The idea was that each group could issue its own law and provide authority for that law.⁸⁸ Along with the insistence on the importance and independence of group life came a view of the social order as one based not on law-as-command but on some principle of association. Thus, G.D.H. Cole, writing in 1920, criticized classical political theory for treating the state as the "embodiment and representative of the social consciousness," so that "over against the State and its actions and activities, this form of theory has set indiscriminately the whole complex of individuals and other associations and institutions, and has treated all their manifestations as individual actions."⁸⁹ Cole argued that this was a false view, arising "mainly from the conception of human society in terms of force and Law."⁹⁰ This view, said Cole, "begins at the wrong end, with the coercion which is applied to men in Society, and not with the motives which hold men together in association."⁹¹ Cole saw three sources of live social theory for his time:

⁸⁴ *Id.* at 25.

⁸⁵ *Id.* at 27.

⁸⁶ *Id.*

⁸⁷ *Id.* at 45.

⁸⁸ For a general discussion of legal pluralism, see Griffiths, *What is Legal Pluralism*, 24 J. LEG. PLURALISM 1 (1986).

⁸⁹ G.D.H. COLE, *SOCIAL THEORY* 6 (1920).

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

the Church, industry (including Marxist and guild socialist thought) and history (where he included Gierke and Maitland with their stress on association).⁹² A later discussion by G.D.H. and Margaret Cole offered this description of groups and the state: "Every modern society is a network of associations. . . . Very often, these particular associations are spoken of as if they existed, in some sense 'within the State, and even as if they owed their being to the State's willingness to grant them recognition.' "⁹³ It is true, the Coles wrote, that the State's attitude towards an association can be immensely important to it.⁹⁴ And while group consciousness is ordinarily not a problem, however, it sometimes produces conflict between the group's members and the state; "it may at any time affect them, calling up a loyalty which will influence their behaviour and perhaps bring them into group conflict with other groups or associations or with the state itself."⁹⁵

English pluralism of the early part of the twentieth century thus differed substantially from American interest group pluralism. The English idea was that group life was real, independent of, and often competing with, the state. English pluralism saw state behavior as bounded by the behavior of other groups, and this view went with the idea that law emanated from several sources. American interest group pluralism, on the other hand, saw the various interest groups as competing for the largess of the central state. This approach did not diminish the state in theory, as English pluralism tended to, but rather saw the state as the monitor of competition for the allocation of limited resources.⁹⁶ Although the English pluralists did not all believe the same thing, they had strong points in common. It has been said that "[t]he chief political interest of Cole's scheme, or of other contemporary schemes in the English

⁹² *Id.* If one looks for the sources of Guild Socialism, one finds, in addition to political pluralism, the tradition of English utopianism and "distributivism," the program of Belloc and Chesterton. See G. CHESTERTON, *THE NAPOLEON OF NOTTING HILL* (1904); see generally S.T. GLASS, *THE RESPONSIBLE SOCIETY* (1966).

⁹³ G.D.H. COLE & M. COLE, *A GUIDE TO MODERN POLITICS* 370-71 (1934).

⁹⁴ *Id.* at 372.

⁹⁵ *Id.* at 372-73.

⁹⁶ On American interest group pluralism, as contrasted with English political pluralism, see NICHOLLS, *THREE VARIETIES OF PLURALISM* (1974) (discussing Bentley, Truman, Dewey, Lippmann, Latham and Dahl). Cultural pluralism is yet another idea which does not discuss the theory of the state at all, but simply refers to the fact or desirability of various difference communities within the state.

'pluralist' mold, lies of course in the proposed dissolution of the state, understood here as a set of central institutions invested with final authority and wielding coercive power."⁹⁷ Pluralism was "a movement which set out above all to devolve responsibilities, to reinforce horizontal relationships, and to dispense with or at least divide up vertical ones."⁹⁸

Several critiques of English pluralist thought have been made. Hocking wrote that pluralists stop short of the only thing that would matter—an attack on the issue of force. Pluralism "proposes no return to the former distribution of armed forces among the various social powers. It does not advocate the abolition of force against recalcitrant citizens and groups."⁹⁹ Hocking thus concluded that "so long as the locus of force remains untouched, political pluralism is hardly more than an assertion of the importance of group authority and of its migrations and an appeal for modest deference to these and other authorities on the part of governments."¹⁰⁰ It is possible that this modest deference is all that is asked for by present advocates of group life. At the same time, a deeper appreciation of group life is sometimes suggested, and if some deeper sense of pluralism is invoked, serious questions about the meaning of pluralist theory must be confronted.

