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## CIVIC VIRTUE AND THE FEMININE VOICE IN CONSTITUTIONAL ADJUDICATION

*Suzanna Sherry\**

A woman's writing is always feminine; it cannot help being feminine; at its best it is most feminine; the only difficulty lies in defining what we mean by feminine.<sup>1</sup>

WHAT is true of women's writing is also true of women's jurisprudence. This article contends that modern men and women, in general, have distinctly different perspectives on the world and that, while the masculine vision parallels pluralist liberal theory, the feminine vision is more closely aligned with classical republican theory, represented in its various forms by Aristotle, Machiavelli, and Jefferson. A feminine jurisprudence, evident, for example, in the decisions of Justice O'Connor, might thus be quite unlike any other contemporary jurisprudence. Emergence of a feminine jurisprudence might therefore influence whether academic calls for new (or rather recycled) jurisprudential theories based upon our classical republican tradition will ultimately have little impact or will usher in a paradigm shift in moral, political, and constitutional theory.

American political and jurisprudential theory has long repudiated its classical republican origins in favor of a highly pluralist liberal vision. Contemporary constitutional interpretation is thus grounded on a thoroughly individualist liberal philosophy. Modern historians, however, have recently refocused attention on the less individualist republican spirit animating the Revolution. This has led a number of constitutional scholars to advocate a return to the nation's early republican values in interpretation of the Constitution. In light of the liberal underpinnings of the last 200 years of

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<sup>1</sup> Virginia Woolf.

American jurisprudence and the depth of the original transformation from a republican to a liberal ideology, these scholars might be engaged in a futile exercise. This article suggests, however, that modern liberalism is a characteristically masculine response to the failure of Jeffersonian republicanism. Because the masculine perspective has been the dominant—and virtually the sole—influence on the legal and political structure, that structure is bound to reflect a more masculine or liberal emphasis on individualism over community. A feminine jurisprudence, instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society.

A full description of a feminine jurisprudence requires an examination of the modern liberal jurisprudence to which the feminine paradigm offers such a contrast. The article will first describe and differentiate the classical tradition from its modern counterpart, and briefly set out the transition from the former to the latter in the American context. It will then identify the characteristically modern framework of the three dominant contemporary schools of jurisprudence: conservatism, liberalism, and radicalism. Finally, the article will draw on feminist work in psychological and literary theory to sketch out the basic feminine alternative to the modern paradigm, and examine Justice O'Connor's opinions both to suggest the operation of a feminine paradigm and to sketch its possible contours in a jurisprudential or constitutional context.

## I. TWO PARADIGMS

Let us imagine two contrasting (and somewhat idealized) paradigms of political and moral philosophy.<sup>2</sup> The “modern” paradigm is individualist. The underlying theme of this atomistic vision is autonomy and separation. Individuals are seen as distinct units:

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<sup>2</sup> As I am using the term, a paradigm is that underlying belief structure common to all practitioners in a given discipline. See T. Kuhn, *The Structure of Scientific Revolutions* 10-11 (1962). A paradigm limits what can be perceived as a problem or solution and blinds those who work within it to alternative paradigms. *Id.* See S. Fish, *Is There A Text In This Class? The Authority of Interpretive Communities* 270-74 (1980); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *Tex. L. Rev.* 1307, 1346 (1979). Recent studies on expert decisionmaking processes suggest, moreover, that paradigms become so internalized that they are unrecognized even by astute experts trying to describe their own thought processes. See, e.g., Jolinson, *What Kind of Expert Should A System Be?*, 8 *J. Med. & Philos.* 77 (1983).

the individualist paradigm denies the possibility of intersubjective conceptions of self.<sup>3</sup> Thus, relationships among individuals, including the communities they form, are secondary. As Michael Sandel describes it: "[W]hat separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. We are distinct individuals first, and *then* we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity."<sup>4</sup>

The modern response to this basic human separateness can, in the context of epistemological and moral theory, take either of two forms. The more common is adoption of an essentially pluralistic and non-teleological view of human nature. This view holds that there is no unitary end toward which humans aspire, no transcendent concept of the good life. "[T]he variety and heterogeneity of human goods is such that their pursuit cannot be reconciled in any single moral order . . . ."<sup>5</sup>

If there is no human *telos* and no unitary moral order, the mechanism for mediating among competing individual interests must necessarily be abstract and universalizable, for it must be applicable to myriad individuals in unforeseeable circumstances. It cannot be contextual, for a contextual resolution of different interests presupposes an identifiable hierarchy of human values (e.g., one's rights "as a person" are more important than one's rights "as a woman").<sup>6</sup> Belief in such a hierarchy—or at least the utilization of

<sup>3</sup> Sandel defines intersubjective conceptions of self as those which "allow that in certain moral circumstances, the relevant description of self may embrace more than a single, individuated human being." M. Sandel, *Liberalism and the Limits of Justice* 62 (1982). The depth of the modern paradigm's rejection of this concept is illustrated by Charles Fried's comment that it is too "obscure" even to comprehend. Fried, Book Review, 96 *Harv. L. Rev.* 960, 966-67 (1983) (reviewing M. Sandel, *supra*).

<sup>4</sup> M. Sandel, *supra* note 3, at 133; accord D. Richards, *The Moral Criticism of Law* 51 (1977).

<sup>5</sup> A. MacIntyre, *After Virtue: A Study in Moral Theory* 133 (1981) (describing, but not advocating, modern liberal theory).

<sup>6</sup> For example, if all persons have a right to equal treatment, it might mean that women are entitled to no special dispensations as a result of their capacity to become pregnant: pregnancy may be excluded from an employer's medical or disability plans because both men and women then have the same medical coverage. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974). On the other hand, if gender (a more specific quality than personhood) is relevant, women may be entitled to greater medical coverage because of their capacity to become pregnant. See 42 U.S.C. § 2000e(k) (1982); Kay, *Models of Equality*, 1985 *U. Ill. L. Rev.* 39 (1985). Liberalism has a hard time resolving disputes at this level.

such a hierarchy to resolve differences within a society<sup>7</sup>—is incompatible with the pluralistic basis of the modern tradition. Moreover, a concern with context is also incompatible with the atomistic perspective of modernism: “[I]f individuals are distinct and not essentially connected with one another, then morality can be expected to concern itself not with the particularity of relationships among people, but with abstractly characterizable features of interactions among individuals whose natures are taken as given.”<sup>8</sup>

The modern paradigm must therefore encompass a system of abstract rules that recognizes both the priority of the individual and the likelihood that diversity will engender dispute. The modern political tradition has supplied just such a system. The concept of individual rights contains all the features required by an individualist political philosophy. Rights are abstract and universal, and are expected to resolve disputes without attending to the concrete attributes of the particular individuals involved. A rights-based theory does not require a unitary human *telos*, but instead allows each individual to develop and progress toward realization of his own values. Rights are the perfect mediating mechanism for a collection of individuals whose aims are essentially in conflict.

The alternative modern response to the separateness of individuals is to seek an abstract mediating principle at the level of describing human nature itself: to identify and justify abstract, transcendent human values. These values are epistemologically rational in that they are derived by intellectual means alone, and they are characteristically modern insofar as they are intentionally divorced from the contexts in which humans live. This transcendental method of avoiding contextual decisionmaking can derive its description of human nature from an abstract idealization of a

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<sup>7</sup> See, e.g., B. Ackerman, *Social Justice in the Liberal State* 10-12 (1980); A. MacIntyre, *supra* note 5, at 11, 235-37; M. Sandel, *supra* note 3; Dworkin, *Liberalism*, in *Public and Private Morality* 113, 142 (S. Hampshire ed. 1978).

<sup>8</sup> Scheman, *Individualism and the Objects of Psychology*, in *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* 225, 237 (S. Harding & M. Hintikka eds. 1983).

universal human *telos*,<sup>9</sup> from a contractarianism rationally deduced from humanity in the state of nature,<sup>10</sup> or from thin air.<sup>11</sup>

The modern paradigm thus reflects an infrastructure of independent, autonomous individuals, tied together by nothing more than the necessity of society. The particular characteristics of those individuals are irrelevant;<sup>12</sup> and thus the modern tradition has had to develop a transcendental approach to conflicts between individuals, focusing on the abstract rights of each rather than on the relationship between them.

The "classical" paradigm stands in radical contrast to the modern perspective. The central theme is connection rather than autonomy. The classical paradigm recognizes an intersubjective vision of self, insofar as "selves must be beings that exist in communities," and self-knowledge is a communal project.<sup>13</sup> Relationships among individuals are more important than the discrete, abstract individuals themselves. Thomas Jefferson, one of the last adherents of the classical paradigm,<sup>14</sup> described perfectly the contrast between the modern focus on individuals and the classical emphasis on relations among individuals:

<sup>9</sup> Modern philosophers fitting this description are rare: Alasdair MacIntyre is the best example. See A. MacIntyre, *supra* note 5. MacIntyre and Aristotle, from whom the former derives much of his philosophy, are in a peculiar position vis-a-vis the modern/classical dichotomy. Insofar as identifying a human *telos* represents a virtue-based, non-individualist philosophy, they illustrate the classical paradigm. However, as the text suggests, their adoption of *transcendent* human *teloi* translates easily into the modern paradigm of abstraction. Thus Aristotle, the father of the classical perspective, provides the seeds of both the modern masculine paradigm (insofar as it is abstract) and the feminine paradigm (insofar as it is teleological). The masculine paradigm abandons Aristotle's teleology, and the feminine paradigm abandons his transcendence.

<sup>10</sup> John Rawls may be thought to fit in this category (although his rights theories are also compatible with the more Dworkinian method of avoiding contextuality). See Krouman, Alexander Bickel's Philosophy of Prudence, 94 *Yale L.J.* 1567, 1600-01 (1985) (associating Rawls with Rousseau).

<sup>11</sup> See, e.g., R. Unger, *Passion* (1984).

<sup>12</sup> The modern paradigm views individuals as fungible "ciphers." See *Reynolds v. Sims*, 377 U.S. 533, 623 (1963) (Harlan, J., dissenting).

<sup>13</sup> See R. Eldridge, *The Situation of the Self: Waywardness, Self-Knowledge, Value, and Community in Wordsworth's Poetry* (unpublished manuscript, copy on file with Virginia Law Review Association).

<sup>14</sup> See *infra* notes 21-54 and accompanying text. Jefferson's library contained an extensive collection of works by both Aristotle and Machiavelli, the two seminal thinkers of the classical tradition as I am describing it. See E. Sowerby, *Catalogue of the Library of Thomas Jefferson* (1983).

Self-interest, or rather self-love, or *egoism*, has been more plausibly substituted as the basis of morality. But I consider our relations with others as constituting the boundaries of morality. With ourselves we stand on the ground of identity, not of relation, which last, requiring two subjects, excludes self-love confined to a single one. To ourselves, in strict language, we can owe no duties, obligation requiring also two parties. Self-love, therefore, is no part of morality.<sup>15</sup>

The classical tradition "entails the affirmation that *homo* is naturally a citizen and most fully himself when living in a *vivere civile*."<sup>16</sup>

Moreover, because humans are perceived fundamentally as members of a unitary community, it is possible to construct a shared *telos*. The community chooses and shapes its own aspirations from among competing visions of the good life, not by a mechanism of mediation, nor by abstract philosophizing, but by a conscious selection and ordering of values. The enduring values thus chosen are the product neither of mere interest calculus nor of rational thought divorced from reality, but rather an artistic or creative weaving of rational thought, intuition, and tradition. The classical paradigm is thus teleological, both in the generic sense of being goal-based and in the more specialized Aristotelian sense of envisioning a human end. This is not to suggest an Aristotelian *telos* that transcends history and society. It is instead to suggest an immanent *telos*: one defined in the context of the historically bound community that aspires to it.<sup>17</sup> The *telos* provides a context in which disputes can be resolved in individual cases, and there is less need to resort to a doctrine of abstract rights.

The modern and classical traditions thus exhibit three characteristic differences. First, modernism is atomistic where classicalism is holistic. In the modern paradigm, society is a collection of individuals; in the classical view, individuals are bits of society.

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<sup>15</sup> Letter to Thomas Law, June 13, 1814, in *The Complete Jefferson* 1032 (S. Padover ed. 1943).

<sup>16</sup> Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 *Pol. Theory*, Aug., 1981, at 353, 355.

<sup>17</sup> See *supra* note 9. For an elaboration of this difference between transcendent and immanent *teloi*, see R. Eldridge, *supra* note 13; cf. Kronman, *supra* note 10 (advocating, following Bickel, a contextual, experiential, or immanent moral/political system in contrast to a modern notion of a universal and abstract rationally-derived system).

Second, modernism is *either* pluralistic and thus necessarily non-teleological *or* transcendently teleological, while classicalism is unitarily but contextually (immanently) teleological. To describe fully a classical moral or political philosophy one must identify an immanent human *telos*; to describe a modern philosophy is to deny that such a *telos* exists. Third, modernism is abstract and therefore rule-based where classicalism is contextual. A theory of rights is only necessary—indeed only coherent—in the modern paradigm.<sup>18</sup>

A form of the classical paradigm dominated the political and moral theories of the Greek philosophers, culminating in the Aristotelian tradition. Aristotelian and Christian theories, both envisioning organic communities of virtue,<sup>19</sup> constituted the reigning paradigm for nearly two thousand years. The classical focus on human virtue and human community, however, failed to sustain a changing world, and self-interest captured the human imagination. The Enlightenment marked a paradigm shift, the beginnings of what became the modern individualist tradition.<sup>20</sup> Although the classical paradigm underlay one final post-Enlightenment experiment, the American Revolution, that flirtation with classical republican political thought also died, and Locke's Enlightenment liberalism—the political theory of the modern paradigm—ultimately formed the ideological basis of the American republic. The transformation of American ideology from classical republicanism to modern liberalism illustrates the failure of the classical tradition. That failure rests on a fundamentally pessimistic perception of human nature and a sadly alienated perception of self. From man as a virtuous (or at least perfectable) *zoon poli-*

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<sup>18</sup> MacIntyre describes the differences between the classical and modern traditions in similar fashion. See A. MacIntyre, *supra* note 5, at 146-47, 223-34; see also Oakeshott, *The Rule of Law*, in *On History and Other Essays* 125 (1983) (describing similar differences between "teleocratic" and "rule of law" societies).

<sup>19</sup> A number of scholars have compared Christianity, especially early Christianity, to the modern liberal tradition, identifying the former as closer to what I am describing as the classical paradigm. See J. Elstain, *Public Man, Private Woman: Women in Social and Political Thought* 56-79 (1981); N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984) (relying heavily on Martin Buber); see also Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 12-14 (1983) (identifying Judeo-Christian norms as "paideic" or communitarian). There are, of course, major differences between the two theories, and highly divergent variations within each tradition, but all are easily described, in contrast to the modern paradigm, as virtue-based and anti-individualist.

<sup>20</sup> See A. MacIntyre, *supra* note 5.



*tikon*, the modern paradigm moves to man as incorrigibly selfish and inevitably singular.

## II. THE DEMISE OF THE CLASSICAL PARADIGM IN AMERICAN HISTORY: FROM REVOLUTION TO RATIFICATION

In the last two decades there has been a "remarkable historiographic upheaval"<sup>21</sup> over the ideological origins of the American Revolution. Once thought to be thoroughly individualist in its outlook, the Revolution has been reinterpreted by contemporary historians "not as a Lockean effort to protect property from taxation and regulation but as a Machiavellian effort to preserve the young republic's 'virtue' from the corrupt and corrupting forces of English politics."<sup>22</sup> These historians thus find the origins of American revolutionary ideology in classical republicanism, primarily as envi-

<sup>21</sup> D. Winch, *Adam Smith's Politics: An Essay in Historiographic Revision* 29 (1978).

<sup>22</sup> J. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* 9-10 (1984). The most influential of these revisionist republican works include B. Bailyn, *The Ideological Origins of the American Revolution* (1967); J. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); G. Wood, *The Creation of the American Republic 1776-1787* (1969). The older, Lockean tradition is admirably represented by L. Hartz, *The Liberal Tradition in America* (1955). According to this interpretation, the founding fathers wholeheartedly endorsed the paradigm of the Enlightenment, rejecting classical notions of virtue and *polis*. Hartz confidently describes "the national acceptance of the Lockean creed, ultimately enshrined in the Constitution." *Id.* at 9.

There is a backlash against the republican revisionists. Both John Diggins and Isaac Kramnick dispute Pocock's description of the American Revolution as essentially Machiavellian. Kramnick merely finds the total rejection of any Lockean influence unpalatable. Kramnick, *Republican Revisionism Revisited*, 87 *Am. Hist. Rev.* 629 (1982). In his view, the American experience represented part of the ongoing paradigm shift initiated by the Enlightenment: English and American radicals "knew their Aristotle, their Machiavelli, and their Montesquieu. But they also knew their Locke." *Id.* at 664.

Diggins seems to deny that classical republicanism had *any* influence on the American revolutionaries, describing his most recent book as a "corrective to the pretensions of American virtue." J. Diggins, *supra*, at 15. He admits, however, that the rhetoric of the Revolution was republican and that the question of virtue as a foundation for the state was at least debated. See, e.g., *id.* at 24, 31. Moreover, most of his counter-republican illustrations center on the Constitutional era rather than the earlier revolutionary era and thus do not disprove the thesis that the original American paradigm was republican and became liberal only later. See, e.g., *id.* at 68, 77, 85-86, 97-98.

Diggins, unlike most modern historians, puts little faith in political rhetoric as illuminating ideology or reasons for action. See *id.* at 347-58; cf. Appleby, *What is Still American in the Political Philosophy of Thomas Jefferson?*, 39 *Wm. & M. Q.*, 3d ser., 287, 308 (1982) (denying that Jeffersonians were classical republicans, but admitting that Pocock and others "are surely correct to insist that civic humanism shaped the terms of political debate in the early national period").

sioned by Machiavelli. Within a short time, however, that ideology began to undergo a major transformation. Perhaps as early as 1787, or as late as the aftermath of the Civil War,<sup>23</sup> classical republicanism faded from the American political consciousness, to be replaced by the liberalism of Locke and Madison.

The contrast between the republican Revolution and the liberal Constitution is stark. Republicanism, unlike liberalism, exalts the good of the whole over the good of its individual members. Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values. The framing of the Constitution completed an ideological transformation from "the perhaps naive Jeffersonian faith in the capacity of the individual for self-development and self-restraint [to] the more generally accepted realism and consecration of self-interest which we associate with Alexander Hamilton."<sup>24</sup> The remainder of this section will describe that transformation.<sup>25</sup>

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<sup>23</sup> See, e.g., G. Wood, *supra* note 22, at 606 (1787 and the adoption of the Constitution signaled "the end of classical politics"); L. Banning, *The Jeffersonian Persuasion: Evolution of A Party Ideology* (1978) (liberalism triumphed no earlier than the end of the War of 1812); R. Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (1984) (classical politics ended with rise of Jacksonian democracy); D. Howe, *The Political Culture of the American Whigs 301-05* (1979) (republican or Whig values lasted until after Civil War); Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in *New Directions in American Intellectual History* 116, 122-29 (J. Higham & P. Conkin eds. 1979) (republicanism lingered through 1880's); J. Pocock, *supra* note 22, at 526-45 (classical influence and awareness of the "Machiavellian moment" continues to present day); cf. M. Horwitz, *The Transformation of American Law, 1780-1860*, at 253 (1977) ("Law, once conceived of as . . . a paramount expression of the moral sense of the community, had come [by 1850] to be thought of as facilitative of individual desires . . .").

<sup>24</sup> Katz, *Thomas Jefferson and the Right To Property in Revolutionary America*, 19 *J.L. & Econ.* 467, 487 (1976).