The questions have often been suggested. Nicholls, for example, criticizes Figgis by suggesting that he was not sufficiently explicit either on the "extent to which the state might interfere with groups"¹⁰¹ or the circumstances in which the state might interfere. "The formal freedom of the individual to leave the group may be nullified in practice by powerful economic and social pressures. Also, may there not be groups whose way of life cripples the character of their members?"¹⁰² Other difficulties with pluralism were suggested by the American Mary Parker Follett in 1918, when she

⁹⁷ Vernon, *Foreword* to G.D.H. COLE, *GUILD SOCIALISM RESTATED* at xxxv (1920).

⁹⁸ *Id.* Guild Socialism, in Cole's version at least, tried to be rid of the state. See G.D.H. COLE, *supra* note 89; W. LIPPMANN, *PUBLIC OPINION* 296 (1922) (noting that, functionally, the coordinator seemed to have all the power of the state). Other Guild Socialists saw the state as an arbiter. See generally A. WRIGHT, G.D.H. COLE AND SOCIALIST DEMOCRACY (1979); Wright, *Guild Socialism Revisited*, 9 J. CONTEMP. HIST. 165-80 (1974).

⁹⁹ W. HOCKING, *supra* note 54, at 88 (footnote omitted).

¹⁰⁰ *Id.* See also F. COKER, *RECENT POLITICAL THOUGHT* 497-517 (1934) (examining pluralistic attack on state sovereignty).

¹⁰¹ Nicholls, *supra* note 96, at 13.

¹⁰² *Id.*

wrote that:

Society . . . does not consist merely of the union of all these various groups. There is a more subtle process going on—the interlocking of groups. And in these interlocking groups we have not only the same people taking up different activities, but actually representing different interests. In some groups I may be an employer, in others an employee. . . . The state cannot be composed of groups because no group nor any number of groups can contain the whole of me, and the ideal state demands the whole of me¹⁰³

Yet another problem is suggested by the possibility that underneath the English pluralist approach is a commitment to a society based on fundamental value consensus.¹⁰⁴ If this is true, how useful can the English pluralism of the first half of the twentieth century be to us, when it is exactly the existence of that consensus on important questions which is in doubt?

At the same time, it would also seem impossible to be committed to ideas of pluralist group life without seriously examining historical pluralist thought. Cole wrote that “the demand for functional devolution”¹⁰⁵ meant “not a demand for the recognition of associa-

¹⁰³ M. FOLLETT, *THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT* 289-90 (1918). Cf. H. LASKI, *GRAMMAR OF POLITICS* 67 (1925) (“To exhaust the association to which a man belongs is not to exhaust the man himself . . .”).

On Follett's sense of the importance of the state, see F. COKER, *supra* note 100. “Miss Follett criticizes the pluralists' conception of the state as ‘competing’ for the citizen's loyalty; and she explains so fully the state's unifying functions, and its direct contact with individuals, that she is hardly to be classed properly among the pluralists.” *Id.* at 513. See also H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 157-63 (1961) (critiquing Follett's views on natural harmony and the creative role of conflict); Kariel, *The New Order of Mary Parker Follett*, 8 W. POL. Q. 425 (1955).

For another American version of pluralist thinking, see C. BERNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1938).

¹⁰⁴ See A. VINCENT, *THEORIES OF THE STATE* 182, 216 (1987).

¹⁰⁵ Guild Socialism stressed functional units rather than geographic units. Morgan notes that while, in the 18th and 19th centuries, “the fiction of representation was sometimes explained and defended as a means by which all the different economic or social interests in a country had a voice in government,” in fact, representation in England and America has always been geographic. E. MORGAN, *INVENTING THE PEOPLE* 41 (1988).

For a recent critique of Guild Socialism's idea of representation, see R. DAHL, *DEMOCRACY AND ITS CRITICS* (1989), and for a discussion of guild socialism/syndicalism and fascist corporatism, see G.D.H. & M. COLE, *supra* note 93, at 405. See also Soifer, *Freedom of Associa-*

tions by the State, but a demand that the state itself should be regarded only as an association."¹⁰⁶ The state, he thought, might be the elder brother, "but certainly in no sense father of the rest."¹⁰⁷ We may want to reject the patriarchal images; the point is worth attention.

* * *

Once we move from the state as the source of law, we can consider other ways of looking at law. Another agenda for feminist work in law might involve a revival of interest in psychological jurisprudence or other work dealing with unofficial legal systems, with a particular focus on psychology and individuals, and particularly the theory of Petrazycki.¹⁰⁸

Petrazycki (1867-1931) was a Russo-Pole who developed a theory of law building on the idea that law existed finally in the minds of individuals. If A has a right to money from B, and B is bound to pay A, the legal phenomenon involved is "not somewhere in space between A and B . . ." Rather, "[t]he legal phenomenon is in the mind of the third person C," who thinks that A has a right to receive and that B has an obligation to pay.¹⁰⁹ Human beings thus experience legal phenomena, and they do so long before they acquire any legal capacity in official law.¹¹⁰

This theory opens the possibility of looking at the experience of legal obligation in a highly variegated way. It is not enough to assert that the law says there is an obligation and so there is. One must say that official law says that there is an obligation, while A, B and C (trained from childhood in specific ways, socialized differ-

tion: Indian Tribes, Workers, and Communal Ghosts, 48 MD. L. REV. 350, 364 (1989) (discussing American version of these ideas).

¹⁰⁶ G.D.H. COLE, *CONFLICTING SOCIAL OBLIGATIONS: PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 140 (1915); cf. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930) (raising the possibility that state is only another kind of association).

¹⁰⁷ G.D.H. COLE, *supra* note 106, at 159.

¹⁰⁸ See generally Rudzinski, *Petrazycki's Significance for Contemporary Legal and Moral Theory*, 21 AM. J. OF JURIS. 107 (1976); Podgorecki, *Unrecognized Father of Sociology of Law: Leon Petrazycki*, 15 L. & Soc'y 183, 191 (1980). See also *supra* notes 78-79.

The psychological theory of law was followed to some degree by the Russian theorist M. Reisner. M. REISNER, *SOVIET LEGAL PHILOSOPHY* 71 (H. Babb trans. 1951). But cf. E. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 76-77 (B. Einhorn trans. 1978) (arguing that real state, rather than its appearances in individual minds, was thing to be examined).

For Petrazycki on the state, see L. PETRAZYCKI, *supra* note 78, at 135.

¹⁰⁹ L. PETRAZYCKI, *supra* note 78, at 135.

¹¹⁰ *Id.* at 12.

ently and raised by different parents) either experience that obligation or do not experience it. The theory is descriptively pluralist to the extent that it envisions the possibility of as many propositions of substantive law as there are individuals, but is normatively less so, since Petrazycki saw a tendency of law (defined as imperative/attributive—involving a claim or right—and distinguished from morality, which is defined as unilateral and imperative only) toward uniformity.¹¹¹ His work has been seen as committed to social engineering and the educational functions of official law.¹¹² For present purposes, the important point is that for Petrazycki, law “ceases to be identified with the state alone.”¹¹³ Rather, Petrazycki “viewed an individual as a member of different social groups which shape her or his rights and duties. A family, a profession, an educational establishment, an association, a company, a territorial unit, . . . and each of them define appropriate human conduct.”¹¹⁴

Petrazycki's theories lead directly to the study of interactive legal behavior in small groups such as the family or the couple, and would seem to have direct relevance to questions of gender and power. Consider this description by Petrazycki of the law of the family:

[F]rom the point of view of the psychological theory of law as imperative-attributive experiences,¹¹⁵ family and intimate domestic life (regardless of whether or not there are between those participants any bonds officially recognized) is a broad and peculiar legal world which is await-

¹¹¹ *Id.* at 112. The point here is that because law involving a claim from a third party is defined as attributive, there is a “tendency to get by force that which is due,” and if some ascribe obligations where others do not, there is conflict. *Id.* at 113. Because of this, law tends “in the direction of bringing the legal opinions of the parties into unity, identity and coincidence . . .” *Id.* So that the opinions of individuals may coincide, there ought to be general rules of obligation, and positive law (as distinguished from intuitive law) is “a suitable means to this end.” *Id.* Positive law is defined by what Petrazycki called “normative facts”—what was done in the past, what the statute says. Positive law, based on “extraneous authorities,” can be official or unofficial, as can intuitive law—“imperative-attributive experiences involving no reference to extraneous authorities.” *Id.* at 114.