<sup>25</sup> The description of this transformation is of necessity generalized and somewhat simplistic. The framers, whether liberal or republican, were neither as monolithic nor as fundamentally antithetical as this description supposes. For an excellent discussion of the different strands of American republicanism, see Kelley, *Ideology and Political Culture From Jefferson to Nixon*, 82 *Am. Hist. Rev.* 531, 536-39 (1977). What I hope to create, however, is a heightened sense of three essential disputes: (1) whether society was an organic whole or a collection of individuals; (2) whether man was irretrievably self-interested or potentially virtuous and community-minded; and (3) whether the function of government was to define and safeguard the common good or protect individual liberties. I rely primarily on the work of historians and do not pretend to be making a new contribution in describing these con-

Three themes dominated the thought of the neoclassical American republicans: the good of the commonwealth as a whole, the subordination of individual interests through the promotion of civic virtue, and citizen participation in a deliberative, value-selective form of government.<sup>26</sup> These three themes were derived from classical republicanism and were the focus of the American revolutionaries and their English predecessors, the "country" party of Bolingbroke and Burgh.<sup>27</sup> Commonwealth, virtue, and an ordered system of values are, moreover, integrally and necessarily related to one another. The good of the commonwealth requires that citizens subordinate their private interests, and the fostering of civic virtue is the mechanism by which they may be expected to do so. Neither private virtue nor public good, however, can be defined in a vacuum: in the republican vision, a primary function of government is to order values and to define virtue, and thereby educate its citizenry to be virtuous.<sup>28</sup>

The republicans conceived of society in organic terms, viewing it

flicts or their ultimate resolution. Quotations from Adams, Jefferson, Madison, and the like are therefore used solely for their illustrative value, not their probative value.

<sup>26</sup> See Katz, *supra* note 24; J. Pocock, *supra* note 22, at 506-52; G. Wood, *supra* note 22, at 46-70, 91-124.

Several other aspects of republican thought must be distinguished as not relevant to the thesis of this article. First, a republican form of government meant (and still means) rule by the people rather than by a monarchy. See, e.g., The Federalist No. 39, at 250-51 (J. Madison) (J. Cooke ed. 1961) ("we may define a republic to be . . . a government which derives all its powers directly or indirectly from . . . the people"). This feature of republican theory, of course, not only survived but became the centerpiece of the liberal Constitution. Adherence to the republican concept of popular representation thus did not undergo any significant transformation. Second, even early Revolutionary thinkers had difficulty with the elitist, anti-egalitarian features of classical republicanism. Thus, the egalitarianism that creates such a dilemma for modern liberalism, see sources cited at *infra* note 119, was present from the beginning; again, no serious transformation was necessary. Finally, republicanism has also been associated with a bias against modern commerce and industry. Joyce Appleby notes that modern historians have "turned the Jeffersonians into nostalgic men fighting a rearguard action against the forces of modernity." Appleby, Commercial Farming and the "Agrarian Myth" in the Early Republic, 68 *J. Am. Hist.* 833, 835 (1982); see Horne, *Bourgeois Virtue, Property and Moral Philosophy in America, 1750-1800*, 4 *Hist. Pol. Thought* 317 (1983). The agrarian, anti-commercial aspect of republicanism is largely irrelevant to this article, except insofar as it suggests that republicanism is handicapped by its adulation of the past.

<sup>27</sup> See L. Banning, *supra* note 23, at 21-69; J. Pocock, *supra* note 22, at 406-22, 462-505; Murrin, *The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721) and America (1776-1816)*, in *Three British Revolutions: 1641, 1688, 1776*, at 368 (J. Pocock ed. 1980).

<sup>28</sup> See Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 36 (1985).

as an independent entity distinct from its members.<sup>29</sup> The common good was thus distinct from and paramount to the good of individuals. Thomas Paine identified this corporate vision of society with the definition of republicanism itself: "[T]he word *republic* means the *public good*, or the good of the whole, in contradistinction to the . . . good . . . of one man."<sup>30</sup> Samuel Adams, like Aristotle, metaphorically compared the body politic to the body human.<sup>31</sup> Thomas Jefferson placed societal needs above individual interest: "I [am] convinced [man] has no natural right in opposition to his social duties."<sup>32</sup>

In the early years of the Revolution, individual liberty was presumed to be synonymous with public liberty.<sup>33</sup> For classical republicans, individual fulfillment came from "sharing in a collective autonomy, a collective freedom and glory."<sup>34</sup> Another aspect of the classical vision of man as but a part of a larger whole was the notion of defining people by their social roles or functions.<sup>35</sup> This notion was echoed by the American republicans in their vision of the differing virtue, and thus the differing functions, of the "few" and the "many": the republicans envisioned a natural aristocracy.<sup>36</sup>

The classical design for virtue in government was thus a passion for the public good. The American revolutionaries recognized, however, that such a scheme of government could work only where individual citizens were imbued with a civic virtue that required subordination of private interest to public good.<sup>37</sup> Thomas Jefferson, as noted earlier, opposed virtue to self-interest: "Self-love . . . is

<sup>29</sup> See L. Banning, *supra* note 23, at 47; G. Wood, *supra* note 22, at 53-65.

<sup>30</sup> Paine, *Dissertations on Government*, etc. (1786), in 1 *The Complete Writings of Thomas Paine* 372-73 (P. Foner ed. 1945).

<sup>31</sup> See S. Adams, "Candidus," Feb. 3, 1776, in 3 *Writings of Samuel Adams* 266 (H. Cushing ed. 1906); 3 *The Life and Works of John Adams* 478-79 (C. Adams ed. 1865).

<sup>32</sup> Letter to Danbury Baptists, Jan. 1, 1802, in 8 *The Writings of Thomas Jefferson* 113 (H. Washington ed. 1864).

<sup>33</sup> G. Wood, *supra* note 22, at 63; Katz, *supra* note 24, at 482.

<sup>34</sup> H. Pitkin, *Fortune Is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli* 81 (1984); see *id.* at 80-105.

<sup>35</sup> See A. MacIntyre, *supra* note 5, at 114-22.

<sup>36</sup> See J. Pocock, *supra* note 22, at 515-17 (describing the republican conception of a "natural aristocracy" of the few, which would be discerned by the many democratically).

<sup>37</sup> L. Banning, *supra* note 23, at 107; see J. Diggins, *supra* note 22, at 10, 12; H. Storing, *What the Anti-Federalists Were For* 15-23 (1981); G. Wood, *supra* note 22, at 53-54; Howe, *Republican Thought and the Political Violence of the 1790s*, in *National Unity on Trial, 1781-1816*, at 73, 81 (E. Ferguson ed. 1970).

no part of morality. Indeed it is exactly its counterpart. It is the sole antagonist of virtue, leading us constantly by our propensities to self-gratification in violation of our moral duties to others."<sup>38</sup> John Adams described the relationship between public and private good:

Public virtue cannot exist in a nation without private, and public virtue is the only foundation of republics. There must be a positive passion for the public good, the public interest, honor, power, and glory, established in the minds of the people, or there can be no republican government, nor any real liberty; and this public passion must be superior to all private passions. Men must be ready, they must pride themselves, and be happy to sacrifice their private pleasures, passions, and interests, nay, their private friendships and dearest connections, when they stand in competition with the rights of society.<sup>39</sup>

The early republicans thus placed their faith in the virtue of the populace. A republic was made and maintained by the character and spirit of its people.<sup>40</sup> Jefferson wrote repeatedly that man was innately moral.<sup>41</sup>

If private virtue was to ensure public good, however, the function of government was to choose both the public good and the private virtue that supported it, "to select the values that ought to control public and private life."<sup>42</sup> Although apparently little dis-

<sup>38</sup> Letter to Thomas Law, *supra* note 15, at 1032-33.

<sup>39</sup> Letter to Mercy Warren, April 16, 1776, in *The Selected Writings of John and John Quincy Adams* 57-58 (A. Koch & W. Peden eds. 1946).

<sup>40</sup> See G. Wood, *supra* note 22, at 52-53; Katz, *supra* note 24, at 482; see also Jefferson, Notes on the State of Virginia, Query XIX, at 225 (1803) ("It is the manners and spirit of a people which preserve a republic . . ."); Jefferson, Letter to Elbridge Gerry, March 29, 1801, in *8 Writings of Thomas Jefferson* 40, 43 (P. Ford ed. 1897) ("the steady character of our countrymen is a rock to which we may safely moor").

<sup>41</sup> The best example is a letter to his nephew written in 1787:

Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense of right and wrong merely relative to this. This sense is as much a part of his nature, as the sense of hearing, seeing, feeling . . . It is given to all human beings in a stronger or weaker degree . . . It may be strengthened by exercise, as may any particular limb of the body.

Letter to Peter Carr, Aug. 10, 1787, in *12 The Papers of Thomas Jefferson* 14 (J. Boyd ed. 1955); see Letter to John Adams, Oct. 14, 1816, in *15 The Writings of Thomas Jefferson* 73, 76 (A. Lipscomb & A. Bergh eds. 1903); Letter to Thomas Law, *supra* note 15, at 1032.

<sup>42</sup> Sunstein, *supra* note 28, at 31 (quotation from unedited manuscript at 5); see also Michelman, Politics and Values or What's Wrong With Rationality Review, *13 Creighton L. Rev.* 487, 509 (1985) (in Rousseauian republican vision "values are an intended *outcome* of

cussed, the anti-pluralist nature of republicanism follows inevitably from its anti-individualism. Only where the object of government is to promote individual goods and interests can diverse, idiosyncratic value systems be accommodated. In the unitary community envisioned by classical republicans, both public good and private virtue must be defined by the commonwealth as a whole. Individual liberty may mean the right to pursue private goods; public liberty must mean the right to participate in defining public good. Thus, an important object of republican government is the structuring of a shared *telos*, a common value system for citizens and their community.<sup>43</sup>

This notion of community values was so closely tied to the notion of virtue itself that it was rarely made explicit. There are, however, some indications in republican writings that a primary end of government was to select the values that would promote a virtuous citizenry. The chief object of government, according to one anti-federalist, should be the "the attainment of virtue, and happiness among ourselves."<sup>44</sup> The anti-federalist insistence that only a small, homogeneous republic could succeed also suggests the anti-pluralist foundation of republicanism.<sup>45</sup> Wisdom and judgment in both the populace and its representatives was seen as a necessary prerequisite to good government.<sup>46</sup> Without these qualities, no nation could be expected to structure its values. The American Senate, "the repository of classical republican honor and wisdom,"<sup>47</sup> served the same deliberative function. Moreover,

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politics; they are public as well as private in origin, originating in political engagement and dialogue as well as in private experience").

<sup>43</sup> Diggins suggests that American republicanism failed in part because its sponsors lacked such a moral vision or *telos*. J. Diggins, *supra* note 22, at 31.

<sup>44</sup> "Brutus," Jan. 3, 1788, in *The Anti-Federalist* 145, 146 (H. Storing ed., abridgement by M. Dry, 1985).

<sup>45</sup> See *infra* note 52 and accompanying text.

<sup>46</sup> J. Diggins, *supra* note 22, at 26-28.

<sup>47</sup> G. Wood, *supra* note 22, at 209; see H. Storing, *supra* note 37, at 61 (discussing federalist responses to anti-federalist criticisms of separation of powers: "The sole intention of [the separation] is to produce wise and mature deliberation."); G. Wood, *supra* note 22, at 208-20. Although this is not, of course, the only function the republicans envisioned for the Senate, even the property-protecting function of the upper house is a far cry from its function as envisioned by the liberal federalists:

The remedy for this inconveniency [the disproportionate strength of the legislature] is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each

the people's participation in the process of selecting values for the community might itself foster individual virtue. A belief in an ordered system of values was thus both a corollary to and an outcome of a reliance on individual virtue.

The notion of common good maintained by a virtuous citizenry was, however, beset by contradictions. Republicanism held that true liberty could only be maintained by the security of property. Yet property would beget wealth, which, when concentrated in the hands of the few, would be destructive of virtue and freedom. Republicanism's predicament lay between the promotion of collective liberty through a system of private property and fear of the corrupting influences of luxury.<sup>48</sup> In locating the authority of government in the governed, republicanism created another dilemma: what would move an uncoerced citizenry to obey?<sup>49</sup> "The republican conundrum was thus how to change the flow of authority from top-down to bottom-up; the republican solution was that obedience must be internalized."<sup>50</sup> Yet the doctrine of civic virtue provided only a partial answer. Jefferson, for example, in advocating pursuit of the virtuous life, never confronted the potential conflict between individual and societal definitions of virtue.<sup>51</sup>

The new republicans also faced a problem unique to America. Republics had always been small, and republicanism assumed that only in small communities could there develop a homogeneity of interest and passion for the public good. The American revolutionaries had to reconcile this republican ideal with the seemingly unlimited geography of the American continent.<sup>52</sup> Finally, Americans were wholly ambivalent about their own nature: did their rusticity and distance from England make them "natural republicans," or

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other, as the nature of their common functions, and their common dependence on the society, will admit.

The Federalist No. 51, at 350 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

<sup>48</sup> See G. Wood, *supra* note 22, at 64-65; Katz, *supra* note 24. For attempted reconciliations of this tension, see J. Pocock, *supra* note 22, at 533-39; Katz, *supra* note 24.

<sup>49</sup> See G. Wood, *supra* note 22, at 66-67; Katz, *supra* note 24, at 482.

<sup>50</sup> Katz, *supra* note 24, at 482.

<sup>51</sup> J. Diggins, *supra* note 22, at 41-42.

<sup>52</sup> For the classic formulation of this small republic theory, see C. Montesquieu, *The Spirit of the Laws* 20-22, 40-48 (Paris 1748) (T. Nugent trans. 1949). For other discussions of this theory, see L. Banning, *supra* note 23, at 107; J. Diggins, *supra* note 22, at 48-49, 65; G. Wood, *supra* note 22, at 473, 502-05; Howe, *supra* note 37, at 84.

was their virtue in jeopardy from within?<sup>53</sup> Despite these recognized problems, there seemed little doubt in 1776 that America would be a republic, and all those committed to republicanism shared essentially the theory of government described above.<sup>54</sup>

By the time of the Constitutional Convention of 1787, that picture of virtually unanimous enthusiasm for classical republican politics had changed drastically. The central factor in the crisis was republicanism's utter dependence "upon a virtuous citizenry."<sup>55</sup> Republicanism was totally dependent on civic virtue to obligate citizens to the public good.<sup>56</sup> In the years of the Articles of Confederation, the founders began to reject the ideals of republicanism because of a perceived licentiousness and lack of virtue among the people. At least as early as 1782, Hamilton attacked the notion of republican virtue: "We may preach till we are tired of the theme . . . ."<sup>57</sup> Virtue, he warned in 1788, would become an appendage of wealth—only the wealthy, being more learned and of better moral character than the poor, would maintain virtuous practices.<sup>58</sup> Man was selfish, and any hope for public interests would have to come from private interests.<sup>59</sup>

Hamilton, Madison, and others began to see human motivations, rather than an education in virtue, as the means by which to control politics and society. The fear of popular corruption, and the construction of government mechanisms to combat it, runs throughout *The Federalist* and other contemporaneous writings.<sup>60</sup> During the ratification debates, both the federalists and the anti-federalists defended their position as the one better able to combat

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<sup>53</sup> See G. Wood, *supra* note 22, at 123.

<sup>54</sup> *Id.* at 60, 91-93.

<sup>55</sup> J. Diggins, *supra* note 22, at 24.

<sup>56</sup> G. Wood, *supra* note 22, at 92.

<sup>57</sup> *The Continentalist* No. 6, July 4, 1782 in 3 *The Papers of Alexander Hamilton* 103 (H. Syrett & J. Cooke eds. 1962).

<sup>58</sup> Hamilton, Address before the New York Ratifying Convention of Poughkeepsie, New York, June 21, 1788, in 5 *The Papers of Alexander Hamilton* 36, 42-43 (H. Syrett & J. Cooke eds. 1962). Hamilton's notion that wealth would promote virtue shows how far the nation's ideology had changed from the original fear of wealth as corruptive.

<sup>59</sup> See G. Stourzh, *Alexander Hamilton and the Idea of Republican Government* 70-71 (1970).

<sup>60</sup> See, e.g., *The Federalist* No. 10 (J. Madison); *The Federalist* No. 15, at 96 (A. Hamilton) (J. Cooke ed. 1961) ("Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint."); L. Banning, *supra* note 23, at 89-91; J. Diggins, *supra* note 22, at 87-98.



and control "the natural lust of power so inherent in man."<sup>61</sup>

Even so staunch a republican as John Adams at times lost faith in the people:

One is . . . astonished at the reflection of Machiavel, 'Such was the spirit of patriotism amongst them in those days, that they cheerfully gave up their private interests for the public good,' when every page of his history shows, that the public good was sacrificed everyday, by all parties, to their private interests, friendships, enmities.<sup>62</sup>

Thomas Jefferson, the patron saint of American republicanism, may have experienced a similar disillusionment. As early as 1776, he expressed doubts about the security of a classical republic: "The fantastical idea of virtue and the public good being a sufficient security to the state . . . I assure you was never mine."<sup>63</sup> At least one reading of his philosophy suggests that by the time of his presidency, he had thoroughly assimilated Madisonian liberalism.<sup>64</sup>

The federalists therefore hoped to create a republican government that did not require virtuous citizens for its sustenance.<sup>65</sup> Assuming that man would not be virtuous, they sought to change human conduct even though human nature was fixed.<sup>66</sup> John Adams, for example, was intent on exploiting "talent and control[ing] power through the Christian sin of pride, utilizing the

<sup>61</sup> George Mason of Virginia, in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia, in 1787*, at 32 (J. Elliot 2d ed. 1836); see Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government, in National Unity on Trial, 1781-1816*, at 11, 20-21, 33-35 (E. Ferguson ed. 1970).

<sup>62</sup> John Adams, 2 *A Defense of the Constitutions of Government of the United States of America* 109 (1787-88).

<sup>63</sup> Thomas Jefferson to Edmund Pendleton, Aug. 26, 1776, in *The Portable Thomas Jefferson* 357 (M. Peterson ed. 1975); see also Letter to Dupont de Nemours, April 24, 1816, in 14 *The Writings of Thomas Jefferson* 487 (A. Lipscomb & A. Bergh eds. 1903) ("[T]he human character . . . requires in general constant and immediate control, to prevent its being biased from right by the seductions of self-love.").

<sup>64</sup> See L. Banning, *supra* note 23, at 89; Katz, *supra* note 24, at 487; cf. Appleby, *supra* note 22, at 289-91 (Jefferson's infatuation with Montesquieu's theories was waning by 1790); Grampp, *A Reexamination of Jeffersonian Economics, in National Unity on Trial, 1781-1816*, at 209 (E. Ferguson ed. 1970) (Jefferson's economic theories also changed).

<sup>65</sup> See *The Federalist* No. 51, at 351-52 (A. Hamilton or J. Madison) (J. Cooke ed. 1961); L. Banning, *supra* note 23, at 99, 107; J. Diggins, *supra* note 22, at 6; D. Epstein, *The Political Theory of The Federalist* 45 (1984); J. Pocock, *supra* note 22, at 522-23; G. Wood, *supra* note 22, at 432, 473, 502-05, 535-47, 559-60; Katz, *supra* note 24, at 487.

<sup>66</sup> G. Wood, *supra* note 22, at 475.

love of praise as a surrogate for reason and virtue."<sup>67</sup> Adams abandoned the concept of virtue as a *cause* of a republic and a "well-ordered constitution," instead seeing virtue as an *effect* of good government.<sup>68</sup> A well ordered constitution required a balance of powers to check the tendency toward tyranny and corruption; an unvirtuous citizenry could not be relied upon to do so.

Madison turned the large size of the new republic to his advantage by arguing that the size would prevent the formation of factions and thus protect the government from corruption.<sup>69</sup> Madison was convinced that factions were due to the "unequal distribution of property," which gave rise to "unfriendly passions" and "violent conflicts."<sup>70</sup> Because this was the "natural" condition of man, the Republic could be preserved only by the "machinery of government."<sup>71</sup> If character would not save the Experiment, structure would; if not virtue, operation. In an age of empiricism, the founders measured their ideal of a virtuous citizen against the citizens of their time. The incongruence of ideal and reality led to a government based on a deeply pessimistic view of human nature as irretrievably self-interested.<sup>72</sup>

In abandoning virtue as the basis of good government, the framers also shifted the purpose of government from perfecting human virtue to promoting individual desires. Despairing of the nobility of human nature, the founders constructed a constitutional structure designed to withstand and cater to its baser aspects.<sup>73</sup> The purpose

<sup>67</sup> J. Diggins, *supra* note 22, at 71.

<sup>68</sup> *Id.* at 70-71.

<sup>69</sup> See *The Federalist* No. 10 (J. Madison); Sunstein, *supra* note 28.

<sup>70</sup> *The Federalist* No. 10 at 59 (J. Madison) (J. Cooke ed. 1961).

<sup>71</sup> J. Diggins, *supra* note 22, at 53 (citing *Federalist* No. 51).