¹¹² See SOCIOLOGY AND JURISPRUDENCE OF LEON PETRAZYCKI, *supra* note 78, at 115-32.

¹¹³ Sadurska, *supra* note 79, at 75.

¹¹⁴ *Id.* at 76.

¹¹⁵ By this, Petrazycki referred to the distinction between obligations which are unilateral (“moral”) involving a feeling of duty without a claim on the part of some other person, and bilateral (“legal”) obligations which involve not only the sense of an imperative, but also a claim on the part of some other person.

ing investigation: a legal world with innumerable legal norms, obligations, and rights independent of what is written in the statutes, and solving thousands of questions unforeseen therein. While there are some features of the content, and of the trend of the historical development, that are common to all systems of the law governing domestic relations, there are also many variants and great differences of a more or less common origin and a common significance. They may be connected with the class structure of a population—the typical domestic law prevailing in the well-to-do and rich strata is distinguished from the same law in the spheres of those who are not well-to-do and of proletarians, while the typical domestic law of the peasants is different from that of the businessman and the aristocrat. But they are, in part, of an individual character: each family is a unique legal world, and each of those taking part in the domestic life (including aunts, grandmothers, poor kinsfolk in remote degree, or friends received into the house and into the family, hangers-on, adopted and foster children, and the like) has his own particular position in the legal mentality which prevails in that family—the right to enjoy one's room and certain other objects alone and to take part in enjoying other parts of the dwelling and objects, the right to take part in common meals and pleasures and in family celebrations and the like, the right of a decisive or advisory voice in certain matters of domestic life (economic and personal), the right to certain degrees of civility, love, and gratitude and to appropriate behavior in different cases, and so forth.¹¹⁶

The technique for investigation was not simply the materials of the official legal system. Rather, Petrazycki urged that one use introspection and particularly one's experience of literature as sources for inquiry of one's experience of law. Literature, he thought, "raised the intensity" of our experience of legal phenomena.

[R]eading stories, novels, newspaper reports and the like

¹¹⁶ L. PETRAZYCKI, *supra* note 78, at 68.

containing vivid portrayals of "shockingly" arbitrary conduct, clear and "sacred" rights trampled under foot, utterly just demands repudiated, and the like; the vivid image of one's own self under strong temptation to deny and to dispute—or otherwise to trample upon the clear and "sacred" right of another or as victim of the shockingly arbitrary conduct and violation of law; the services of friends in bringing us (for purposes of the experiment) the point of legal enthusiasm, or in "boiling" and indignation, and so forth; all such experimental means may enable us to observe and to study the relevant psychic experiences particularly characteristic of law.¹¹⁷

In effect, the work of Petrazycki and others (including the English pluralists) leads to the study of small legal systems and their norms which, as Michael Reisman suggests, "may be significant factors in the shaping of personalities [in] ways that have civic impact and importance, not to speak of effects on an individual's autonomy, self-assurance, sense of self-worth and capacity to develop affection toward others."¹¹⁸ Moreover, if work stresses psychology¹¹⁹ and psychological differences as well as the impact of gender on these differences, the result might be a clearer idea of why some official law (drawn from and influencing these differences) tends to work and why some does not. The use of pluralist or psychological theories may assist us in getting to the problem of legal capacity in a social environment.¹²⁰ Pluralism clearly opens the way to consid-

¹¹⁷ *Id.* at 14.

¹¹⁸ Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DEN. J. INT'L L. & POL'Y 165 (1983). Reisman concludes his discussion by noting that he is not suggesting the elimination of a public/private line: "I am not calling for a comprehensive scheme of microlegal statutes." *Id.* at 182. His attempt is to

alert and sensitize scholars and the diverse official, as well as non-official custodians of the private sphere or civil order, to the fact that key aspects of individual lives are affected by microlegal arrangement. Individuals should become aware of them so that, like the other norms of society, they may be appraised, and, where necessary, changed to increase their contribution to a good life.

Id. See also W.M. REISMAN, *Law from the Policy Perspective*, in INTERNATIONAL LAW ESSAYS (W.M. Reisman & M. McDougal eds. 1985).

¹¹⁹ Feminist jurisprudence has of course already drawn on the writing on feminism and psychoanalytic theory. *E.g.*, Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986).