<sup>72</sup> Gordon Wood's description of the depth of the transformation cannot be improved upon:

[The Lockean] image of a social contract formed by isolated and hostile individuals was now the only contractual metaphor that comprehended American social reality. . . .

. . . .

. . . The Constitution represented both the climax and the finale of the American Enlightenment, both the fulfillment and the end of the belief that the endless variety and perplexity of society could be reduced to a simple and harmonious system. By attempting to formulate a theory of politics that would represent reality as it was, the Americans of 1787 shattered the classical Whig world of 1776.

G. Wood, *supra* note 22, at 601-02, 606.

<sup>73</sup> As stated by one commentator: "Between Machiavelli and Locke lies the dilemma of American politics. Classical political philosophy aims to discipline man's desires and raise

of government was to protect private aims and interests.<sup>74</sup> The "principal task of modern [l]egislation" was not the ennobling of the human spirit but "[t]he regulation of these various and interfering interests."<sup>75</sup>

At best, this theory of government exalts the isolated individual over the member of a community by shifting the function of government from promoting or perfecting human nature to protecting the exercise of individual human nature. Both Madison and the later Jefferson put this private, self-directed individual ahead of the community. "Justice," wrote Madison, "is the end of government. It is the end of civil society."<sup>76</sup> Madison's conception of justice meant "the protection of each man's faculties,"<sup>77</sup> and thus rejected as a governmental function the deliberately selective *perfecting* of those faculties.<sup>78</sup>

A more cynical interpretation of *The Federalist* and of the Constitution it defends finds not even this regard for individual faculties, but rather an almost Hobbesian view of human existence as "nasty, brutish and short."<sup>79</sup> Despite all the rhetoric in *The Federalist* about justice, the Constitution is defended primarily on its ability to secure safety and prosperity. Jay introduced the first fourteen papers as addressing the need to provide for "the preservation of peace and tranquility . . . against dangers from *foreign arms and influence*, [and against] dangers of the *like kind* arising from domestic causes."<sup>80</sup> Papers three through ten accordingly ad-

him far above his vulgar wants; liberalism promises to realize desires and satisfy wants. The first is more noble, the second more attainable." J. Diggins, *supra* note 22, at 16.

<sup>74</sup> There is some debate about whether man's private interests were primarily economic or political. See generally D. Epstein, *supra* note 65. In either case, the interests were self-centered, not altruistic, and thus inconsistent with republican virtue.

<sup>75</sup> *The Federalist* No. 10, at 59 (J. Madison) (J. Cooke ed. 1961).

<sup>76</sup> *The Federalist* No. 51, at 352 (J. Madison or A. Hamilton) (J. Cooke ed. 1961).

<sup>77</sup> D. Epstein, *supra* note 65, at 86.

<sup>78</sup> See *id.* at 79, 84-85, 162-63. Despite his thesis that Madison and the federalists also sought to protect the good of the commonwealth, Epstein acknowledges that promoting individual faculties was Madison's "more fundamental end." *Id.* at 163. Jefferson's belief that the end of government was the promotion of individual capacities is more difficult to document by reference to specific passages, but one author has concluded that "Jefferson wanted government to offer protection to the personal realm where men might freely exercise their faculties." Appleby, *supra* note 22, at 293. How much Jefferson actually changed his views is open to some debate.

<sup>79</sup> T. Hobbes, *Leviathan* 97 (1952) (reprinted from 1651 ed.).

<sup>80</sup> *The Federalist* No. 3, at 13-14 (J. Jay) (J. Cooke ed. 1961).

dress the propensity of the proposed union to safeguard against these dangers, and eleven through thirteen address the economic advantages of union. In number fourteen, Madison summarized the benefits of a union in language that again stresses security at the expense of civilization:

We have seen the necessity of the union, as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the old world; and as the proper antidote for the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own.<sup>81</sup>

Protection of individual rights, when discussed in any but the most rhetorical terms, is left to the states.<sup>82</sup> Human potential and human aspirations to higher values are left untouched. Even the authors of *The Federalist* implicitly admitted that this is a sad "reflection on human nature."<sup>83</sup>

Based on the "psychology of temptation and the politics of suspicion,"<sup>84</sup> the Constitution of 1787, and especially the Bill of Rights of 1789, represent a triumph of modern liberalism over classical republicanism.<sup>85</sup> Individualism had become the founda-

<sup>81</sup> The Federalist No. 14, at 83 (J. Madison) (J. Cooke ed. 1961). To complete the triad, Hamilton also described the objects of government similarly:

The Principal purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries.

The Federalist No. 23, at 146-47 (A. Hamilton) (J. Cooke ed. 1961).

<sup>82</sup> See The Federalist No. 17, at 105-06 (A. Hamilton) (J. Cooke ed. 1961) (identifying "the administration of private justice" as one of the reasons that state governments command greater popular affection and loyalty than will the federal government).

<sup>83</sup> The Federalist No. 51, at 349 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

<sup>84</sup> J. Diggins, *supra* note 22, at 74.

<sup>85</sup> For a discussion of the liberal nature of the Constitution, see, e.g., G. Wood, *supra* note 22, at 430-564. But see *infra* note 149 (suggesting different interpretation of the Constitution). For detailed discussions of the liberal origins of parts of the first and fifth amendments, see Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 *Yale L.J.* 694, 704-05 (1984); Note, Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of The Self, 97 *Harv. L. Rev.* 1468, 1471-72, 1475-85 (1984) [hereinafter cited as Note, Reinterpreting the Religion Clauses]; see also *Walters v. National Ass'n of Radiation Survivors*, 53 *U.S.L.W.* 4947, 4965 n.18 (U.S.

tion of the Republic,<sup>86</sup> whereas in 1776 it was anathema to it. Because the ancient republics had died, and because it appeared that this new republic might also succumb to corruption, Americans adopted the individualism of Locke over the Republic of Machiavelli and Harrington.<sup>87</sup>

This early American partiality to an individualist ideology foreshadowed a jurisprudential tradition that has lasted almost two centuries. Individual autonomy serves as the underlying paradigm for virtually the entire modern American jurisprudential tradition. The next section of this article attempts to demonstrate that the three major schools of contemporary American jurisprudence, although they differ on virtually everything else, share this common paradigm.<sup>88</sup>

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1985) (Stevens, J., dissenting) (“[A]ll of the checks and balances [of the Constitution] are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.”).

<sup>86</sup> Madison wrote that it might be “unfavorable to liberty” if each individual were to become “insignificant . . . in his own eyes.” National Gazette, Dec. 19, 1791, *in* 14 The Papers of James Madison 170 (R. Rutland, T. Mason, et. al. eds. 1983).

<sup>87</sup> At least one interpretation suggests that the classical paradigm was once again briefly and unsuccessfully revived in the anti-federalist triumph of 1800. See L. Banning, *supra* note 23, at 273-302. On both sides of the Atlantic, the classical paradigm survived underground—in literature—for a time after its political demise. See generally R. Ferguson, *Law & Letters in American Culture* 96-195 (1984) (reviewing the strains in American literature during the early 1800’s.); R. Eldridge, *supra* note 13.

<sup>88</sup> What follows in the text is necessarily a highly simplified description of the three schools of jurisprudence. I have, however, tried to retain the essence of each school. For an insightful elaboration upon liberalism and radicalism, as described in the text, see Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. Rev. 1103 (1983). I am identifying Robert Nozick as the prime example of the third, neo-conservative school, which is not included in Shiffrin’s analysis.

At least one political philosopher has drawn paradigm lines quite differently. In his introduction to a collection of essays on Nozick’s theories, Jeffrey Paul identifies Rawls’ “distributivist liberalism” as the “current ideological paradigm” and suggests that Nozick’s vision of the minimal state is “a wholly new conceptual paradigm.” *Reading Nozick: Essays on Anarchy, State, and Utopia* 2 (J. Paul ed. 1981). My thesis is that Nozick and Rawls share the deeper underlying paradigm of autonomy, which cannot be perceived absent the illumination of a contrasting, classical paradigm. Anthony Kronman also has noticed the common grounding of the otherwise different schools of jurisprudence; he notes that Bruce Ackerman, Roberto Unger, and Richard Posner all adhere to “some independent scheme of values based only upon reason and a few elementary propositions regarding the nature of the human species.” Kronman, *supra* note 10, at 1572.

### III. THE JURISPRUDENCE OF THE MODERN PARADIGM: FROM NOZICK TO UNGER

#### A. *Conservative Jurisprudence: Nozick*

Robert Nozick's minimal state is an archetypal example of the consequences of an individualistic philosophy. He identifies as his "root idea" the fact that "there are different individuals with separate lives," and asserts that all valid moral and political philosophy must "reflect the fact of our separate existences."<sup>89</sup> The minimal state is merely a method of allowing each individual to reach the highest form of individuality:

The minimal state treats us as inviolate individuals . . . ; it treats us as persons having individual rights with the dignity this constitutes. . . . [This treatment] allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity. How *dare* any state or group of individuals do more. Or less.<sup>90</sup>

Nozick denies entirely the validity of any doctrine that recognizes connection or community as a separate and valuable principle:

But why may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm . . . . In each case, some cost is borne for the sake of the overall social good. . . . But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits others. Nothing more.<sup>91</sup>

Nozick thus perfectly illustrates the first tension between the mod-

<sup>89</sup> R. Nozick, *Anarchy, State, and Utopia* 33 (1974); see Nagel, *Libertarianism Without Foundations*, in *Reading Nozick: Essays on Anarchy, State, and Utopia*, 191, 193 (J. Paul ed. 1981).

<sup>90</sup> R. Nozick, *supra* note 89, at 333-34.

<sup>91</sup> *Id.* at 32-33. This rejection of the concept of a social entity, distinct from the individuals who make it up, is not limited to Nozick; at least one of his severest critics belittles the idea of a social entity while affirming the necessity of balancing harms and benefits. See Nagel, *supra* note 89, at 197; see also J. Rawls, *A Theory of Justice* 264 (1971) (using individualistic concepts to develop a concept of community).

ern and classical traditions: his minimalist state is based on a wholly atomistic philosophy, with no room for collectivity.

This preference for individualism and its concomitant need for mediating devices is also embodied in the contemporary law and economics movement: "The economist rejects absolutes: what is good is what the individual prefers; a good society is one that maximizes freedom of choice. The economists' values speak to the question of *how* society should be organized in order to satisfy individual desires, whatever they may be."<sup>92</sup>

### *B. Liberal Jurisprudence: Rawls and Dworkin*

The essence of the myriad traditions that make up modern liberalism is also atomistic. That liberal political philosophy takes autonomy as an underlying principle is almost a truism.<sup>93</sup> Ronald Dworkin has recognized that liberal theories, including both his own and that of Rawls, are what he calls "rights-based", as opposed to "goal-based."<sup>94</sup> As he explains the distinction, rights-based theories<sup>95</sup> "place the individual at the center," while goal-

<sup>92</sup> Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 *Ind. L.J.* 426, 452 (1975).

<sup>93</sup> For statements in general support of the proposition, see, e.g., J. Elstain, *supra* note 19, at 14-16; M. Sandel, *supra* note 3, at 11; R. Unger, *Knowledge & Politics* 21-22 (1975); Dworkin, *supra* note 7, at 259-65; Eisenstein, *The Sexual Politics of the New Right: Understanding the "Crisis of Liberalism" for the 1980s*, in *Feminist Theory: A Critique of Ideology* 77, 79 (N. Keohane, M. Rosaldo, & B. Gelpi eds. 1982) [hereinafter cited as *Feminist Theory*]; Johnson, *Do You Sincerely Want To Be Radical?*, 36 *Stan. L. Rev.* 247, 256 (1984); Klare, *Judicial Deradicalization of The Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 *Minn. L. Rev.* 265, 276 & n.36 (1978); Nagel, *supra* note 89; Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 *Soc. Theory & Prac.* 461, 465 (1980); Shiffrin, *supra* note 88, at 1145 & n.144; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 783-85 (1983); Note, *Reinterpreting the Religion Clauses*, *supra* note 85, at 1471. But see F. Schauer, *Free Speech: A Philosophical Enquiry* 47-48 (1982) (noting that much of liberal doctrine emphasizes "the interests of society at large rather than . . . the interests of the individual). Isaiah Berlin drew an illuminating distinction between autonomy and heteronomy, or dependence on the external world, suggesting that the former, although not exclusive, is the "essence" of mankind. I. Berlin, *Two Concepts of Liberty* 21-22 (1958); accord, Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1392 (1984).

<sup>94</sup> See Dworkin, *supra* note 7, at 168-77, 204-05; M. Sandel, *supra* note 3, at 66, 138.

<sup>95</sup> Dworkin also identifies another type of individualist theory as "duty-based". The main difference between the two is that a rights-based theory focuses on the individual's independence of choice, while a duty-based theory is concerned with the individual's adherence to a moral standard. Both, unlike goal-based theories, are centered on the individual, and the two differ only in whether the emphasis is on individual conformity or individual indepen-

based theories are more concerned with community well-being than with individual welfare.<sup>96</sup> Although Dworkin admits that this classification is rather crude, it serves to highlight the difference between the individualistic modern paradigm and the communitarian classical paradigm.

The connection between liberalism and an atomistic conception of self goes much deeper than the difference between rights-based and goal-based theories of justice. The very primacy of justice in the liberal political philosophy is itself a manifestation of liberals' concern for individual values over fraternal values.<sup>97</sup> Michael Sandel's telling critique of John Rawls' theory of justice illustrates how an obsession with justice is only necessary in an ethos in which individuals are seen as separate and in conflict.<sup>98</sup> Rawls, like Dworkin, builds his entire jurisprudence around an individualistic conception of human nature.<sup>99</sup> He rejects utilitarianism because it "does not take seriously the distinction between persons,"<sup>100</sup> and devises a "veil of ignorance" to ensure that those who would agree

dence. Dworkin, *supra* note 7, at 171-72. Modern duty-based theories are comparatively rare. They might be characterized as a less mature version of either a rights-based or a goal-based theory. See *infra* notes 202-209 and accompanying text.

<sup>96</sup> Dworkin, *supra* note 7, at 172.

<sup>97</sup> As described by Michael Sandel:

'Deontological liberalism' is above all a theory about justice, and in particular about the primacy of justice among moral and political ideals. Its core thesis can be stated as follows: society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good . . .

See M. Sandel, *supra* note 3, at 1. Although Sandel offers a persuasive critique of Rawls' deontological individualism, his own project is less successful because he fails to adequately integrate community and intersubjectivity into his political theory. See Sagoff, Book Review: *The Limits of Justice*, 92 *Yale L.J.* 1065, 1080 (1983) (reviewing M. Sandel, *supra* note 3).

<sup>98</sup> Sandel contrasts Rawls' well-ordered society, with its emphasis on distributive justice, with the family, in which altruism and concern for others obviate the need for a developed theory of justice; he suggests that enforcing "justice" in a family situation is in fact destructive. M. Sandel, *supra* note 3, at 33; see Hardwig, *Should Women Think in Terms of Rights?*, 94 *Ethics* 441, 447 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983).

<sup>99</sup> See, e.g., J. Rawls, *supra* note 91, at 251-57, 264; M. Sandel, *supra* note 3, at 10-11, 51-52, 61-64, 133, 148-49 (1982); Nagel, *Rawls on Justice*, in *Reading Rawls: Critical Studies of A Theory of Justice* 1, 9-10 (N. Daniels ed. 1974).

<sup>100</sup> J. Rawls, *supra* note 91, at 27.



to the basic terms of his contractarian system of justice remain uninfluenced by social constraints.<sup>101</sup>

Moreover, one of the constraints of Rawls' "original position" (the blind state of nature from which he derives the contractual terms of justice) is that the participants are mutually disinterested, without reason to further the interests of others.<sup>102</sup> The depth of Rawls' attachment to this individuated conception of the self may be seen in his characterization of benevolence as a "second-order" notion. Determined to incorporate only widely shared propositions into his original position, Rawls assumes with little argument that benevolence, or concern for the interests of others, is not sufficiently embedded in human nature to find a place in the original position.<sup>103</sup> The modern paradigm exalts a devotion to one's own interests; a contemporary version of the classical paradigm, on the other hand, might consider benevolence a widely shared human trait.

Dworkin denies, although not very convincingly, that his version of liberalism adopts an atomistic or individualistic view of human nature.<sup>104</sup> Rawls does not deny that his theory is individualistic but argues that it is not incompatible with communitarian ideals.<sup>105</sup> The main premise of his argument for community is that only through union with others can an individual become complete.<sup>106</sup> Even this premise, however, is a weak endorsement of communitarian values because, as Sandel has noted, it presupposes distinct individuals with different needs and interests as the measuring unit.<sup>107</sup> Moreover, Rawls' premise that individuals "are to deliber-

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<sup>101</sup> See Scanlon, Rawls' Theory of Justice, *in* Reading Rawls: Critical Studies of A Theory of Justice 169, 171 (N. Daniels ed. 1974). Scanlon himself notes that an individualistic conception of persons "may not be absolute," nor is the conception itself "formed outside of or independent of particular social and historical circumstances." *Id.* at 178. This admission, coupled with Scanlon's suggestion that despite the conception's contextual nature, it is "uncontroversial" in this "era and civilization," illustrates the pervasiveness of the modern paradigm. See *id.*

<sup>102</sup> See J. Rawls, *supra* note 91, at 127-29.

<sup>103</sup> *Id.* at 191. Rawls dismisses concern for the interests of others as "extensive ties of natural sentiment." *Id.* at 129. Sandel criticizes Rawls' relegation of benevolence to "second-order" status. M. Sandel, *supra* note 3, at 171.

<sup>104</sup> Dworkin, *supra* note 7, at 142.

<sup>105</sup> See Rawls, Fairness to Goodness, 84 *Philos. Rev.* 536 (1975).

<sup>106</sup> See J. Rawls, *supra* note 91, at 523; M. Sandel, *supra* note 3, at 61.

<sup>107</sup> See *supra* note 4 and accompanying text.

ate as if they prefer more rather than less primary goods,"<sup>108</sup> already incorporates an unconnected view of human nature, in which self-interest is paramount to altruism.

At base, liberal moral theory is individualistic largely because it excludes any intersubjective conceptions of self;<sup>109</sup> without an intersubjective self, the contours of the conflict between individual and community are antecedently determined. Although modern liberalism may recognize the necessity of connection, it emphasizes individualism to such an extent that wherever the two conflict—as they are bound to do<sup>110</sup>—it is the modern and not the classical paradigm that prevails.<sup>111</sup> The depth of contemporary adherence to the atomism of the modern paradigm may be illustrated by Edwin Baker's comment that "most people in the post-Enlightenment world" will accept the basic Rawlsian premise of autonomy.<sup>112</sup>

In addition to a decidedly individualist bias, liberal jurisprudence exhibits two other traits characteristic of the modern paradigm: liberalism epitomizes an abstract, rule-based theory, and liberalism is a highly pluralistic philosophy. In a world of self-interested individuals, abstract rules or principles are a necessary alternative to such contextual moral notions as virtue.<sup>113</sup> Dworkin's own notion of rights as "trump" is characteristic of liberal theories: in the game of life, we must find fair rules to play by.<sup>114</sup> The central idea of the liberal perspective is that of entitlement: "distinct individuals have interests that they are entitled to protect if they

<sup>108</sup> Rawls, *supra* note 105, at 543.

<sup>109</sup> See *supra* note 3.

<sup>110</sup> See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *Yale L. J.* 1063 (1981); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205, 211-12 (1979); Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *The Burger Court: The Counter-Revolution That Wasn't* 218, 223-33 (V. Blasi ed. 1983).

<sup>111</sup> For example, while Rawls defines rights as the absence of restrictions and sets a minimal subsistence level for all members of society, he does not allow certain morally irrelevant factors, such as intelligence, luck, or a certain amount of economic good fortune, to count as "restrictions." As long as the worst off groups are better off in an absolute sense with these restrictions than they would be without them, his distributivist principles have been satisfied. See J. Rawls, *supra* note 91, at 75-78, 204, 224-26, 277-78. His theory of justice thus places "absolute well-being" above "relative share," see D. Richards, *supra* note 4, at 48, emphasizing the individualist rather than relational cast of his theory.

<sup>112</sup> Baker, Sandel, 133 *U. Pa. L. Rev.* 895, 924 (1985).

<sup>113</sup> See *supra* notes 6-8 and accompanying text.

<sup>114</sup> Dworkin, *supra* note 7, at xi.

so wish."<sup>115</sup> The scope of individual entitlement, of course, varies with each theory. Dworkin, among many others, finds a right to "equality."<sup>116</sup> The basic Rawlsian right is "fairness"—which takes some six hundred pages to define. Still other theories list various individual liberties as rights. Each of these definitions of rights or entitlements, however, shares the common feature of abstractness. Once the entitlement is defined and the neutral principles specified, it remains only to follow the rules laid down.

The classical perspective, because it is less constrained by the fascination for "distinctness," can encompass a broader notion of what we owe to others as extensions of ourselves. Virtues, unlike rights, can be defined contextually. It may, for example, be virtuous to abort a child whose life will be filled with physical pain, and less virtuous to abort a child simply because he or she is of the "wrong" gender. Liberalism recognizes only that the woman has a right to an abortion (or that the fetus has a right to life), regardless of the circumstances. The notion of compassion further illustrates the difference between a right and a virtue because what constitutes compassion depends on the circumstances. Compassion may sometimes be a virtue; being the object of compassion can never be a right.<sup>117</sup>

Liberalism is also a quintessentially pluralistic philosophy. With no human *telos* against which to measure different theories of rights, liberalism has no hierarchy of values. A liberal state is therefore required to remain neutral toward its citizens' diverse and competing definitions of the good life.<sup>118</sup> Liberalism thus be-

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<sup>115</sup> Id. at 176.

<sup>116</sup> Id. at 272-78.

<sup>117</sup> Judith Jarvis Thomson draws a similar distinction between rights (with their correlative duties) and moral virtues, or "oughts." See Thomson, A Defense of Abortion, 1 *Phil. & Pub. Aff.* 47, 60-62 (1971).

<sup>118</sup> See, e.g., B. Ackerman, *supra* note 7, at 10-12; A. MacIntyre, *supra* note 5, at 11, 235-37; M. Sandel, *supra* note 3; Dworkin, *supra* note 7; Heller, The Importance of Normative Decisionmaking, 1976 *Wis. L. Rev.* 385, 475; Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 *Yale L.J.* 1037-38 (1980). Although David A.J. Richards argues that liberals are free to criticize others' moral choices, he admits that the state must remain neutral: criticism is acceptable, penalties are not. Richards, *supra* note 93. Robin West has developed an intriguing theory of "pragmatic liberalism," which is committed to an evolving but non-neutral definition of the good life. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 *U. Pitt. L. Rev.* 673 (1985). Whether or not it is a viable approach, it is definitely not a liberal approach.

comes mired in such endless conflicts as those between negative and positive rights, and between liberty and equality.<sup>119</sup>

### C. *Radical Jurisprudence: CLS and Unger*

It is more difficult to see how the Conference on Critical Legal Studies (CLS) embodies the individualist paradigm. One might read that movement's ideology to reject the modern paradigm of autonomy in favor of the communitarian paradigm suggested here. Shiffrin notes that "democratic radicals" (his encompassing nomenclature for the critical legal scholars) criticize liberalism for being "excessively individualistic."<sup>120</sup> Roberto Unger explicitly denounces the liberal dichotomy between individual and society and seeks to reconcile the two under the ideal of sympathy.<sup>121</sup> Mark Tushnet has offered a powerful critique of the liberal theory of rights.<sup>122</sup> On closer examination, however, even the critical legal scholars vacillate between endorsement of a communitarian perspective and mere tinkering with the liberal perspective. Moreover, despite their desire to expose the underlying contextuality of the abstract propositions of liberalism, they exhibit a characteristically modern tendency toward abstraction.<sup>123</sup> Finally, the contrast be-

<sup>119</sup> See, e.g., Dworkin, *supra* note 7, at 123; Nagel, *supra* note 89.

<sup>120</sup> Shiffrin, *supra* note 88, at 1109.

<sup>121</sup> R. Unger, *supra* note 93, at 191-235. For examples of attempts to perform this reconciliation in a specific legal context, see, e.g., Sax, *Takings, Private Property and Public Rights*, 81 *Yale L. J.* 149 (1971); Note, *Reinterpreting the Religion Clauses*, *supra* note 85.

<sup>122</sup> Tushnet, *An Essay on Rights*, *supra* note 93; see Kennedy, *Critical Labor Law Theory: A Comment*, 4 *Indus. Rel. L. J.* 503 (1981).

<sup>123</sup> See Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 *Harv. Women's L.J.* 59, 65 (1985) ("by building abstraction upon abstraction, the trashers approach the kinds of formalism and idealism that they set out to critique"). The following exchange provides a delightful illustration of the masculine abstraction of radical scholarship:

Morris: It's a very crude kind of historicism he's peddling, surely? And bad aesthetics.

Hilary: This is all very fascinating, I'm sure, but could we discuss something a little more practical? Like what the four of us are going to do in the immediate future?

Desiree: It's no use, Hilary. Don't you hear the sound of men talking?

Morris: (to Philip) The paradigms of fiction are essentially the same whatever the medium. Words or images, it makes no difference at the structural level.

Desiree: "The structural level," 'paradigms.' How they love those abstract words. 'Historicism'!

D. Lodge, *Changing Places* 250-51 (1975). Astute readers might ask why this article itself contains an abundance of references to paradigms and structures. As Carol Gilligan has

tween the classical paradigm and the critical legal scholars is most marked in the absence of any teleological underpinnings to modern radical scholarship.

Roberto Unger perhaps best exemplifies the radical effort to recognize and resolve the tension between autonomy and heteronomy.<sup>124</sup> Unger's attempted synthesis of individual and community captures the spirit of the conflict inherent in any attempt to re-integrate the classical tradition into the modern paradigm. Although he is fundamentally unable to suggest a realistic method for achieving this synthesis,<sup>125</sup> his discussion of the liberal failure to credit the relational aspect of the self identifies liberalism with the modern perspective.

Even Unger, however, is unable to overcome the peculiarly modern attachment to a strong notion of individualism and autonomy. He warns of the consequences of too strong a commitment to connection: "The relational view threatens our ability to identify individuals or mankind. Because everything is ultimately connected with everything else, there would be no place to set the boundaries of individual or species nature."<sup>126</sup> He continues that theme in his more recent book:

We present to one another both an unlimited need and an unlimited danger, and the very resources by which we attempt to satisfy the former aggravate the latter . . . .

. . . Each of [our] ventures into a life of longing for other people

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noted, women's fluency in the masculine voice "must correlate with educational attainment in society." DuBois, Dunlap, Gilligan, MacKinnon, & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buff. L. Rev.*, 11, 59 (1985) (Gilligan [hereinafter cited as DuBois]).

<sup>124</sup> See Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 *Tex. L. Rev.* 1477 (1984) (suggesting that Unger provides a coherent and elaborate formulation).

<sup>125</sup> Unger appears to suggest, irrationally, that the community needs to be both limited in number and encompassing of all humanity. R. Unger, *supra* note 93, at 221. He also labels the ideal of sympathy—by which the reconciliation of self and community is achieved—as a "dreamt-of circumstance," *id.* at 217, perhaps suggesting that he recognizes the apparent impossibility of achieving such a reconciliation absent a new paradigm to illuminate the way. Other critical legal scholars also appear to recognize the current hopelessness of their utopian vision. See, e.g., Kelman, *Trashing*, 36 *Stan. L. Rev.* 293, 296 n.11 (1984); Kennedy, *supra* note 110, at 212-13.

<sup>126</sup> R. Unger, *supra* note 93, at 194. In another passage he seems equally despairing of the consequences of too much emphasis on either half of the dichotomy: "It is the experience of the conflict between the hope that one might think for oneself and the need to be understood or, to rephrase it in a stronger and negative form, between the fear of enslavement and the fear of madness." *Id.* at 215.

threatens to create a craven dependence and to submerge our individual selves under group identities and social roles.<sup>127</sup>

Other critical legal scholars appear equally unable to confront the classical paradigm of connection without real terror. Duncan Kennedy, for example, has suggested that "at the same time that it forms and protects us, *the universe of others . . . threatens us with annihilation* and urges upon us forms of fusion that are quite plainly bad rather than good."<sup>128</sup>

The radical position on the notion of individual rights is similarly ambivalent. Trashing liberalism and its attendant theory of rights is a favorite CLS pastime, but it "appears to be directed more at exposing the injustice of contemporary social relations than at denigrating the core idea of human rights."<sup>129</sup> Tushnet, for example, devotes a large portion of his critique of rights theory to demonstrating the potential for misuse of "rights-talk."<sup>130</sup> Peter Gabel has attempted to justify and transform the concept of rights for the achievement of radical ends.<sup>131</sup> Unger's own program contains a revised vision of rights as they would exist in his reconstituted society.<sup>132</sup> Although one motif of the Conference on Critical Legal Studies is the identification of the inevitable contextuality of our world, the amplification of this theme leads CLS into variations on modern rights theory.

The ultimate failure of the radical project confirms the final difference between the modern and classical paradigms. Radical jurisprudence attempts to reconcile the individual and community

<sup>127</sup> R. Unger, *Passion: An Essay on Personality* 20 (1984).

<sup>128</sup> Kennedy, *supra* note 110, at 212 (emphasis added); see Baker, *supra* note 112, at 897 (criticizing Sandel's notion of the group subject because it "could provide the basis for a dangerous and unwarranted notion of group or community rights"); Gordon, *New Developments in Legal Theory, in The Politics of Law: A Progressive Critique* 281, 288 (D. Kairys ed. 1982) ("one of the most threatening aspects of social existence [is] the danger posed by other people"); cf. Hutchinson & Monahan, *supra* note 124, at 1499 & n.105 (decrying Unger's optimism that a reconstituted society would choose the "right" values: "This optimistic leap of faith . . . has little basis in history.").

<sup>129</sup> Hutchinson & Monahan, *supra* note 124, at 1487; see *id.* at 1482-89. The CLS position on rights is not only ambivalent, it is often unintelligible. See, e.g., Gabel & Kennedy, *Roll Over Beethoven*, 36 *Stan. L. Rev.* 1, 37-41 (1984).

<sup>130</sup> Tushnet, *An Essay in Rights*, *supra* note 93, at 1386-94.

<sup>131</sup> Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563 (1984).

<sup>132</sup> See, e.g., Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563, 597-602, 611-15 (1983).

without any sense of what it is to be a member of a human community. The critical legal scholars, in their haste to deconstruct the world, have neglected to construct a human *telos*. Alasdair MacIntyre suggests that what the modern world lacks is a normative description of human aspiration: the Enlightenment, in rejecting Aristotelian teleology, destroyed the context of moral philosophy. Without such a context, post-Enlightenment moral theories were doomed to failure from the outset.<sup>133</sup> John Diggins ascribes the failure of American republicanism to the same lack: "Ultimately the idea of virtue had no determinative content, no transcendent quality that stood over and against the objective world of power and interests, no moral vision that inspired the individual to identify with values higher than his own interests."<sup>134</sup>

Radical jurisprudence is in this regard no different. Despite its claim of being a new paradigm, it is ultimately little more than a rejection of the old one: it is substantively empty because it has no teleological content. The reason for adopting a critical or radical approach, Tushnet has suggested, is because such a stance "is defined as the party in opposition to what exists."<sup>135</sup> The Conference on Critical Legal Studies seem to be, as one author has described the modernist movement in art, "less an argument *for* a particular style than a reaction *against* the traditional modes . . . ."<sup>136</sup>

Unger's work is again instructive because his is the most ambitious attempt to construct a post-modern paradigm by reintegrating the classical paradigm. After criticizing the liberal ideology, he attempts to construct a positive description of its successor.<sup>137</sup> He begins by sketching out the "social consciousness"<sup>138</sup> and outward manifestations of an unliberal state but concludes that such a survey "fails to supply a standard by which to judge the merits of the contending views and ideals."<sup>139</sup> He thus recognizes that, without a definition of the transcendent quality of humanity, no at-

<sup>133</sup> See A. MacIntyre, *supra* note 5 at 49-59.

<sup>134</sup> J. Diggins, *supra* note 22, at 31.

<sup>135</sup> Tushnet, *An Essay on Rights*, *supra* note 93, at 1398.

<sup>136</sup> Boyle, *Modernist Social Theory: Roberto Unger's Passion*, 98 *Harv. L. Rev.* 1066, 1077 (1985).

<sup>137</sup> See R. Unger, *supra* note 93, at 174.

<sup>138</sup> He uses "social consciousness" to mean something very like what Kuhn calls a paradigm: "The concept of social consciousness refers to a widely shared way of conceiving society and its relation to nature and to individuals." *Id.* at 148.

<sup>139</sup> *Id.* at 181.

tempt to revive the notion of man as part of a community can succeed.

When he tries to define such a transcendent quality, however, his attachment to modern individualism defeats the project from the outset. His explication suffers from two fundamental theoretical problems, which serve to turn his attempt at a positive description into yet another negative one.

First, he defines the universal quality of humanity as that of "a predicament rather than that of a substance."<sup>140</sup> What characterizes a human *telos* seems to be, for Unger, not the striving for a particular goal but the necessity of struggle in and of itself. In a later work, *Passion*, he makes this explicit: virtue consists in "context-smashing," or going beyond social context, and the human *telos* is context-transcendence itself.<sup>141</sup> It does not seem to matter where we go, just that we keep moving. There is thus no substantive content to his teleology.<sup>142</sup>

Second, he subscribes to the modern notion that a description of human nature is factual while any specification of a human *telos* is normative. The major project of *Passion* is to justify the discredited leap of faith from fact to value,<sup>143</sup> and to show that normative values can be derived from factual premises. What Diggins and MacIntyre appear to recognize, which Unger does not, is that a

<sup>140</sup> Id. at 195-96.

<sup>141</sup> See R. Unger, *supra* note 127, at 88-89. To say that Unger makes anything "explicit" may be to accord his work both more and less credit than it is due. What he says is that the Christian-romantic ethic is "corrigible" to the extent that it incorporates and reconciles a notion of empowerment. Id. at 69-76. He then states:

Philosophy conceived in this spirit is simply context-smashing . . . If someone were to ask us why we want to live in the present in this way, we should answer: first, because this is the kind of being we really are and, second, because by living in this fashion we empower ourselves individually and collectively.

Id. at 88-89.

<sup>142</sup> In this, Unger echoes the liberal emphasis on process as the most important human or jurisprudential value. See, e.g., J. Ely, *Democracy and Distrust* (1980); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *Yale L.J.* 1315, 1338 (1974). Again, the radical scholars often criticize the liberal reliance on process but seem ultimately to endorse process over substance themselves.

<sup>143</sup> The most explicit declaration of Unger's underlying adherence to the dichotomy between facts about human nature and prescriptions about human conduct lies in frequent references to attributing normative force or normative consequences to conceptions of human nature or identity. This disjunction between a conception and its implications strongly suggests that he believes the former to be "fact" and the latter "value." See, e.g., R. Unger, *supra* note 127, at 3, 21, 40-41, 43, 78.



description of human nature must also be normative insofar as it presupposes "the existence of reasons for human action that are not contingent upon any desires or purposes that men actually have but are intrinsically authoritative."<sup>144</sup> In other words, what MacIntyre calls "untutored human nature" cannot be understood except in the context of the normative "human-nature-as-it-could-be-if-it-realised-its-*telos*."<sup>145</sup>

The urge to ground a prescriptive theory of human ends in concrete human *fact* is an instance of the second, rarer form of modernism's rejection of immanent *telos*: there must be an abstract quality out there somewhere, called "human nature," to which we can anchor our normative schemes: "The temptation to place the moral foundations of society in a pre-existing state of nature reflects the powerful wish to give one's favored scheme of values a precision and unconditional legitimacy that put it safely beyond the realm of political controversy."<sup>146</sup> A contextual paradigm recognizes that normative schemes, embedded in society and social roles, are all there are.

#### IV. REVIVING THE CLASSICAL PARADIGM

There has recently been a resurgence of interest in the classical paradigm. In addition to the critical legal scholars, who do not explicitly identify their project with either Aristotelianism or republicanism, scholars in a number of disciplines are evidencing renewed interest in the classical paradigm. The best known modern Aristotelian is Alasdair MacIntyre, who argues quite cogently that a return to a morality grounded on a human *telos* and human virtues is the only solution to modern dilemmas.<sup>147</sup> Modern Jeffersonians abound and come in every imaginable political variety.<sup>148</sup>

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<sup>144</sup> J. Diggins, *supra* note 22, at 31.

<sup>145</sup> A. MacIntyre, *supra* note 5, at 51.

<sup>146</sup> Kronman, *supra* note 10, at 1603.

<sup>147</sup> A. MacIntyre, *supra* note 5; see P. Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (1978); I. Murdoch, *The Sovereignty of Good* (1971). It is interesting that of these most prominent modern classicists, one is explicitly Christian in outlook, see *supra* note 19, and two are women, see *infra* note 166.

<sup>148</sup> See R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983); F. Dallmayr, *Polis and Praxis: Exercises in Contemporary Political Theory* (1984); Sunstein, *supra* note 28. Diggins characterizes the scholarship as an effort to "rescue America from liberalism." J. Diggins, *supra* note 22, at 19. Justice Powell, the only native Virginian on the Supreme Court, has explicitly adopted a Jeffersonian view of the historical

The most common theme of the new republicans is to suggest that our republican heritage is embodied in the Constitution and should be relevant to modern interpretations of that document.<sup>149</sup>

The renewed interest in the classical paradigm raises two important questions. The first, not dealt with in this article, seeks the causes for this resurgence of a long-dormant philosophy. The second concerns the future of classical theory. A political or moral philosophy based on virtue and community has failed at least once and perhaps as many as four times.<sup>150</sup> What is the likelihood that modern Aristotelianism will ultimately prove more persuasive than its predecessor or that the current variations on republicanism, unlike the Jeffersonian vision, may realistically be implemented?<sup>151</sup> Classical republicanism has always been identified as a backward-looking tradition;<sup>152</sup> is there any way to make it more forward-

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circumstances surrounding the framing of the Constitution, arguing that promoting the general welfare was a primary motivation for the Constitution. See *EEOC v. Wyoming*, 103 S. Ct. 1054, 1075 (1983) (Powell, J., dissenting). What is particularly interesting, in light of the thesis of this article, is that Justice O'Connor was the only other justice to join his opinion.

<sup>149</sup> Cass Sunstein, for example, suggests that Madisonian liberalism seeks safeguards against the "naked preferences" of individuals and powerful interest groups. Sunstein, *supra* note 28, at 82; see Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984). David Epstein's careful exegesis of *The Federalist* attempts to demonstrate that its authors were concerned not only with private rights but also with the public good as an end of government. See D. Epstein, *supra* note 65. Similarly, Jonathan Macey has suggested that the Constitution was designed to be "public-regarding" in the sense that it was designed to favor the interests of the polity over the desires of special-interest groups. Like the framers, however, Macey relies on the structure of the Constitution, rather than on human virtue, to achieve this object; he explicitly eschews any reliance on virtue. See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 *Colum. L. Rev.* 223 (1986).

<sup>150</sup> The Enlightenment constitutes the first, undisputed transition from the classical to the modern paradigm. Various interpretations of American history suggest that the drafting of the Constitution in 1787 and the fading of the anti-federalists of the early nineteenth century constitute two more failures of the classical paradigm. See *supra* notes 21-87 and accompanying text. Finally, a number of scholars have suggested that the critical legal studies movement has failed in its attempt to integrate the classical paradigm. See, e.g., Johnson, *supra* note 93, at 261-62, 285; Leff, *Book Review*, 29 *Stan. L. Rev.* 879 (1977); Shiffrin, *supra* note 88, at 1110 & n.33, 1179-87.

<sup>151</sup> John Diggins, for example, deplores Lockean liberalism but rejects the possibility of a revival of republicanism based on what he sees as a non-existent Jeffersonian heritage, advocating instead a Calvinist approach. See J. Diggins, *supra* note 22; Wood, *Hellfire Politics*, *New York Review of Books*, Feb. 28, 1985, at 29. Mark Tushnet suggests that regardless of the framers' ideology, "it is unclear that the republican tradition is readily available to us." Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 *Mich. L. Rev.* 1502, 1540 (1985).

<sup>152</sup> See, e.g., Berthoff, *Independence and Attachment, Virtue and Interest: From Republi-*

looking and thus more viable? In particular, this article addresses the question whether a republican-inspired interpretation of the United States Constitution is either possible or distinct from current interpretations.