¹²⁰ We speak as though legal capacity is unitary, but we have an age of majority, doctrines of the mature minor, early emancipation, drinking and driving ages, etc.

eration of various definitions of capacity by different groups; the psychological theory of law, as offered by Petrazycki, was even prepared to consider the possibility of law in the mind of the madman.¹²¹ These perspectives lead us away from a binary approach of traditional legal theory which sees only capacity and incapacity, and towards theories which can deal with the force of socialization and culture in various contexts.

While some work in feminist jurisprudence has raised the problems of the self¹²² and of multiple identification, it has not considered these questions in the context of a jurisprudence focused specifically on the psychological aspects of legal experience or on the rules of interaction (as against the violence of interaction) in small groups or intimate settings. Feminist jurisprudence may wish to explore the possibilities of Petrazycki's psychological theory of law. For example, the theory might cast light on specific gender relations like those in domestic context. We might be able to define the family as a legal world comprised of individuals who have obligations as well as rights to respect, gratitude and love. We might discern legal obligations consisting of the duty to suffer mistreatment quietly: "Even to suffer blows without repining, indignation, or resistance to bodily punishment is deemed a matter of course by persons (slaves, children, and wives—at a certain stage of culture) who ascribe to others the corresponding right (the master of the house)."¹²³ This obligation, felt by slaves, children and wives, is not understood as an aspect of female masochism, but as a psychological legal experience of particular human beings socialized in particular ways.

¹²¹ "No significance of any kind attaches either to recognition and protection by the state, or to any acknowledgment of whatsoever sort by any one at all, as regards the concept of law herein established and its extension to the corresponding psychic phenomena." L. PETRAZYCKI, *supra* note 78, at 74. The law of the insane becomes a "special object of study as pathological law or legal pathology" analogous to child law or criminal law. *Id.* at 75.

¹²² *E.g.*, West, *Feminism Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 88 ("What women experience on a daily basis is not a socially constructed *selfhood*, but rather a socially constructed *lack-of-self*, a sense of *selflessness*.") (emphasis in original).

¹²³ L. PETRAZYCKI, *supra* note 78, at 94. All of this can, of course, change.

Now . . . the reestablishment of slavery, serfdom and the like would be unthinkable, not merely because it would be impossible to achieve the corresponding passive legal motivation on the part of those held to be subordinate, but also because the masters would not be conscious of the rectitude of their position and of the active ethical motivation of slave-possessing conduct.

Id. at 97.

Susan Brownmiller's *Waverly Place*¹²⁴ deals with a woman, herself abused, who fails to aid a battered child. The child dies. The central questions of the novel are the psychology of the woman and her responsibility for the crime. Shall we view her as a victim? As someone who failed in maternal responsibilities? As someone who violated the criminal law of the state? How shall we view her dependency on her abusive lover? Why, as is said as to many battered wives, did she not leave? Feminism has tended to discuss this issue in terms of disability, low self-esteem and lack of alternatives. Brownmiller's protagonist, though, is a professional, not the poor, untrained and desperate woman we ordinarily classify as a victim. How then are we to see her?

To begin with, a psychological theory of law enables us to reach an individual psychological dimension of behavior without having to say that we are in the realm of psychology or (the generic term for empathetic non-law) social work. One character in the Brownmiller work describes Judith as a sado-masochist; another only sees a victim of a one-way street of violence against women.¹²⁵ We can also say that she had a particular legal consciousness. We can analyze victim behavior not merely negatively—in terms of disability and powerlessness—but also in terms of a victim's sense of obligation:¹²⁶ her obligation to obey and to be uncomplaining. We can then focus on the possibly conflicting legal obligations to men and children. Similarly, one can analyze the abuser in terms of family history, background, psychology and the various legal experiences, entitlements and claims in his individual psyche, even to the point of talking about legal pathology. One can also follow Petrazycki and think about the impact of positive official law on an individual's experience—whether for purposes of the analysis of that individual's case or for purposes of a general reform of the social situation with a view towards reducing the incidence of par-

¹²⁴ S. BROWNMILLER, *WAVERLY PLACE* (1989).

¹²⁵ *Id.* at 146. On the history of domestic abuse, see L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988).

¹²⁶ Another context in which this approach might make sense would be date rape. Do (some) women believe that if a man has spent a certain amount of time/money on a date, he is entitled to sexual relations even without her consent? Does the man in this situation believe this? In short, what are the rules, as understood by each side? If they are the same, how do we understand the rape? (This illustration comes from an interesting discussion of such issues in a constitutional law class conducted by Milner Ball, Professor of Law at the University of Georgia School of Law (Feb. 7, 1990)).

ticular behavior.