It is tempting to ascribe the death of virtue to an inevitable human progression, both personal and political.<sup>153</sup> Such a thesis may be bolstered by traditional theories of individual moral development, which suggest that individuals progress from a morality of self-centeredness through a morality of other-centeredness to a fully mature morality based on abstract, universal principles.<sup>154</sup> There is a striking parallel between the modern paradigm of political philosophy and such a mature individual morality. Lawrence Kohlberg describes the mature or "postconventional" stage in stunningly individualistic and abstract (i.e., modern) terms:

To count as postconventional, . . . terms [like "rights"] must be used in a way that makes it clear that they have a foundation for a rational or moral *individual who has not yet committed himself to any group or society or its morality*.<sup>155</sup> [The value] perspective [is that] of a rational individual aware of values and *rights prior to social attachments* and contracts.<sup>156</sup> [At this stage, the] [p]rinciples are universal principles of justice . . . .<sup>157</sup>

Perhaps the similarity between the modern paradigm and Kohlberg's highest stage of moral development is best captured in his description of the postconventional stage as embodying a "prior-to-society" individual perspective.<sup>158</sup>

The classical tradition, on the other hand, is marked by the "other-centeredness" characteristic of the middle stages of development. The similarity is illustrated by the quotation from Jeffer-

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can Citizen to Free Enterpriser, 1787-1837, in *Uprooted Americans: Essays to Honor Oscar Handlin* 97, 101-102 (R. Bushman ed. 1979); Kramnick, *supra* note 22, at 631; Murrin, *supra* note 27, at 406. Cass Sunstein also suggests—and then attempts to refute—that republicanism might be too "romantic and outmoded" for the modern world. See Sunstein, *supra* note 28, at 76, 82.

<sup>153</sup> See, e.g., R. Unger, *supra* note 93, at 244-53.

<sup>154</sup> See Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in *Moral Development and Behavior: Theory, Research, and Social Issues* 31 (T. Lickona ed. 1976).

<sup>155</sup> *Id.* at 37 (emphasis added).

<sup>156</sup> *Id.* at 35 (emphasis added).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 33.

son cited earlier: "Self-interest, or rather self-love, or *egoism*, has been more plausibly substituted as the basis of morality. But I consider our relations with others as constituting the boundaries of morality."<sup>159</sup> Kohlberg describes the middle stage of maturity (the "conventional" level) as marked by "see[ing] things from the point of view of shared relationships between two or more individuals."<sup>160</sup> He also describes this level repeatedly in terms of subordination of individual interests to societal needs:

[The identifying characteristics of the conventional stage are] (1) concern about social approval; (2) concern about loyalty to persons, groups, and authority; and (3) concern about the welfare of others and society . . . . What fundamentally defines and unifies the characteristics of the conventional level is its *social perspective*, a shared viewpoint of the participants in a relationship or a group. The conventional individual subordinates the needs of the single individual to the viewpoint and needs of the group or the shared relationship.<sup>161</sup>

Jefferson's rejection of self-interest in favor of a morality based on others might be viewed as a transition from the earliest (selfish) stages of morality to the middle stages. The transition from the other-centeredness of republicanism to the abstraction of liberalism thus might be seen to represent a transition to the highest stages. Under this theory, the rejection of the classical paradigm simply represents a maturing process, and attempts to revive it will ultimately fail unless some radically new factor is present.

Newer theories of moral development suggest, however, that the modern and classical paradigms do not simply mirror *consecutive* stages of moral development, but instead reflect a *continuing* human tension at both the personal and political levels.<sup>162</sup> If the tension between autonomy and heteronomy is newly resolvable every generation, and individual resolution of the tension largely determines what that generation's dominant philosophy will be, are we likely to resolve the tension any differently than earlier gen-

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<sup>159</sup> Letter to Thomas Law, *supra* note 15, at 1032.

<sup>160</sup> Kohlberg, *supra* note 154, at 38.

<sup>161</sup> *Id.* at 33-36; see also *id.* at 34-35 (table of six moral stages).

<sup>162</sup> See N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and the Human Malaise* (1976); C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (1982).

erations? To avoid the Scylla of liberalism's overemphasis on autonomy and the Charybdis of the neoclassical tendency to romanticize the community and subsume the individual, we must reconcile the modern and classical traditions, not simply replace the former with the latter.<sup>163</sup> None of the authors discussed so far offers a means by which that reconciliation can take place without, as Drucilla Cornell puts it, "having to jump over our own shadow."<sup>164</sup>

Recent feminist scholarship on differences between men and women, however, has far-reaching implications for the modern par-

<sup>163</sup> The ideal of reconciliation highlights another problem with the critical legal studies movement. CLS literature — from the law review articles to *The Lizard* — rejects any notion of conciliation, leaving instead an impression of confrontation. In criticizing the established order, these scholars seem to deny that there is any good in the world: a favorite deconstructionist exercise is to demonstrate how judicial responses we *thought* were benevolent were in fact counterproductive. See, e.g., Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Klare, *Critical Theory and Labor Relations Law*, in *The Politics of Law: A Progressive Critique* 65 (D. Kairys ed. 1982); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 Law & Soc'y Rev. 529 (1977); Tushnet, *A Marxist Analysis of American Law*, 1 Marxist Persp. 96 (1978); cf. Hutehinson, *From Cultural Construction to Historical Deconstruction*, 94 Yale L. J. 209 (1984) (CLS response to the failure of liberalism is nihilism). The radical response to the existence of the dichotomy—and to the current dominance of individuality—is to disintegrate one's opponents and their viewpoints. The response described here, and ascribed to a feminine perspective, is to integrate the paradigms. Thus, the injection of a feminine viewpoint might significantly alter the style, and perhaps the underlying objective, of even the Conference on Critical Legal Studies. Reconciliation seems to be vital: one consequence of modern failures to reconcile self and community may be the rise of the law and economics movement. See Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated By the Regulation of Vacation Home Development*, 1976 Wis. L. Rev. 385, 468-502.

It is not so surprising that even a radical movement excludes the feminine paradigm. Past radical groups have treated women little better than their liberal or conservative counterparts. See generally H. Eisenstein, *Contemporary Feminist Thought* 126 (1983) (women within the New Left treated as inferiors, servants, and sexual objects); S. Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* 76-87, 111-12, 176-79 (1979) (women viewed in accordance with traditional sex roles in civil rights projects and Students for a Democratic Society); A. Jaggar & P. Struhl, *Feminist Frameworks* 10-11 (1978) (male militants at Columbia attempted to impose domestic tasks on female militants). CLS appears to be no different. See Johnson, *supra* note 93, at 281 n. 89 (suggesting CLS is as white-male-dominated as the faculty of Yale Law School); cf. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391 (1984) (in discussing almost two dozen major figures in CLS, Schlegel mentions one woman, in passing, on the penultimate page of his article).

<sup>164</sup> Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 314 (1985).

adigm and its potential for shadow jumping. The new scholarship suggests that men and women, by and large, develop strikingly different conceptions of self and thus of the world. The next section of this article describes what might be called a feminine perspective and suggests that the feminine perspective strongly resembles the classical paradigm while the masculine perspective strongly resembles the modern paradigm. Although all of us have some mix of the two paradigms in our own world-view, and some men are more classical and some women more modern, the classical perspective may be more dominant in women:

This is not to say that there is a monolithic "women's viewpoint" any more than there is a monolithic "men's viewpoint." Plainly there is not. Rather, it is to suggest that women's life experiences still differ sufficiently from men's that a diverse group of women would bring a somewhat different set of perceptions and insights . . . than would a similarly diverse group of men.<sup>165</sup>

If the modern paradigm is an inevitable result of male domination of the public sphere, the influx of large numbers of women into that sphere might radically alter the chances of re-integrating the classical paradigm or at least change the likely balance of the resolution of the tension between the two paradigms.<sup>166</sup>

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<sup>165</sup> Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, Women's Rts. L. Rep. 175, 175 n.2 (1982). Williams appears to limit the effect of different "life experiences" to "certain issues," *id.*, presumably those especially affecting women. For a refutation of this latter argument, see *infra* notes 169-70 and accompanying text.

<sup>166</sup> See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *Tex. L. Rev.* 387, 400-01 n.64 (1984) (suggesting that "legal liberalism" is a result of male dominance). Two of the best modern attempts at reconciling the paradigms are made by women. See Cornell, *supra* note 164; West, *supra* note 118. Drucilla Cornell reconciles them under the theory of "dialogism," and Robin West under the theory of "pragmatic liberalism," but both represent a conscious attempt to integrate self and community, to achieve, in Cornell's words, a theory of a "decentered subject, relational at its core . . . [but which] does not dissolve the self totally in an all-encompassing community." Cornell, *supra* note 164, at 299. The men writing in the area tend simply to deconstruct the liberal paradigm or resurrect the classical paradigm but do not integrate the two. See, e.g., A. MacIntyre, *supra* note 5; M. Sandel, *supra* note 3; R. Unger, *supra* note 93. But see Shiffrin, *supra* note 88, at 1111-12, 1192-1215 (synthesizing the two schools under the rubric of "eclectic liberalism"). Many simply despair of the possibility of reconciliation. See, e.g., Brest, *supra* note 110, at 1108; Johnson, *supra* note 93, at 257; Tushnet, *Following the Rules Laid Down*, *supra* note 93. It is delightfully ironic that in the same article in which Brest expresses pessimism that this fundamental tension between self and other can ever be resolved, he also asks, in the context of identifying judges as their law clerks' "adopted fathers," "[w]ho knows how our world might appear if one could honestly add 'or mothers'?" Brest, *supra* note 110, at 1106

## V. WOMEN'S PERSPECTIVE: RECAPTURING THE JEFFERSONIAN MOMENT

### A. Introduction

New studies in a variety of academic disciplines suggest that women in fact may have a unique perspective, a world-view that differs in significant respects from that of men. Feminist scholars in such diverse fields as philosophy, history, sociology, art, and anthropology have identified peculiarly feminine perspectives in those disciplines.<sup>167</sup> Recent work in psychology and in literary theory is particularly illuminating. Psychological studies suggest that women's moral development and concept of self may differ from those of men. Feminist literary theory suggests that women's writing differs from men's in ways that reflect a radically different perspective. Despite the independence of the research and the differences in both topics of investigation and terms of description, the feminine perspective identified in each of these fields is, at its core, a single, common approach. That approach is captured in the tension between women's primary concern with intimacy or connection and men's primary focus on separation or autonomy.<sup>168</sup>

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n.230. Perhaps he would not be so certain the tension is unresolvable if "or mothers" could honestly be added.

<sup>167</sup> See R. Morgan, *The Anatomy of Freedom: Feminism, Physics and Global Politics* (1982); N. Noddings, *supra* note 19; E. Showalter, *A Literature of Their Own* (1977); P. Spacks, *The Female Imagination* (1975); Blecki, *Feminist Literary Criticism: An Introduction*, in *Feminist Literary Criticism: A Symposium 1* (K. Bordan & F. Rinn eds. 1974); Harding & Hintikka, *Introduction*, in *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science ix* (S. Harding & M. Hintikka eds. 1983); O'Brien, *Feminist Theory and Dialectical Logic*, in *Feminist Theory: A Critique of Ideology* 99 (N. Keohane, M. Rosaldo, & B. Gelpi eds. 1982); Garfunkel, *The Improvised Self: Sex Differences in Artistic Identity* (Dissertation, Dep't of Psych. & Soc. Rel., Harv. Univ., 1984); Goodman, *Women's Studies: The Debate Continues*, *N.Y. Times Magazine*, Apr. 22, 1984, at 39; Kolbert, *Scientific Ideas: Women's vs. Men's*, *N.Y. Times*, Oct. 17, 1985, at C1, col. 1; Goleman, *Psychology Is Revising Its View of Women*, *N.Y. Times*, Mar. 20, 1984, at C1, col. 1.

<sup>168</sup> The most persuasive explanation for the differences between men and women is based on differences between boys' and girls' development of an ego or sense of self. Ego development occurs while the child is still quite young and is therefore significantly influenced by the child's primary caretaker. Because, in general, girls are raised by a primary caretaker of the same gender and boys are raised by a primary caretaker of the opposite gender, girls reaffirm their early attachments while boys repudiate them. Thus, women come to see themselves as fundamentally connected and men see themselves as fundamentally detached. See N. Chodorow, *supra* note 162, at 166-68; C. Gilligan, *supra* note 162, at 5-23. Other explanations for the differences between men and women include the socialization process,

This difference between men and women may influence the manner in which they think about, write about, and practice their disciplines. Thus, it is probable that women's unique perspective on law and jurisprudence, as a function of their different world-view, extends well beyond areas traditionally seen as affecting women,<sup>169</sup> and in fact encompasses all legal issues. Just as women's writing on all subjects—not just on intimacy, domesticity, or women's place in society—reflects a different cast, women's views on the law in general may provide insights and approaches that are less natural to, and therefore less available to, male lawyers and judges.

This different approach to the law makes women a potentially innovative force in the legal community. Because women have been excluded from the mainstream of legal authority and legal change, the legal system, like moral, political, and philosophical discourse, has become "a set of cultural and symbolic forms that view human experience from the distorted and one-sided perspective of a single gender."<sup>170</sup> This is not to suggest merely that the legal structure

the mother's varying reaction to sons and daughters, and biological differences. See, e.g., E. Erikson, *Identity, Youth and Crisis* (1968); E. Janeway, *Man's World, Woman's Place: A Study in Social Mythology* (1971); J. Miller, *Toward a New Psychology of Women* (1976); Flax, *The Conflict Between Nurture and Autonomy in Mother-Daughter Relationships and Within Feminism*, *Fem. Stud.*, June 1978, at 171.

<sup>169</sup> It long has been recognized that women may make unique contributions to specific areas of law because personal experience in those areas gives them a distinct perspective on the legal rules and underlying policy considerations. Until recently, female educators and practitioners alike generally have been channeled into a few limited areas of law, primarily areas such as family law, trusts and estates, and discrimination law. See, e.g., Fossum, *Women Law Professors*, 1980 *Am. Bar Found. Research J.* 903, 911-13; White, *Women in the Law*, 65 *Mich. L. Rev.* 1051, 1063 (1967). One limitation of the view that women make "unique contributions" to certain areas of the law is that it relies on the premise that one cannot fully understand an aspect of the law unless one has personally experienced it. Thus, only members of minority groups can teach discrimination law, only women can teach rape law, and so on. If this is followed through to its logical conclusion, all law teachers will ultimately become specialists in unalterable areas, depending not only on gender but also on ethnic, social, and economic backgrounds. For example, black students at Harvard Law School boycotted a course on race discrimination because it was taught by Jack Greenberg, a white lawyer with extensive civil rights litigation experience. See *N.Y. Times*, Aug. 9, 1982, at A9, col. 1. This is socially unwise, educationally unsound, and may well be constitutionally defective.

<sup>170</sup> O'Brien, *supra* note 167, at 99. As early as 1946, Justice Douglas noted that:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the inponderables . . . [A] flavor, a distinct quality is lost if either sex is excluded.



ignores or minimizes significant gender differences,<sup>171</sup> but rather that because women have been excluded from shaping our legal structure in general, that structure reflects a distorted view of the tension between autonomy and connection and between the individual and society.

What sort of distortion has the masculine paradigm introduced into our legal system? Feminist scholars identify three primary dichotomies between men's and women's thinking: while women emphasize connection, subjectivity, and responsibility, men emphasize autonomy, objectivity, and rights. Although the parallels between the feminine perspective and classical paradigm, or between the masculine perspective and modern paradigm, are not precisely congruent, the similarities are too strong to ignore.

Recall the introductory description of the characteristic differences between the classical and modern paradigms. The contrast between women's emphasis on connections among individuals, and men's on individual autonomy, is almost exactly parallel to that between classical holism and modern atomism. Women's preference for a subjective approach, and men's for an objective approach, recall the dichotomy between contextuality and abstraction. Finally, the male emphasis on rights matches the modern paradigm's reliance on an abstract, rule-based method for mediating between competing interests in a pluralist society; the feminine ethic of caring and responsibility suggests instead the classical tendency to define human existence in terms of relationships to others and to favor contextual societal values and individual virtues. The remainder of this section explores these similarities in detail.

A brief caveat is in order. First, I am not contending that gender-based differences are universal, only that they are likely enough that the historical exclusion of women from the shaping of

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Ballard v. United States, 329 U.S. 187, 193-94 (1946).

<sup>171</sup> The Supreme Court's treatment of pregnancy-based classifications illustrates the tendency to treat women as if they were men. See *General Elec. Co. v. Gibert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974); see also Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 *Or. L. Rev.* 265, 280-84, 301-04 (1984) (discussing the Supreme Court's inability to view reproductive freedom cases as essentially sexual discrimination cases). It is equally fallacious, however, to assume that legal recognition of gender differences is the solution. Doctrinal recognition of generalized gender differences is dangerous because it both perpetuates those differences and adopts an unfairly universal approach to a contextual problem. See Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955, 968 (1984); Wildman, *supra*.

the legal system has had a profound impact, which cannot be reversed—or, to a large extent, even recognized—until women begin to participate in that enterprise. Second, I am not limiting my analysis to a feminist perspective: feminists have a particular political agenda that may or may not be shared by all women (and is shared by some men). Rather, this is an analysis of a feminine perspective that encompasses aspects of personality and relationship to the world that have nothing to do with one's political preferences.<sup>172</sup> Finally, I am not suggesting that the feminine perspective

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<sup>172</sup> For examples of authors suggesting the existence of a *feminist* perspective rather than a *feminine* perspective, see, e.g., H. Eisenstein, *supra* note 163 (alternates between the two); J. Elshtain, *supra* note 19, at 221 (discussing the political prescriptions of radical feminist discourse); MacKinnon, *Feminism, Marxism, Method and the State: Toward A Feminist Jurisprudence*, 8 *Signs: J. Women in Culture & Soc'y* 635 (1983) (describing the liberal state as the embodiment of male interest and suggesting a feminist theory of state); Polan, *Toward A Theory of Law and Patriarchy*, in *The Politics of Law: A Progressive Critique* 294 (D. Kairys ed. 1982) (suggesting a marxist-feminist approach to law).

The few legal scholars who have suggested the existence of a *feminine* jurisprudence fall into three categories. First, a number of authors have made the suggestion, with little or no elaboration on the potential content or effect of a feminine jurisprudence. See, e.g., Fox, *Goodbye to Gameplaying*, *Juris Dr.*, Jan. 1978, at 37; Pearson & Sachs, *Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession*, 43 *Mod. L. Rev.* 400, 413 (1980); Williams, *supra* note 165, at 175 n.2. Second, there are those who believe that a feminine perspective is either derived from, or useful for, resolving "women's issues." See, e.g., Cole, *Strategies of Difference: Litigating For Women's Rights In a Man's World*, 2 *J.L. & Inequality* 33, 51-52 (1984); DuBois, *supra* note 123, at 13-15 (Dunlap); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *Yale L.J.* 913, 965-68 (1983); cf. Karst, *Woman's Constitution*, 1984 *Duke L.J.* 447, 460-61, 480, 485 (a feminine perspective can be used for this and more). This argument suffers from an overly narrow focus. See *supra* note 169. In particular, a focus on women's perspective as "the voice of the victim" suggests that the perspective is limited merely to remedying gender inequality (broadly conceived). See, e.g., DuBois, *supra* note 123, at 27-74 (MacKinnon).

Third, two authors have attempted the project I address in the text, but with a more limited scope. Carrie Menkel-Meadow has sketched out the difference a women's perspective makes in pedagogical technique and in the procedural form of the legal system, but she has not extended the analysis to jurisprudential matters. See DuBois, *supra* note 123, at 50-59 (Menkel-Meadow); Menkel-Meadow, *Portia, In a Different Voice: Speculations on a Woman's Lawyering Process*, 1 *Berkeley Women's L.J.* 39 (1985); Menkel-Meadow, *Women in Law?: A Review of Cynthia Fuchs Epstein's Women in Law*, 1983 *Am. Bar Found. Research J.* 189, 192. Menkel-Meadow, *Women as Law Teachers: Toward the Feminization of Legal Education*, in *Humanistic Education in Law: Essays on the Application of a Humanistic Perspective to Law Teaching*, Monograph III at 16 (1981) (Project for the Study and Application of Humanistic Education in Law: Columbia Univ. School of Law).

Kenneth Karst also has described potential feminine innovations in constitutional law but has limited himself to innovations "within the range of permissible judicial interpretation of the Constitution as we know it." Karst, *supra*, at 480. His article also focuses only on differences in moral perception, rather than on the wholly different paradigm I am suggesting

is any better than the masculine perspective, just that it is different. The incorporation of a new perspective need not imply a hierarchical ranking; I am arguing merely that the law has been distorted by its one-sided focus and that the feminine perspective described here represents a move toward correcting that distortion.<sup>173</sup> In particular, the feminine perspective is a natural reflection of the classical paradigm, and its integration is likely to remove the particular distortions of modern liberalism.

### B. Connection and Autonomy

Like the classical paradigm, the feminine perspective views individuals primarily as interconnected members of a community. Nancy Chodorow and Carol Gilligan, in groundbreaking studies on the development of self and morality, have concluded that women tend to have a more intersubjective sense of self than men and that the feminine perspective is therefore more other-directed.<sup>174</sup> Other studies tend to confirm this finding.<sup>175</sup> The essential difference between the male and female perspectives mirrors the fundamental difference between the modern and classical paradigms: “[t]he basic feminine sense of self is connected to the world, the

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here. A more fundamental problem with Karst's analysis is that he seems to equate the feminine paradigm with liberal (or perhaps somewhat radical) political ideology. See, e.g., *id.* at 495 & n.185. In doing so, he defeats his own purpose, for he all but suggests that the feminine paradigm was operating (albeit unconsciously) in the Warren era. See, e.g., *id.* at 497-99; DuBois, *supra* note 123, at 14-15, 69 (Dunlap, DuBois). Finally, Karst is correct to disclaim the ability of a male to explore a feminine paradigm, see, e.g., Karst, *supra*, at 447-48; his own masculine emphasis on autonomy manifests itself sporadically throughout the article. See, e.g., *id.* at 477 (identifying the dilemmas of autonomy, but assuming that autonomy is something to strive for despite its dilemmas); *id.* at 479 (describing autonomy as “threatening” to women, rather than as unnecessary or simply outside their emotional ken).

<sup>173</sup> As Carol Gilligan notes, the discourse about the two perspectives in the context of jurisprudence “is no longer either simply about justice or simply about caring, it is about bringing them together to transform the domain.” DuBois, *supra* note 123, at 45; see *id.* at 60-61 (Gilligan).

<sup>174</sup> See N. Chodorow, *supra* note 162; C. Gilligan, *supra* note 162. See also DuBois, *supra* note 123, at 47-48 (Gilligan) (in one study, five percent of men and 60% of women tended to focus on the feminine rather than the masculine perspective).

<sup>175</sup> For example, even at a very young age, female children tend to be more dependent on and reluctant to leave their mothers. See Goldberg & Lewis, *Play Behavior in the Year-Old Infant: Early Sex Difference*, 40 *Child Dev.* 21 (1969); Messer & Lewis, *Social Class and Sex Differences in the Attachment and Play Behavior of the Year-Old Infant*, 18 *Merrill-Palmer Q. Behav. & Dev.* 295 (1972).

basic masculine sense of self is separate."<sup>176</sup> Women thus tend to see others as extensions of themselves rather than as outsiders or competitors.<sup>177</sup>

Gilligan suggests that Kohlberg's description of a morally mature person—a "rational individual aware of values and rights prior to social contracts" who adopts "universal principles of justice," including "respect for the dignity of human beings as individual persons"<sup>178</sup>—instead describes a masculine morality.<sup>179</sup> That masculine perspective embodies the individualism inherent in the modern paradigm. The parallel between the classical paradigm and feminine morality, by contrast, is clearly illustrated by Gilligan's quotation of a typical female response to a moral dilemma:

By yourself, there is little sense to things. It is like the sound of one hand clapping, the sound of one man or one woman, there is something lacking. *It is the collective that is important to me*, and that collective is based on certain guiding principles, one of which is that *everybody belongs to it*, and that you all come from it. You have to love someone else, because while you may not like them, you are inseparable from them. In a way, it is like loving your right hand. *They are part of you; that other person is part of that giant collection of people that you are connected to.*<sup>180</sup>

Women's emphasis on connection also suggests that the cliché that women are more cooperative and less competitive than men may have some basis in fact. Historically, women have tended to

<sup>176</sup> N. Chodorow, *supra* note 162, at 169; see Chodorow, *Family Structure and Feminine Personality*, in *Woman, Culture and Society* 43, 44 (M. Rosaldo & L. Lamphere eds. 1974) (feminine personality defines itself in relation and connection to other people more than does masculine personality); Douvan, *New Sources of Conflict in Females at Adolescence and Early Adulthood*, in *Feminine Personality and Conflict* 31, 38 (1970); Garai & Scheinfeld, *Sex Differences in Mental and Behavioral Traits*, 77 *Genetic Psych. Monographs* 169, 270 (1968); C. Gilligan, *supra* note 162, at 8 ("femininity is defined through attachment"). But see E. Maccoby & C. Jacklin, *The Psychology of Sex Differences* 142-50 (1974).

<sup>177</sup> Psychologists use the term "fluid ego boundaries" to suggest what I am calling an intersubjective sense of self. For theories that women's ego boundaries are more fluid (and thus that their conceptions of self are more intersubjective), see N. Chodorow, *supra* note 162, at 67-99, 169; J. Miller, *supra* note 168, at 71-73; Carlson, *Sex Differences in Ego Functioning: Exploratory Studies of Agency and Communion*, 37 *J. Consulting & Clinical Psych.* 267, 270-71 (1971); Gutmann, *Women and the Conception of Ego Strength*, 11 *Merrill-Palmer Q. Behav. & Dev.* 229 (1965); Scheman, *supra* note 8, at 238-39.

<sup>178</sup> Kohlberg, *supra* note 154, at 34-35 (describing the post-conventional level).

<sup>179</sup> See C. Gilligan, *supra* note 162, at 18-22.

<sup>180</sup> *Id.* at 160 (some emphasis in original, some added).

achieve their goals communally; from quilting bees to consciousness-raising sessions, women have banded together rather than striving individually.<sup>181</sup> There are analogous differences between the organization and ideology underlying women's traditional dominion, the family, and men's traditional arena, the marketplace: as Frances Olsen notes, the market is based on an individualist ethic and the family on an altruistic ethic.<sup>182</sup>

Some of the most intriguing evidence of a feminine perspective comes from the field of literary criticism, where feminist critics are discovering characteristic differences in both style and substance between male and female authors. In seeking to identify this "uniquely female literary consciousness,"<sup>183</sup> they are discovering indications of a similar tension between autonomy and connection. Male writers typically portray individuals as existing prior to and divorced from society. The male metaphor, and the male travail, is individualist.<sup>184</sup> In contrast, women writers are less apt to focus on purely individual heroism. Unlike the archtypal masculine "coming of age" novel, the developing feminine counterpart describes women's maturation in the context of a group of women, the definition of one "self" from among many "selves":

For the woman writer, "the group" is a kind of interior quest, a portrait of the artist as several different young selves—contrasting,

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<sup>181</sup> See, e.g., N. Auerbach, *Communities of Women: An Idea in Fiction* (1978); S. Evans, *supra* note 163, at 214-15 (small groups became the primary structure of women's liberation); G. Lerner, *The Majority Finds Its Past: Placing Women in History* 43, 121 (1979); Heilbrun, *A Response To Writing and Sexual Difference*, in *Writing and Sexual Difference* 291, 292 (E. Abel ed. 1982). Women's preference for cooperation over competition may explain early findings that women feared success. Sassen, *Success Anxiety in Women: A Constructivist Interpretation of Its Source and Significance*, 50 *Harv. Educ. Rev.* 13 (1980).

<sup>182</sup> Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1505 (1983); see also M. Sandel, *supra* note 3, at 33 (family life governed by the principle of justice differs in kind from family life governed by spontaneous affection). The universality of separate spheres for men and women is reflected in the distinction between the public political world and the private world of household or family made in all but the simplest society. See J. Elshtain, *supra* note 19, at 6, 14.

<sup>183</sup> Showalter, *Introduction*, in *The New Feminist Criticism: Essays on Women, Literature, and Theory* 6 (E. Showalter ed. 1985); see Showalter, *Feminist Criticism in the Wilderness in The New Feminist Criticism: Essays on Women, Literature, and Theory* 243 (E. Showalter ed. 1985).

<sup>184</sup> See S. Gilbert & S. Gubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination* 67 (1979); Baym, *Melodramas of Beset Manhood: How Theories of American Fiction Exclude Women Authors*, in *The New Feminist Criticism: Essays on Women, Literature, and Theory* 63, 71 (E. Showalter ed. 1985).

perhaps warring, images that are ghosts of her adult destiny. She exorcises them by giving each self her own life. The group portrait thus releases the "other" woman within the mature writer—all those women she chose not to be when she grew up.<sup>185</sup>

Feminist literary critics are also beginning to identify some characteristically feminine styles, which also suggest an intersubjective perspective. For example, women writers more frequently use a technique of rotating a novel's perspective from one character to another.<sup>186</sup> This technique is often criticized by male critics,<sup>187</sup> and it may be that women authors are more receptive to the technique because they are better able to perceive not only the relations among characters but also those between themselves and the characters they create. They almost literally "become" their characters (male and female) for the same reason that their intersubjective perspective keeps them from fully separating themselves from others. Males, on the other hand, with their emphasis on autonomy, see the technique as a violation of the ideal of separation.

### C. *Contextuality and Abstraction*

Scholarship in literature and psychology also suggests that women are more contextual and men more abstract. Piaget, for example, found that girls playing children's games tend to treat the rules of the game as less fixed and more flexible than do boys and that girls are more likely to stop a game altogether—thus preserving friendships—if a dispute arises. For boys, development and application of fixed, abstract rules is almost as important as the object of the game itself.<sup>188</sup> Again, Kohlberg's description of moral development (i.e., the development of the masculine perspective) stresses a progression from context-bound judgments to abstract moral principles.<sup>189</sup> Women, on the other hand, in responding to moral dilemmas, tend instead to look to circumstances rather than to abstractions: the right moral response depends on the context.<sup>190</sup>

<sup>185</sup> Gould, *Life After Radcliffe*, N.Y. Times Book Review, Sept. 23, 1984, at 9.

<sup>186</sup> See, e.g., Mellown, *Character and Themes in the Novels of Jean Rhys*, in *Contemporary Women Novelists: A Collection of Critical Essays* 118, 130 (P. Spacks ed. 1977).

<sup>187</sup> *Id.*

<sup>188</sup> See J. Piaget, *The Moral Judgment of The Child* 82 (1965); see also Lever, *Sex Differences in the Games Children Play*, 23 *Social Probs.* 478 (1976) (similar findings).

<sup>189</sup> See Kohlberg, *supra* note 154.

<sup>190</sup> See C. Gilligan, *supra* note 162, at 38.

This concept of feminine reliance on context is borne out in some empirical experiments. For example, the greater familiarity of even young boys with universal principles is well illustrated by a simple experiment in which boys and girls were shown pictures of everyday objects and asked to group related objects:

[B]oys tend to bracket together objects (or pictures of objects) whose intrinsic characteristics are similar, whereas girls weight more heavily the functional and relational characteristics of the entities to be compared. For instance, boys frequently bracketed together such entities as a truck, a car, and an ambulance, while girls bracketed such entities as a doctor, a hospital bed, and an ambulance.<sup>191</sup>

The boys focused on the abstraction of "locomotion," seeing the objects as independent units, while the girls emphasized instead the concrete relationships among objects.<sup>192</sup> Other studies confirm that males of all ages are better able to separate discrete objects from their backgrounds and relationships than are females. Males are said to be less field-dependent; that is, they have a greater "ability to overcome the influence of an embedding context."<sup>193</sup>

Moreover, current controversies in philosophy tend to break down along gender lines. Despite exceptions, male philosophers often endorse more abstract and less contextual theories. For example, mainstream discussions of virtue tend to assume that virtues are abstract qualities. Committing murder under dangerous circumstances, though a criminal act, may still constitute an instance of the virtue of courage. Philippa Foot, on the other hand, suggests that virtues are contextual, not abstract: the virtue of courage is exhibited only under circumstances where the act itself can be considered courageous.<sup>194</sup>

Some of the most sophisticated attempts to develop "concrete universals"—a notion of essences (*teloi*) located in space and

<sup>191</sup> Hintikka & Hintikka, How Can Language Be Sexist? *in* *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* 139, 145 (S. Harding & M. Hintikka eds. 1983) (footnote omitted).

<sup>192</sup> *Id.* at 145-46; see Maccoby, Sex Differences in Intellectual Functioning, *in* *The Development of Sex Differences* 25-55 (E. Maccoby ed. 1966).

<sup>193</sup> J. Sherman, On the Psychology of Women: A Survey of Empirical Studies 21 (1971); see Witkin & Goodenough, Field Dependence and Interpersonal Behavior, 84 *Psychological Bull.* 661, 662 (1977) (explaining concept of field dependence).

<sup>194</sup> See P. Foot, *supra* note 147, at 15-17.

time<sup>195</sup> and thus reconciling context with the notion of a human *telos*—have been written by women.<sup>196</sup> Iris Murdoch, for example, deplores the loss of a human *telos*, but denies that her (or anyone's) moral theories can be used "as a formula which can be illuminatingly introduced into any and every moral act."<sup>197</sup> She explicitly argues that moral concepts are necessarily "concrete universals."<sup>198</sup> That women are disproportionately represented among modern philosophers seeking both a contextual and a teleological moral theory suggests that, for whatever reason, the reconciliation of the modern and classical paradigms is more natural to women.

Literary criticism also recognizes the difference between the abstraction of men and the concreteness of women. One critic has suggested, for example, that George Eliot's *Mill on the Floss* illustrates the tension between the male notion of universal maxims and the female unwillingness to differentiate the universal from its particular applications.<sup>199</sup> Women's writing has also been charac-

<sup>195</sup> See Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, in *Women and Philosophy: Toward a Theory of Liberation* 5 (C. Gould & M. Wartofsky eds. 1976). Gould defines the concept of concrete universality by contrasting it with abstract universality. Within the abstract conception, universals are only those things common to all humans and so are fixed and unchanging. Id. at 9, 27. The concrete universal, by contrast, is the totality or all common and all different characteristics of a class. Id. at 26. The concrete universal, therefore, is not a fixed essence, but "develops in time . . . [and is] concretely located in history and society." Id. at 27.

<sup>196</sup> Philippa Foot attempts to construct a contextual theory of virtue. See P. Foot, *supra* note 147. Iris Murdoch rejects the modern concept of identity as dependent upon impersonal reality, and tries to construct a contextually teleological moral theory based on morality as "an individual . . . making a specialized personal use of a concept." I. Murdoch, *supra* note 147, at 25. Robin West describes "pragmatic liberalism" as essentially requiring a contextual teleology: pragmatic liberalism is "committed to a *naturalistic* and *evolving* conception of the good life," as opposed to either a "moralistic and static" conception or "indiscriminate preference maximization." West, *supra* note 118, at 674, 682. Drucilla Cornell attempts to revive the Hegelian concept of "geist" to reconcile universality and context. Cornell, *supra* note 164, at 359-372. Whether these attempts are characterized as revivals or as reformations of the classical paradigm, they all reject the modern paradigm.

<sup>197</sup> I. Murdoch, *supra* note 147, at 42-43; see Gould, *supra* note 195, at 5 (describing the philosophic approach of concrete universality and suggesting that it can be used to analyze the position of women).

<sup>198</sup> I. Murdoch, *supra* note 147, at 29.

<sup>199</sup> Jacobus, *The Question of Language: Men of Maxims and The Mill on the Floss*, in *Writing and Sexual Difference* 37, 42 (E. Abel ed. 1982). Jacobus contrasts Eliot's remark, in her novel, that "the man of maxims is the popular representative of the minds that are guided in their moral judgment solely by general rules," with the view of the central character, Maggie Tulliver—"to lace ourselves up in formulas is to ignore the special circum-



terized (and criticized) as less linear and unified and more fluid than men's;<sup>200</sup> this again suggests a focus on context rather than on abstract rules of progression. Even feminine literary criticism is more contextual: Elaine Showalter has suggested that one characteristic of feminist criticism is the rejection of (masculine) objective, non-experiential critical theories.<sup>201</sup>

#### D. Responsibility and Rights

Until recently, the archetypal developmental continuum of individual moral sensibility was believed to be an orderly progression from self-centeredness through other-centeredness to the development of logical, independent, universal principles—rights—that depend neither on one's own needs nor on what others believe is right.<sup>202</sup> Although this progression mirrors male moral development, it fails to reflect the moral growth pattern of women.<sup>203</sup>

Gender-based differences in moral structure, long seen as evidence of women's moral immaturity,<sup>204</sup> may in fact be evidence of a feminine morality that differs in its emphasis from that of males. In her study of moral development, Carol Gilligan found that women tend to view a moral problem as "a problem of care and responsibility in relationships rather than as one of rights and rules."<sup>205</sup> When faced with the moral dilemma of whether a man should steal a drug he cannot afford to save his dying wife, Gilligan found that, while men struggle with the conflicting rights of the parties, women focus on the druggist's "moral obligation to show compassion,"<sup>206</sup> "not on the conflict of rights but on the failure of response."<sup>207</sup> Although men and women may agree that the man ought to steal the drug, men justify it in terms of a resolution be-

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stances that mark the individual lot." *Id.* (quoting G. Eliot, *Mill on the Floss* 628 (A. Byatt ed. 1979)).

<sup>200</sup> Gardiner, *On Female Identity and Writing By Women*, in *Writing and Sexual Difference* 177, 185 (E. Abel ed. 1982); Jacobus, *supra* note 199, at 39-40.

<sup>201</sup> Showalter, *Feminist Criticism in the Wilderness*, *supra* note 183, at 244.

<sup>202</sup> See L. Kohlberg, *The Philosophy of Moral Development* (1981); Kohlberg, *supra* note 154.

<sup>203</sup> See C. Gilligan, *supra* note 162, at 18-22.

<sup>204</sup> See L. Kohlberg, *supra* note 202; N. Noddings, *supra* note 19, at 42; J. Sherman, *supra* note 193, at 101-02.

<sup>205</sup> C. Gilligan, *supra* note 162, at 73.

<sup>206</sup> *Id.* at 54 (quoting a subject of Gilligan's study).

<sup>207</sup> *Id.*

tween conflicting rights of husband and druggist, and women in terms of the need for more compassion by the druggist in the face of the husband's compassion for his wife.<sup>208</sup> Whether personal or political,<sup>209</sup> the moral structure of "mature" males reflects a paradigm of independent rights, while that of females emphasizes relational responsibilities.

Gilligan's work suggests that moral development from the conventional level may take either of two directions: progression toward a contextual moral theory (expanding on Aristotelian notions of what is right or good but placing human *teloi* in context) or progression toward an abstract moral theory (emphasizing rights as a form of trump). Recognition of alternative routes of moral development may shed new light on the failure of Jeffersonian republicanism and the ultimate triumph of liberalism. The classical paradigm, especially in its republican form, may be an example of the conventional level on the verge of its masculine successor. The republican vision represented an incomplete or immature ideology, but its maturation might have taken either of two paths: development of a mature virtue-based ideology or rejection of virtue in favor of rights. The former reflects a feminine vision, the latter a masculine perspective. Because the feminine paradigm has been conspicuously absent from the shaping of moral or political traditions, the development of the nation's ideology has paralleled individual moral development in the male pattern, not the female pattern.<sup>210</sup>

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<sup>208</sup> See, e.g., *id.* at 29.

<sup>209</sup> The two types of morality—personal and political—are intimately connected: "every moral vision is ultimately and irreducibly a political vision: a vision (or understanding or experience) of the world and of our place, as fundamentally social beings, in that world." Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U.L. Rev. 1137, 1149 (1984).