The utility of pluralist theories for feminist jurisprudence as a movement interested in groups is even more apparent. As noted earlier, some of those associated with feminist jurisprudence have acknowledged the importance of memberships in communities based on affiliations other than gender. Thus, Martha Minow has urged that "feminist critiques" be developed in contexts "beyond gender, such as religion, ethnicity, race, handicap, sexual preference, socioeconomic class and age."¹²⁷ She has also noted that group identification may not only be a matter of ascription but also may involve chosen identifications.¹²⁸

Feminism, though understood to be centrally about women, is also about men to the extent that freeing women from traditional roles will also involve changing the roles of men.¹²⁹ What finally do we mean by a man or a woman?¹³⁰ The question necessarily raises

¹²⁷ Minow, *supra* note 20, at 47.

¹²⁸ Minow, *Where Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987). While the "assignment of difference . . . marks the relationship between those who have the power to claim that theirs is the true perspective and those who have no such power[, there is also a] contrast between differences which are embraced [by the group] and those which are not." *Id.* at 175 n.211. Further, there is an "enduring historical and experiential weight of membership in groups considered different by those in power, weight that could well persist even if power relations change." *Id.*

This analysis, in the context of gender, may be useful in organizing private life, leading in some instances to various forms of female separatism.

For a discussion of the issue of "another inside" with reference to Jews, see Galanter, *Outside, Inside: Jewish Justices in the Homeless Society* (Book Review), 14 L. AND SOC. INQUIRY 507 (1989) (reviewing R. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988)).

¹²⁹ As in the case of (some) women, freeing men from role constraints may not be what they want (again, the cultural conditioning/ false consciousness issue). Who told the Chinese men, *see supra* note 38, what to find attractive? Who tells anyone? For a recent science-fiction treatment of gender and ideology, see S. TEPPER, *THE GATE TO WOMEN'S COUNTRY* (1988).

¹³⁰ See P. BROWN, *BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* 160-177 (1988).

Basic aspects of human beings, such as sexuality, sexual differences and other seemingly indestructible attributes of the person associated with the physical body struck Origen as no more than provisional

. . . . The body was poised on the edge of a transformation so enormous as to make all present notions of identity tied to sexual differences, and all social roles based upon marriage, procreation and childbirth seem as fragile as dust dancing in a sunbeam.

problems of group definition and membership. Yet, the issue is only beginning to be explored systematically in feminist work.

It may be that—with significant exceptions—feminist theory has not been forced to think in detail about issues of group membership,¹³¹ because women have been relatively comfortable with the initial sense of the group. That is, we thought that we knew who were women and who were men.¹³² Consideration of difference and social and self-definition¹³³ in the context of the handicapped, on the other hand, has rejected such assumptions and has stressed problems raised by the attribution of difference against an assumed norm. Neither approach (the apparently self-evident biological or the ascription theory) is sufficient when dealing with problems of religion, ethnicity or class.¹³⁴

If "How does an individual become a member of something?" is one question, the next question must be "What is the something?" How do we conceive the unit and its purposes, and who is "we"? We generally begin by assuming that groups are formed by consent; however, one finds that some groups do not believe that they are formed by consent. Rather, these groups see themselves as formed through some other process essentially involuntary, such as birth. Finally, some groups hold that, at least for certain purposes,

Id. at 167-68.

¹³¹ For consideration of Indian tribal membership, see Resnik, *supra* note 59 (noting problem that the "other" may not, in fact, be entirely that, but may be influenced by main system).

¹³² A certain complication on this issue is introduced by the question of transsexualism. See J. MORRIS, CONUNDRUM (1974).

Formerly we assumed that if it took a wise man to know his father, one at least could know his mother. New birth technologies, however, have introduced problems here as well.

¹³³ If the self is entirely social, what is the source of the self-definition?