<sup>210</sup> Anthony Kronman has described an analogous bifurcated path out of the Hobbesian state of nature. He suggests that parties in a state of nature, wishing to enter into contracts that neither they nor any third party has the pure strength to enforce, must develop mechanisms to provide security of performance. Three of his potential mechanisms presume that the parties' interests are unalterably opposed to one another and thus rely on such hostile devices as taking hostages. These mechanisms are quintessentially masculine. The final mechanism he describes as "union": the parties "reduce the risk of opportunism by taking steps to increase the likelihood that each will see his own self-interest as being internally connected to the welfare of the other." This last mechanism is fundamentally feminine. Although Kronman suggests that all four mechanisms still survive in our post-nature law of contracts, the very numerical imbalance between masculine and feminine mechanisms illus-

## VI. TOWARD A FEMININE JURISPRUDENCE: THE FEMININE PERSPECTIVE OF JUSTICE O'CONNOR

The preceding argument suggests that the Constitution, especially in light of subsequent interpretations in the liberal tradition, is a quintessentially masculine document. Calls for a more classical interpretation are unlikely to succeed as long as the interpreters are exclusively male. But the interpreters are no longer exclusively male. Justice O'Connor's four years on the Supreme Court provide an excellent opportunity to test the thesis that a feminine perspective might result in a feminine jurisprudence and to sketch the contours of one version of that jurisprudence. If the thesis is correct, O'Connor's jurisprudence should differ in characteristically feminine or classical ways from the jurisprudence of her brethren. The remainder of this article will explore the feminine aspects of her jurisprudence. In particular, it will focus on differences between Justices O'Connor and Rehnquist: because they are otherwise ideologically similar, and because they so often vote together,<sup>211</sup> their disagreements are significant. This pattern of disagreement is highly suggestive of the operation of a uniquely feminine perspective.<sup>212</sup>

### A. Community Values

Despite the fundamental dichotomy between a jurisprudence of rights and a jurisprudence of community, there is one type of case in which the two will intersect to yield the same result. Both individualists and communitarians may be expected to protest infringement of individual rights that protect against diminution of

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trates the prevalence of the masculine paradigm. See Kronman, *Contract Law and the State of Nature*, 1 J.L. Econ & Organization 5 (1985).

<sup>211</sup> During the 1981 term, O'Connor and Rehnquist voted together in 81.6% of the Court's full-opinion decisions; in 1982-1983 they voted together in 85.7% of the Court's full-opinion decisions; and in 1983-1984 they voted together in 91.9% of the Court's full-opinion decisions. In the 1981 and 1983 terms, only Brennan and Marshall voted together more often, and in the 1982 term no two justices did so. See *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62, 305 (1982); *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 70, 296 (1983); *The Supreme Court, 1983 Term*, 98 Harv. L. Rev. 87, 308 (1984).

<sup>212</sup> This data cannot be quantified or proven scientifically and is thus open to criticism that it is possible to find indications of a feminine perspective in the writings of *any* Justice. These indications are, however, so prevalent in O'Connor's jurisprudence, and so characteristic of her disagreements with her brethren, that I doubt whether an analysis of any other Justice's work would yield such a consistently suggestive pattern.

or exclusion from community membership. Two issues frequently before the Supreme Court exhibit this intersection. In establishment clause cases, government endorsement of religion might be deemed to devalue the community status of non-believers. In discrimination cases, a demand for equal treatment can be viewed as a demand to be treated as an equal member of the community. The common thread in these cases is that the rights at issue belong to individuals as members of communities rather than as autonomous units. While most constitutional and statutory rights protect the individual *against* the community, anti-establishment and anti-discrimination values safeguard the individual's right to *belong* to the community. It is therefore highly suggestive that O'Connor frequently disagrees with Rehnquist (and often with Chief Justice Burger as well) in such cases.

### 1. *Establishment Clause Cases*

In three major establishment clause cases, Justice O'Connor joined the majority in striking down state statutes while Justice Rehnquist dissented.<sup>213</sup> In several other cases, the two justices disagreed at least in part.<sup>214</sup> This pattern of disagreement suggests that O'Connor does not fully share Rehnquist's hostility to individual rights. O'Connor's explanation of her position on the establishment clause is not, however, fully congruent with established liberal doctrine on the protection of individual rights. She relies instead on a strikingly unique vision of the harms that the establishment clause is intended to prevent. That vision fits the feminine paradigm to the extent that it derives its force from a preference for notions of community over notions of individual rights.

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<sup>213</sup> See *Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

<sup>214</sup> See *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (both justices dissent from majority invalidation of parochial school aid program, but on different grounds); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985) (majority invalidates two programs providing public aid to parochial schools: Rehnquist would uphold both programs, but O'Connor only one); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (both join majority in upholding public display of creche, but O'Connor concurs separately to "clarify" her view of the appropriate test); *Larson v. Valente*, 456 U.S. 228 (1982) (majority invalidates reporting regulations applicable to some religious organizations but not others: neither O'Connor nor Rehnquist would grant standing, but only Rehnquist joins White's dissent on the merits).

Justice O'Connor first described her own views of the establishment clause in *Lynch v. Donnelly*.<sup>215</sup> In that case, the Court upheld, against an establishment clause challenge, the inclusion of a creche in a municipality's annual Christmas display. Justice O'Connor joined the majority opinion but also wrote separately "to suggest a clarification of [the Court's] Establishment Clause doctrine."<sup>216</sup> She read the precedents to establish a rule forbidding "government endorsement or disapproval of religion."<sup>217</sup> Her explanation for that rule reveals her reliance on the values of community rather than individual rights: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."<sup>218</sup>

This theory came to fruition a year later in *Wallace v. Jaffree*.<sup>219</sup> In *Lynch*, O'Connor had found no message of exclusion from community in the decision to erect a creche. In *Wallace*, she found that Alabama's school prayer statute did communicate such a message. She therefore joined the "liberal" majority in voting, over strong dissents by Burger, White, and Rehnquist, to invalidate the statute. She did not, however, join Stevens' majority opinion, which held that, under the three-prong test developed in *Lemon v. Kurtzman*,<sup>220</sup> the statute was fatally flawed by its religious purpose. She relied instead on the test she had fashioned in *Lynch*. In light of the controversy surrounding the statute's enactment, she held that an "objective observer" would necessarily conclude that both the intended and received message of the statute was endorsement of religious activity. Elaborating on the importance of community membership, O'Connor suggested that diminution of that membership, as well as exclusion from the community, violates the establishment clause: "the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the politi-

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<sup>215</sup> 465 U.S. 668 (1984).

<sup>216</sup> *Id.* at 687 (O'Connor, J., concurring).

<sup>217</sup> *Id.* at 688

<sup>218</sup> *Id.*

<sup>219</sup> 105 S. Ct. 2479 (1985).

<sup>220</sup> 403 U.S. 602 (1971).

cal community."<sup>221</sup>

A theory that characterizes the evil of government endorsement of religion as a detriment to one's membership in the community, rather than as a violation of one's individual rights, goes a long way toward explaining the pattern of disagreement between O'Connor and her fellow conservatives. Although she often joins the conservative contingent in denying protection to ordinary individual rights—those that inhere solely in the individual—she is less willing to permit violations of what might be termed intersubjective individual rights. Government endorsement of religion deprives individuals of what O'Connor views as a value qualitatively different from most ordinary individual rights: full membership in the community. This very anomalous sort of right derives its force not from the independence of individuals but from their mutual interdependence.

## 2. *Discrimination Cases*

Although it is not surprising that Justice O'Connor is more receptive to claims of gender discrimination than is Justice Rehnquist,<sup>222</sup> it is more difficult to explain her greater willingness to remedy the effects of race discrimination and discrimination against aliens.<sup>223</sup> Moreover, in several cases that defy easy charac-

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<sup>221</sup> *Wallace*, 105 S. Ct. at 2497 (O'Connor, J., concurring).

<sup>222</sup> See, e.g., *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (O'Connor finds paying lower retirement benefits to women violates Title VII; Rehnquist does not); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (O'Connor finds failure to cover medical expenses of employees' pregnant spouses, when all other medical costs of spouses are covered, violates Title VII; Rehnquist does not); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (O'Connor finds exclusion of men from state nursing school violates equal protection clause; Rehnquist does not); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (O'Connor finds employment discrimination within the scope of Title IX's prohibition against gender discrimination by institutions receiving federal funds; Rehnquist does not); *Zipes v. TWA*, 455 U.S. 385 (1982) (both agree with majority that filing charges with the EEOC is an equitable, not a jurisdictional, prerequisite to bringing a suit under Title VII, but only Burger and Rehnquist join Powell's separate concurrence to stress the necessity of timely charges for any award of retroactive seniority). But see *Grove City College v. Bell*, 465 U.S. 555 (1984) (both agree that Title IX is limited to narrow program receiving federal funds); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (both agree that, in a gender discrimination case under Title VII, an offer of reinstatement, even without an offer of retroactive seniority, tolls an employer's backpay liability).

<sup>223</sup> On race discrimination, see, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (in case limiting scope of affirmative action in employment, O'Connor writes separately to stress the narrowness of the Court's holding); *Guardians Ass'n v. Civil Serv.*

terization, the difference between her position and that of Justice Rehnquist seems to lie in her reluctance to accept conduct that condemns groups or individuals to outsider status. Although her reasoning in this area is less clearly articulated than in her establishment clause jurisprudence, an examination of several cases illustrates the underlying framework of an emphasis on community. That framework indicates that her greater sympathy for the victims of race or alienage discrimination is part of a consistent pattern of protection of the value of full membership in communities.

Two companion cases involving apportionment illustrate Justice O'Connor's views on discrimination. Apportionment cases involve one of the most fundamental aspects of community membership, the right to participate in the shaping of the community's values

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Comm'n, 463 U.S. 582 (1983) (under Title VI, O'Connor would allow greater relief to victims of discrimination than would Rehnquist; she also notes that she might construe Title VI to prohibit non-intentional discrimination were the issue not foreclosed by precedent); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (O'Connor joins majority upholding IRS regulation making discriminatory schools ineligible for tax-exempt status; Rehnquist dissents); *Kolender v. Lawson*, 461 U.S. 352 (1983) (O'Connor finds "stop-and-identify" statute unconstitutionally vague, noting danger of discriminatory enforcement against particular groups; Rehnquist dissents); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (O'Connor joins majority finding NAACP-sponsored boycott of white merchants protected by first amendment and therefore not subject to action for damages; Rehnquist concurs in result only, without opinion); *Rogers v. Lodge*, 458 U.S. 613 (1982) (O'Connor joins majority affirming district court's finding that at-large election district maintained for racially discriminatory purpose; Rehnquist dissents); *Hathorn v. Lovorn*, 457 U.S. 255 (1982) (O'Connor finds that state court asked to implement change in state voting laws must first determine whether pre-clearance by attorney general is necessary under Voting Rights Act; Rehnquist finds that state courts have no role in enforcing the Voting Rights Act); *Blanding v. DuBose*, 454 U.S. 393 (1982) (O'Connor joins per curiam opinion construing Voting Rights Act to require perfect compliance with detailed procedures; Rehnquist concurs, but writes separately to lament the "unreasonably burdensome and unrealistic control" over state and local governments given to the federal government under the Act.); *Canaday v. Lumberton City Bd. of Educ.*, 454 U.S. 957 (1981) (O'Connor joins majority in granting injunction against annexation pending Voting Rights Act clearance; Rehnquist dissents); *Board of Educ. v. Davis*, 454 U.S. 904 (1981) (Court denies certiorari in school desegregation case; Rehnquist dissents).

On discrimination against aliens, see, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (O'Connor holds that employer commits unfair labor practice by reporting illegal alien to INS in retaliation for participation in union activities; Rehnquist dissents on ground that illegal aliens are not "employees" within the meaning of the NLRA); *Bernal v. Fainter*, 467 U.S. 216 (1984) (O'Connor joins majority in invalidating restriction of notary public status to citizens; Rehnquist dissents); *Toll v. Moreno*, 458 U.S. 1 (1982) (O'Connor would allow in-state tuition discrimination against some aliens; Rehnquist would allow it against all aliens).

through the electoral process. In *Brown v. Thomson*,<sup>224</sup> the Court upheld Wyoming's apportionment scheme for its house of representatives despite a maximum deviation of eighty-nine percent from population equality between counties. Justice Powell's opinion relied heavily on the fact that the plaintiffs were challenging only the representation granted to the state's least populous county. Under the apportionment formula provided by the Wyoming legislature, Niobrara County would not have been entitled to any representation in the Wyoming house. The legislative scheme, however, guaranteed each county at least one representative. Plaintiffs challenged Niobrara County's mathematically undeserved single representative on the ground that it diluted the votes of residents of more populous counties. O'Connor, Rehnquist, Burger, and Stevens joined Powell's opinion while Brennan, White, Marshall, and Blackmun dissented.

In *Karcher V. Daggett*,<sup>225</sup> decided the same day, the Court invalidated a New Jersey congressional apportionment scheme with a maximum deviation of 0.6984%. Justice Brennan's majority opinion held that the state failed to meet its burden of showing that "the population deviations in its plan were necessary to achieve some legitimate state objective."<sup>226</sup> O'Connor again joined the majority, along with Marshall, Blackmun, and Stevens; Burger, White, Powell, and Rehnquist dissented. Thus, Rehnquist, Burger, and Powell would have upheld imperfect apportionment schemes in both cases and Brennan, Marshall, and Blackmun would have invalidated both plans. The discrepancy in White's voting pattern apparently rested on the size of the numerical deviation, and Stevens explained his vote in *Karcher* as a vote against deliberate political gerrymandering.<sup>227</sup> What seems irreconcilable at first glance is O'Connor's approval of the large deviation in *Brown* and her condemnation of the small deviation in *Karcher*.

O'Connor explained her apparently inconsistent votes in a concurrence in *Brown*.<sup>228</sup> After an initial bow both to equality as a guiding ideal and to a need for flexibility, she relied on two aspects

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<sup>224</sup> 462 U.S. 835 (1983).

<sup>225</sup> 462 U.S. 725 (1983).

<sup>226</sup> *Id.* at 740.

<sup>227</sup> *Id.* at 744 (Stevens, J., concurring).

<sup>228</sup> 462 U.S. at 848 (O'Connor, J., concurring). Stevens joined her concurrence in *Brown*, although she did not join his in *Karcher*.



of the Wyoming scheme to justify treating it more favorably than the New Jersey scheme. First, while New Jersey failed to demonstrate that its deviations were necessary to any non-discriminatory purpose, O'Connor had "no doubt that the population deviation resulting from the provision of one representative to Niobrara County is the product of the consistent and nondiscriminatory application of Wyoming's longstanding policy of preserving county boundaries."<sup>229</sup> Second, emphasizing that even this policy would not justify a statewide maximum deviation of eighty-nine percent,<sup>230</sup> O'Connor noted that the relevant deviation in the case was not the eighty-nine percent "when the State of Wyoming is viewed as a whole, but the additional deviation from equality produced by the allocation of one representative to Niobrara County."<sup>231</sup>

Both votes are consistent with classical republican ideals. In *Karcher*, O'Connor voted to uphold the principle of "one person, one vote," thus preserving to each citizen an undiluted voice in the electoral process. In *Brown*, however, that republican principle collided with another classical ideal. O'Connor's reliance on the importance of preserving county boundaries, a justification rejected by the liberal dissenters,<sup>232</sup> echoes a theme discussed in the next section: the notion of the community itself as an independent entity with interests to be protected. O'Connor was willing to protect individuals' access to community membership and participation only to the point at which it conflicted with ensuring the viability of a certain type of community. The priority of the community's interests, at the cost of diminishing the value of membership for some of its members, recalls the republican demand that individuals subordinate their selfish desires to the needs of the collective. O'Connor's emphasis on the fact that the additional deviation in this case was quite small suggests both a limit to the sacrifices that communities may demand of their members and a feminine tendency to examine apportionment questions in context rather than in the abstract.<sup>233</sup>

Another case involving neither race nor gender discrimination

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<sup>229</sup> Id. at 849.

<sup>230</sup> Id. at 850.

<sup>231</sup> Id. at 849.

<sup>232</sup> See id. at 853-55 (Brennan, J., dissenting).

<sup>233</sup> See supra notes 188-201 and accompanying text; infra notes 269-306 and accompanying text.

helps to elucidate the boundaries of O'Connor's view of the relationship between community values and discrimination. In *United Brotherhood of Carpenters & Joiners v. Scott*,<sup>234</sup> union members assaulted and severely injured nonunion employees. The victims sued under 42 U.S.C. § 1985(3), alleging a conspiracy to violate their civil rights. White's majority opinion held that the plaintiffs stated no cause of action. The claim of conspiracy to violate the victim's first amendment rights of association with other non-union employees failed because it involved neither state action nor an attempt to influence state action. The majority then relied upon established precedent to hold that a section 1985(3) claim of conspiracy to deprive plaintiffs of equal protection of the laws does not require state action, but does require a class-based animus. The majority concluded that a bias against others because of their economic views or status did not constitute the requisite "class-based animus."

Unsurprisingly, the decision evoked an angry dissent from the liberals. Blackmun authored the dissent, which was joined by Brennan, Marshall, and O'Connor. Blackmun prefaced his lengthy and thorough historical examination of the legislative intent in enacting section 1985(3) with a telling description of how the problem ought to be framed:

The Ku Klux Klan Act was the Reconstruction Congress' response to politically motivated mob violence in the postbellum South designed to intimidate persons in the exercise of their legal rights. . . . Today, in a classic case of mob violence intended to intimidate persons from exercising their legal rights, the Court holds that the Ku Klux Klan Act provides no protection.<sup>235</sup>

This characterization of the issue helps explain why an otherwise politically conservative Justice O'Connor might join the dissent. Mob violence aimed at intimidating persons from exercising legal rights—whether against blacks in the postbellum South or against the non-union employees in *Scott*—is a time-tested method of keeping outsiders on the outside. The majority's division of class-based animus into biases based on race, on political status, and on economic status, each subject to different rules under section

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<sup>234</sup> 463 U.S. 824 (1983).

<sup>235</sup> *Id.* at 839-40 (Blackmun, J., dissenting).

1985(3), overlooks the fundamental similarity of all instances of mob violence inspired by a desire to keep members of another class from sharing in the benefits adhering to membership in the conspirators' own group.

A final case, *Zobel v. Williams*,<sup>236</sup> serves to highlight the unique status of the feminine perspective in modern jurisprudence. That case involved a challenge to an Alaska statute that distributed a state budget surplus to state residents in varying amounts depending on their length of residency. Burger, in an opinion joined by all the justices except Rehnquist and O'Connor, found the scheme invalid under the equal protection clause. Rehnquist, the sole dissenter, would have upheld the statute. O'Connor concurred in the judgment only: she found the statute valid under the equal protection clause but invalid as a violation of the right to travel protected by the privileges and immunities clause.

Alaska attempted to justify its distribution scheme as a way to reward residents for their past contributions to the state. Using only a rational basis test to strike down the statute, the majority found this objective illegitimate. O'Connor disagreed:

I respectfully suggest . . . that the Court misdirects its criticism when it labels Alaska's objective illegitimate. A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. Under some circumstances, the objective may be wholly reasonable. Even a generalized desire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper.<sup>237</sup>

In a footnote, she suggested community volunteer work and contributions to the state's ecology as examples of the types of benefits to the community that it might be rational to reward.<sup>238</sup> Reiterating the legitimacy of rewarding past service to the community, O'Connor stated that she "would recognize them as valid goals and inquire only whether their implementation infringed any constitutionally protected interest."<sup>239</sup> She ultimately found such an infringement of the right to travel and therefore joined the majority

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<sup>236</sup> 457 U.S. 55 (1982).

<sup>237</sup> Id. at 72 (O'Connor, J., concurring) (footnote omitted).

<sup>238</sup> Id. at 72 n.1.

<sup>239</sup> Id.

in holding the statute invalid.

O'Connor's opinion in *Zobel* is illuminating in a number of respects. Her refusal to find an equal protection violation in a case *not* involving a "discrete and insular minority"—a group with outsider status—is consistent with the feminine jurisprudential rejection of individual rights except where they implicate community membership. Her reliance on the right to travel suggests protection of the right to join a community: she notes that "[s]tripped to its essentials, the plan denie[d] non-Alaskans settling in the state the same privileges afforded longer term residents."<sup>240</sup> Most important, O'Connor, unlike most of the Court, is willing to allow communities to discriminate among members on the basis of their past willingness to suppress their own selfish desires for the benefit of the community. A republican community may—indeed must—reward individual virtue. An egalitarian community of autonomous individuals may not.<sup>241</sup>

### 3. *A Community Perspective*

A communitarian feminine jurisprudence is manifested in a variety of other O'Connor opinions. In several cases, she seems to treat the community as a discrete and important juridical entity. In *Allen v. Wright*,<sup>242</sup> parents of black public schoolchildren sought standing to challenge IRS procedures that were allegedly ineffective in preventing discriminatory private schools from illegally obtaining tax exempt status. The plaintiffs alleged that the availability of tax-exempt status for discriminatory private schools made it more difficult to integrate the public schools their children attended. O'Connor's majority opinion rejected this argument and several others, and found that the plaintiffs lacked standing. In attempting to base their standing to sue on the effect of the tax exemptions on public schools, the plaintiffs relied heavily on *Coit v. Green*.<sup>243</sup> In *Coit*, the district court allowed parents of black public school students to challenge the IRS grant of tax exemptions to

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<sup>240</sup> *Id.* at 73.