¹³⁴ In the context of religion, the first observation must be that the idea that one chooses religion is fine if one is thinking, for example, about protestantism, or about the position which the state should take consistent with ideas of religious liberty. Choice of religion will not work as a descriptive statement of the ways in which religious membership is universally defined. As for ethnicity, one would have to confront the problems arising out of conflicts between citizenship and ethnic identification. Is it solved by hyphenation? By the view that citizenship is the only public identification and that ethnicity is, like religion, private from the point of view of the state? Is it altogether self definition? See generally B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); M. GALANTER, COMPETING EQUALITIES (1984). As for class, how does one begin? Is class a matter of objective or subjective inquiry? Actual income or how one feels? When is it measured? How careful a differentiation can we tolerate in a society officially without classes?

there is no exit option.¹³⁵

Individuals clearly have conflicting and overlapping group memberships and role identifications. Despite this, our conversation often focuses on small communities and groups as self-contained and autonomous. The model of the individual and the group becomes the individual, and the particular wholly encompassing group, the person who is one primary thing.¹³⁶ The idea of state intervention¹³⁷ on this model is analogized to the issues of humanitarian intervention in the international context—unit against unit—with a possible free exercise defense.¹³⁸ This is a significant perspective, but perhaps we ought to explore others. Women are

¹³⁵ See *Guinn v. Church of Christ*, 775 P.2d 766 (1989) (holding first amendment does not preclude tort action against religious group for emotional distress and invasion of privacy). "The Church of Christ believes that all its members are a family; one can be born into a family but never truly withdraw from it. A Church of Christ member can voluntarily join the church's flock but cannot then disassociate himself from it." *Id.* at 769. Is there confusion of biological and legal relationships in the reference to family? The court found that the plaintiff could withdraw from membership in part because she did not know that by joining the church, she was "relinquishing her civil right voluntarily to disassociate herself from that body." *Id.* at 777. On this point, the dissent argued implied consent. *Id.* at 795 (Hodges, J. dissenting). See also *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597 (1989) (holding Choctaw Indian children were "domiciled" on reservation even though they themselves were never physically present on reservation). Cf. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1086 (1987) (explaining idea of perpetual allegiance). "Early in our history Justice Story for the court argued that the 'general doctrine is that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens.'" *Id.* at 1086. A similar doctrine supported the British impressment of seamen. As a psychological matter, the "exit option" may also have a misleading sound of finality. See B. ZABLOCKI, *THE JOYFUL COMMUNITY* 282 (1971) (explaining that apostates refer to a "constant theme" in the lives of ex-Brudershof members: the "inability ever to completely break away").

¹³⁶ This model assumes that one group represents all of the individual's interests. David Truman noted on this point that

[t]he view of a group as an aggregation of individuals abstracts from the observable fact that in any society, and especially a complex one, no single group affiliation accounts for all of the attitudes of interests of any individual except a fanatic or a compulsive neurotic. No tolerably normal person is totally absorbed in any group in which he participates

D. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 508-09 (1971).

¹³⁷ For a discussion of the idea of state "intervention" in the family, see Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985). Another myth of intervention exists, mythical because of the fact of group interpenetrations with government. See Macaulay, *Private Government*, in L. LIPSON & S. WHEELER, *LAW AND THE SOCIAL SCIENCES* 445, 449 (1989).

¹³⁸ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing free exercise defense to compulsory school attendance).

mothers, daughters, sisters, wives, atheists, Christians, Jews, lawyers, teachers, scholars, critics, realists and formalists. We identify with many groups, without being defined completely either by any one group or, indeed, by all the groups of which we are members. To make this observation is to go no further than some of those who wrote early in the century.¹³⁹

Building on that work is the unfinished agenda of pluralism; it might be an appropriate one for feminist jurisprudence. Feminist scholarship which has thus far gone furthest on this question¹⁴⁰ tends to be concerned about problems raised by the omission of other groups from legal thinking and the dangers which arise, for example, when the experiences of white women are universalized. Feminists, however, have only begun to think again about the problems raised by considering generally what a group is or how it is constituted, or how groups relate to each other, or how individuals choose between competing group loyalties.¹⁴¹ Judith Resnik has noted that "[c]ommunitarianism is a popular word in legal academe today, but the word is used without much attention paid to the fact of a multitude of extant communities, with competing modes of being."¹⁴² It is also true that there is not much sense of the complexity of the social situation as to communities, for while some people identify with one community, probably many more see themselves as members¹⁴³ of several or even many, all of which make normative claims.

CONCLUSION

This Article has argued, in part, that feminist jurisprudence has

¹³⁹ The earlier generation of pluralists wrote, however, without the full benefit of American legal realism. If we assume that we represent the state in addressing the issue of membership, we might want to take the approach of the U.C.C. § 2-104 in defining merchants; that is, we do not ask who is a merchant in general, but we only ask with reference to some particular transaction or context.

¹⁴⁰ E.g., E. SPELMAN, *INESSENTIAL WOMAN* (1988).

¹⁴¹ See Follett, *Community is a Process*, 27 *PHIL. REV.* 576 (1919).

¹⁴² J. RESNIK, *supra* note 14, at 1926. Even within the limits of an inquiry based on gender, one feels that feminist jurisprudence, in general, has not even reliably reached the level of sophistication of George Simmel on this question when he noted the limit on female solidarity which might be created by the motherhood of sons. G. SIMMEL, *THE WEB OF GROUP AFFILIATIONS* 133-34 (R. Bendix trans. 1955). There may be many linkages stronger than gender. See W. THACKERY, *BARRY LYNDON* (1844).

¹⁴³ See B. BITTKER, *supra* note 134, at 91-105.

aspects which mark it as a professional legal enterprise focusing (inevitably?)¹⁴⁴ on the concerns of lawyers as well as the concerns of women while accepting the unique authority of official law. There are, however, certain aspects of feminist jurisprudence which open other issues and provide us with different agendas.

Problems of pluralism, like those outlined here, are not new problems in general or for American law. These were the problems that Joseph Story recognized in 1816 in *Martin v. Hunter's Lessee*.¹⁴⁵ Story stressed the "importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."¹⁴⁶ He concluded that "[i]f there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."¹⁴⁷ The lack of uniformity was the thing to be avoided. "The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution"¹⁴⁸

Some, though, have entertained the possibility that multiple interpretation may be equally valid under different public and private authorities, and equally authoritative within a particular system. The resulting situation is not deplorable, although it has difficulties. These difficulties are greater than those involved in governmental federalism, in which, however dispersed, power is finally seen to be allocated by an organized and recognized political authority. Alternative theories of law allow us to modify this hierarchical allocation;¹⁴⁹ the alternative images tend to be those of

¹⁴⁴ See Stanley Fish's discussion of anti-professionalism in S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERATURE AND LEGAL STUDIES* (1989).

¹⁴⁵ 14 U.S. (1 Wheat.) 304 (1816).

¹⁴⁶ *Id.* at 347.

¹⁴⁷ *Id.* at 347-48.

¹⁴⁸ *Id.* at 348.

¹⁴⁹ Psychological jurisprudence theories derived from Eugen Ehrlich (law of associations) and pluralism, recognize a significant role for official law. But they tend to stress the point that official law does not act on passive individual subjects. Thus Chester Bernard wrote: "Authority lies always with him to whom it applies." C. BERNARD, *supra* note 103, at 183.

harmony.¹⁵⁰

Finally, however, we might remember that "harmony" is itself culturally defined; what is recognized now as harmony in music was once called dissonance.¹⁵¹ We must begin with an exercise equivalent to ear training. Teaching us to hear the different lines and different narratives is a major emphasis and contribution of feminist jurisprudence. Perhaps it is too soon to judge the issue of ultimate harmony. The first task is to learn to hear the different parts.¹⁵²

¹⁵⁰ That harmony tends either to rest on something finally incomprehensible or millennial—the harmony simply is or will come to be—on an assumption of the ultimate singleness of human nature and human rationality. See Weisbrod, *Towards a History of Essential Federalism*, 21 U. CONN. L. REV. 979 (1989) (noting images of harmony in the utopian tradition).

What is the relationship of any of these ideas and images and the positive law of the state? Richard Kay writes: "Perhaps individuals, groups and governments really can co-exist with the sole security of mutual good will and self-restraint. But that is a risky proposition—one our society seems to have rejected in seeking to establish a rule of law." Kay, *Constitutional Cultures: Constitutional Law* (Book Review), 56 U. CHI. L. REV. 311, 325 (1990) (reviewing R.F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989)).

¹⁵¹ A. COPLAND, *supra* note 63, at 45 (discussing changing ideas of harmony).

¹⁵² "Practical" in the title of this paper means something about first steps, easy pieces, and using other categories to understand the world in a more complicated way than we often do at present. Another idea of practicality is about detailing ways of actually going the whole distance from here to there. Of course, it has always been obvious that from here to there is a problem-filled route, not least in relation to theories of the state. As Elster comments on Nozick, even the minimalist state might have to do quite a lot under the principle of rectification of past injustice. J. ELSTER, *MAKING SENSE OF MARX* 475 (1985). It might also have to do a lot in establishing the conditions—whatever they might be seen to be—of free choices, for men or women.