<sup>241</sup> Contrast O'Connor with Baker's description of Rawlsian liberalism: "people in the original position, not knowing if they themselves would be virtuous, would not choose rules that aim at rewarding virtue." Baker, *supra* note 112, at 913.

<sup>242</sup> 104 S. Ct. 3315 (1984).

<sup>243</sup> 404 U.S. 997 (1971) (mem.).

racially discriminatory private schools.<sup>244</sup> The Supreme Court affirmed summarily. In *Allen*, O'Connor sought to distinguish *Coit* by focusing in part on the size of the affected community: she noted that "the suit in *Coit* was limited to the public schools of one State,"<sup>245</sup> in contrast to the *Allen* complaint, "which aims at nationwide relief."<sup>246</sup> As Brennan pointed out in dissent, the size of the community is irrelevant to standing but instead "relates solely to the scope of a properly certified class."<sup>247</sup> O'Connor's use of the distinction is therefore novel. It perhaps suggests an underlying perception that small, homogenous, cohesive communities are the appropriate targets of judicial relief.

Communities are not only independent juridical entities, but, in Justice O'Connor's view, they are often entitled to more favorable treatment than individuals. In *Block v. North Dakota*,<sup>248</sup> O'Connor was the sole dissenter from the Court's application of a general statute of limitations to bar a state's suit to quiet title. Her opinion stressed that the state should not be subject to the statute of limitations applicable to ordinary individuals because the state holds land "in trust for the public."<sup>249</sup> In *Idaho v. Oregon*,<sup>250</sup> she would have held ordinary rules limiting equitable remedies similarly inapplicable to a state's suit to protect its fishing rights.<sup>251</sup> Finally, in *Jefferson County Pharmaceutical Association v. Abbott Laboratories*,<sup>252</sup> she would have held the sale of pharmaceutical products to state and local government-operated hospitals (for resale in competition with private pharmacies) exempt from the Robinson-Patman Act.<sup>253</sup> She seemed again to rely on a notion that government institutions are unique because of their status vis-a-vis their citizens: she found the exemption appropriate because "[s]tate and local governments have developed programs for providing services to

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<sup>244</sup> *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd sub nom. *Coit v. Green*, 404 U.S. 997 (1971).

<sup>245</sup> *Allen*, 104 S. Ct. at 3332.

<sup>246</sup> *Id.* at 3333.

<sup>247</sup> *Id.* at 3340 n.9 (Brennan, J., dissenting).

<sup>248</sup> 461 U.S. 273 (1983).

<sup>249</sup> *Id.* at 295 (O'Connor, J., dissenting).

<sup>250</sup> 462 U.S. 1017 (1983).

<sup>251</sup> See *id.* at 1032-38 (O'Connor, J., dissenting).

<sup>252</sup> 460 U.S. 150 (1983).

<sup>253</sup> See *id.* at 189 (O'Connor, J., dissenting).

the public . . . based on the . . . assumption [that they are exempt]."<sup>254</sup>

O'Connor is particularly unlikely to take a typical conservative approach—and thus particularly likely to disagree with Rehnquist—in cases implicating participation in the processes of government. On issues as diverse as restrictions on the broadcast media,<sup>255</sup> exemptions to the Freedom of Information Act,<sup>256</sup> interpretation of the Voting Rights Act,<sup>257</sup> and rewards to citizens for community service,<sup>258</sup> she has disagreed with Rehnquist (and often with the liberals as well) on the explicit or implicit ground that his position undermines the right or duty of citizens to participate in government. Inexplicable under ordinary conservative political theory, her position may reflect both an emphasis on membership in the community and a view that shaping the values of the community through governmental processes is one important function of community members.

O'Connor also is more likely to find and stress the "public purpose" of various governmental actions. In *Merrion v. Jicarilla Apache Tribe*,<sup>259</sup> she agreed with a liberal majority that the Indian tribe's taxing power derived from the tribe's general power to "control economic activities within its jurisdiction, and to defray the cost of providing governmental services;"<sup>260</sup> she rejected the conservative dissent's argument that it derived merely from the power to exclude non-Indians from reservation lands.<sup>261</sup> In a contracts clause case, *Energy Reserves Corp. v. Kansas Power & Light Co.*,<sup>262</sup> she joined a portion of a liberal majority opinion rejected by the conservative concurrences; the controversial section concluded that even if there had been an impairment of contract, there was a sufficient public purpose to uphold the governmental action.<sup>263</sup> She also wrote a unanimous opinion in a takings case, *Hawaii Housing Authority v. Midkiff*,<sup>264</sup> that can only be explained from a commu-

<sup>254</sup> *Id.* at 188 (O'Connor, J., dissenting).

<sup>255</sup> See *FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984).

<sup>256</sup> See *FBI v. Abramson*, 456 U.S. 615 (1982).

<sup>257</sup> See cases cited *supra* note 223.

<sup>258</sup> See *Zobel v. Williams*, 457 U.S. 55 (1982).

<sup>259</sup> 455 U.S. 130 (1982).

<sup>260</sup> *Id.* at 137.

<sup>261</sup> See *id.* at 160 (Stevens, J., dissenting).

<sup>262</sup> 459 U.S. 400 (1983).

<sup>263</sup> See *id.* at 416-17.

<sup>264</sup> 104 S. Ct. 2321 (1984). For further discussion of this aspect of this case, see Sherry,

nitarian perspective, essentially approving land redistribution for its own sake.

Finally, describing O'Connor as a communitarian is as explanatory as the "conservative" label when it comes to her obvious hostility to the rights of criminal defendants. Not only does she constitute part of the core conservative majority in most criminal procedure cases, she occasionally construes the fourth and fifth amendments even more narrowly than some of her conservative brethren. In *Segura v. United States*,<sup>265</sup> she was the only justice to join Burger's characterization of the fourth amendment as primarily precluding unreasonable, rather than warrantless, seizures. In *Pillsbury Co. v. Conboy*,<sup>266</sup> only she and Stevens dissented from a holding that an individual could not be required to testify as to the content of his own grand jury testimony at a civil deposition without further grant of immunity. In *Colorado v. Nunez*,<sup>267</sup> a case in which certiorari was dismissed as improvidently granted, she joined White's concurring opinion reaching the merits of the fourth amendment question and construing that amendment to afford very narrow protection.<sup>268</sup> If the community is more important than individual rights, it is quite predictable that Justice O'Connor would be a strong law and order proponent: she will protect the community from crime even at the expense of the individual rights of criminal defendants.

### B. *Virtue in Context*

The emerging jurisprudence of Justice O'Connor also exhibits a characteristically feminine perspective in its emphasis on contex-

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Issue Manipulation by the Burger Court: Saving the Community from Itself, 70 Minn. L. Rev. 611 (1986).

<sup>265</sup> 104 S. Ct. 3380 (1984).

<sup>266</sup> 459 U.S. 248 (1983).

<sup>267</sup> 465 U.S. 324 (1984).

<sup>268</sup> See *id.* at 326-27; see also *New York v. Quarles*, 467 U.S. 649 (1984) (O'Connor concurs in part and dissents in part; agrees that nontestimonial evidence derived from informal interrogation is admissible and states that she would agree with the Court's public safety exception to *Miranda* rule for oral statements if the Court were writing on a clean slate); *Anderson v. Fuller*, 455 U.S. 1028 (1982) (joining Burger dissent from denial of certiorari where court of appeals concluded that there was insufficient evidence of intention in a felony-murder conviction). But see *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (O'Connor joins majority holding that a warrantless nighttime entry into defendant's home to arrest him for a non-jailable civil traffic offense violated the fourth amendment).

tual decisionmaking and its focus on the virtues of the decisionmaker rather than the rights of those about whom decisions are made. These two notions seem intertwined in the legal context insofar as the rejection of rigid, bright-line rules often undermines the protection of individual rights and thus leaves a gap in the theory of decisionmaking. The feminine focus on the virtue of connection—which, at least in the criminal context, often translates as compassion or mercy—fills that gap.

O'Connor often rejects bright-line rules and occasionally makes explicit her preference for contextual determinations. *Wilson v. Garcia*<sup>269</sup> involved the question of the appropriate statute of limitations for actions under 42 U.S.C. § 1983. Established doctrine under 42 U.S.C. § 1988 directs courts to look to state law for the appropriate limitations period, and courts accordingly have applied the limitations period applicable to the state cause of action most closely analogous to the section 1983 claim. This led courts to apply varying limitation periods to claims under section 1983, depending on the characterization of plaintiff's particular claim.<sup>270</sup> With O'Connor as the sole dissenter, the Court in *Wilson* decided that all section 1983 actions should be characterized as personal injury actions for purposes of determining the appropriate statute of limitation. Stevens' majority opinion rested primarily on a need for a uniform rule. O'Connor argued instead for the application of "individualized statutes of limitation."<sup>271</sup> She noted that the diversity of claims under section 1983, "ranging from simple police brutality to school desegregation cases,"<sup>272</sup> made the Court's "single inflexible analogy" inappropriate.<sup>273</sup> She pejoratively characterized the majority's demand for uniformity as a mere "'desire for symmetry of abstract legal principles.'<sup>274</sup> Finally, she pointed out the new rule would not ensure uniformity: "The Court's new analogy lacks any magical power to conjure uniformity where diversity

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<sup>269</sup> 105 S. Ct. 1938 (1985).

<sup>270</sup> See *id.* at 1946 & nn.32-33 (recognizing problem and citing cases).

<sup>271</sup> *Id.* at 1950 (O'Connor, J., dissenting).

<sup>272</sup> *Id.* at 1951 (quoting Note, Choice of Law Under Section 1983, 37 U. Chi. L. Rev. 494, 504 (1970)).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1953 (quoting Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 813 (1957)).



is the natural order."<sup>275</sup>

O'Connor's strong dislike of bright-line rules is particularly evident in a labor case, *Charles D. Bonanno Linen Service v. NLRB*.<sup>276</sup> The sole issue in the case was whether a bargaining impasse justified an employer's withdrawal from a multiemployer bargaining unit. The majority adopted a uniform rule prohibiting withdrawal under those circumstances, and Burger's dissent (in which Rehnquist joined) advocated a uniform rule permitting withdrawal. O'Connor dissented separately to argue that the answer should depend on an examination of "the circumstances surrounding and following an impasse."<sup>277</sup> Similarly, in *United States v. Mechanik*,<sup>278</sup> Justice Rehnquist's majority opinion adopted a per se rule that subsequent conviction by a petit jury makes certain constitutional violations in the grand jury harmless error. O'Connor's concurrence rejected both the majority's rule and the presumption of the existence of prejudice from grand jury violations. She instead would direct courts to examine, in each case, whether "the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt as to whether it had such effect."<sup>279</sup> Thus, even where she agrees with Rehnquist's result, she will sometimes file a separate opinion to record that the basis for her decision is the particular circumstances of the case.<sup>280</sup> She

<sup>275</sup> *Id.*; see *Chardon v. Soto*, 462 U.S. 650 (1983) (O'Connor joins majority in applying local rule, not uniform federal rule, pertaining to effect of denial of class certification on statute of limitations); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) (O'Connor dissents from application of uniform federal statute of limitations to an employee's combined suit against employer for breach of collective bargaining agreement and against union for breach of its duty of fair representation). O'Connor frequently disagrees with Rehnquist on statute of limitations issues, although not always in any particular pattern. See, e.g., *County of Oneida v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985) (Rehnquist joins Steven's dissent; O'Connor does not); *Honda Motor Co. v. Coons*, 105 S. Ct. 808 (1985) (Rehnquist dissents from denial of certiorari; O'Connor does not); *Simmons v. Sea-Land Serv. Inc.*, 459 U.S. 931 (1982) (White and O'Connor dissent from denial of certiorari; Rehnquist does not).

<sup>276</sup> 454 U.S. 404 (1982).

<sup>277</sup> *Id.* at 427 (O'Connor, J., dissenting); see *Shepard v. NLRB*, 459 U.S. 344 (1983) (Rehnquist writes majority opinion affirming NLRB refusal to award "complete relief" for violations of NLRB prohibition against "hot cargo" agreements; O'Connor alone dissents and would require NLRB to determine whether requested relief was necessary under the circumstances to effectuate the prohibition).

<sup>278</sup> 54 U.S.L.W. 4167 (U.S. Feb. 25, 1986).

<sup>279</sup> *Id.* at 4170.

<sup>280</sup> See, e.g., *United States v. Boyle*, 105 S. Ct. 687 (1985); *Toll v. Moreno*, 458 U.S. 1

also often writes separately to note that the Court's decision does not foreclose individual determinations to the contrary on remand or under other circumstances.<sup>281</sup>

O'Connor further elaborated her requirement of individualized decisionmaking in a criminal case that saw her aligned with the liberal majority against the conservative contingent. In *Eddings v. Oklahoma*,<sup>282</sup> she joined the majority holding that the eighth amendment requires an individualized consideration of mitigating circumstances in capital cases. The Court thus invalidated a state law that, as interpreted by the state courts, precluded the consideration of family background and personal history. The Chief Justice dissented, joined by White, Rehnquist, and Blackmun. O'Connor wrote a separate concurrence to explain the need for "extraordinary measures to ensure . . . that the sentence was not imposed out of whim, passion, prejudice, or mistake."<sup>283</sup> Those safeguards, in effect, ensure that the punishment is tailored to individual desert.

Individualized decisionmaking does not always lead O'Connor to a decision in favor of the individual. In *Mennonite Board of Missions v. Adams*,<sup>284</sup> she dissented (with Powell and Rehnquist) from the majority's finding that failure to observe a uniform requirement of notice by mail before property could be sold for taxes constituted a violation of due process. While the majority invalidated the sale because it failed to conform to the applicable rule, O'Connor would have held the notice sufficient under the particular circumstances of the case.

O'Connor's requirement of contextual decisionmaking apparently applies not only to the end result of a case but also to the Supreme Court's consideration of the applicable legal test. *Bearden v. Georgia*,<sup>285</sup> raised the question whether a court could

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(1982).

<sup>281</sup> See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985); *United States v. Locke*, 105 S. Ct. 1785 (1985); *Ohio v. Kovacs*, 105 S. Ct. 705 (1985); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Smith v. Phillips*, 455 U.S. 209 (1982).

<sup>282</sup> 455 U.S. 104 (1982).

<sup>283</sup> *Id.* at 118 (O'Connor, J., concurring).

<sup>284</sup> 462 U.S. 791 (1983).

<sup>285</sup> 461 U.S. 660 (1983). O'Connor's invalidation of the automatic revocation of probation is also an example of her compassionate view of punishment in general. See *infra* notes 295-301 and accompanying text.

revoke the probation of an indigent who failed to pay a fine and restitution. O'Connor's majority opinion held that where the probationer fails to pay through no fault of his own, a court must first determine whether there are any alternatives to imprisonment before revoking probation. Earlier cases involving imprisonment of indigent defendants had rested exclusively on equal protection grounds,<sup>286</sup> and the parties in *Bearden* consequently focused on whether strict scrutiny or rational basis was the appropriate standard of review.<sup>287</sup> O'Connor rejected this formulaic approach and decided the legal issue itself by reference to the circumstances:

Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose."<sup>288</sup>

O'Connor thus seems to reject the rigid, abstract decisionmaking process that characterizes modern equal protection law.

One prerequisite for individualized decisionmaking is a modicum of procedural protections to ensure accurate assessment of individual circumstances. Thus, although O'Connor is unwilling to enforce the rights of criminal defendants where those rights are peripheral to the truthfinding function of the criminal justice system,<sup>289</sup> she jealously guards other sorts of procedural protections. She has joined majority opinions, over Rehnquist dissents, in cases holding that indigent defendants are guaranteed *effective* assistance of counsel on first appeal,<sup>290</sup> that a state must provide an indigent defendant with a psychiatric expert if the defendant makes a preliminary showing that sanity is likely to be a significant factor at trial,<sup>291</sup> and that technical procedural rules cannot bar a defendant from obtaining the protection of an instruction that cautions the jury not to draw an adverse inference from the defendant's failure

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<sup>286</sup> See *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

<sup>287</sup> *Bearden*, 461 U.S. at 665.

<sup>288</sup> *Id.* at 666-67 (footnote omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

<sup>289</sup> See *supra* notes 265-68 and accompanying text.

<sup>290</sup> See *Evitts v. Lucey*, 105 S. Ct. 830 (1985).

<sup>291</sup> See *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985).

to testify.<sup>292</sup> Full consideration of factual and legal circumstances is conducive to individualized decisionmaking, and O'Connor therefore is generally hostile to procedural "technicalities," whether they preclude consideration of issues favorable to the state or the criminal defendant.<sup>293</sup> Outside the criminal context, she again favors greater procedural protections than the conservative label would predict.<sup>294</sup>

Another general exception to O'Connor's adoption of the conservative, law-and-order position is the area of punishment in general and capital punishment in particular. An examination of her opinions in this area suggest three characteristically feminine aspects. First, punishment decisions are a quintessential example of her call for individualized decisionmaking, leading her to eschew hard and fast rules condemning individuals to death.<sup>295</sup> Second, leniency toward convicted criminals suggests that she may allow the virtue of mercy or compassion to alter the formal rules of the criminal justice system.<sup>296</sup> Third, she tends to focus on the responsibil-

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<sup>292</sup> See *James v. Kentucky*, 466 U.S. 341 (1984); see also *Carter v. Kentucky*, 450 U.S. 288 (1981) (establishing right to such instruction).

<sup>293</sup> Compare *New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring) (suggesting that she might be willing to alter *Miranda* requirements) with *Boag v. MacDougal*, 454 U.S. 364 (1982) (joining majority that liberally construes an indigent prisoner's pro se complaint and therefore reverses its dismissal).

<sup>294</sup> See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985); *Gregory v. Town of Pittsfield*, 105 S. Ct. 1380 (1985) (O'Connor dissenting from denial of certiorari).

<sup>295</sup> See, e.g., *Enmund v. Florida*, 458 U.S. 782, 827-31 (1983) (O'Connor, joined by Rehnquist, dissents from majority opinion invalidating death penalty in felony-murder conviction for lack of intent, but agrees that case should be remanded for a new sentencing hearing because court failed to consider individual mitigating circumstances); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (O'Connor concurs to emphasize need for individualized consideration of mitigating circumstances).

<sup>296</sup> See, e.g., *Arizona v. Rumsey*, 467 U.S. 203 (1984) (O'Connor's majority opinion held that sentencing procedure in a capital case is equivalent to trial on the merits of imposing the death penalty, and the double jeopardy clause prohibits death sentence on remand after life sentence was set aside); *Ralston v. Robinson*, 454 U.S. 201 (1981) (O'Connor joins Steven's dissent from majority holding that a juvenile sentence could be converted into an adult sentence, which would result in more severe confinement conditions); see also *Brown v. Chaney*, 105 S. Ct. 601 (1984) (Burger, White, and Rehnquist, but not O'Connor, dissent from denial of certiorari where lower court had vacated death sentence). O'Connor also declined to join Rehnquist's dissent in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), discussed *infra*. Although she did not comment on specific portions of his opinion, and it is therefore impossible to describe exactly her views on compassion and mercy, it is at least plausible to suggest that she would not subscribe to the following (paradigmatically male) comment in Rehnquist's opinion:

Despite the Court's rhetorical references to the need for "reliable" sentencing deci-

ity and virtue of the decisionmaker rather than on the rights of the defendant.<sup>297</sup>

O'Connor's concurring opinion in *Caldwell v. Mississippi*<sup>298</sup> illuminates her focus on the responsibility of the decisionmaker rather than the rights of the defendant. *Caldwell* was a challenge to a death sentence imposed after the prosecutor told the jury:

[Y]our decision [to impose the death sentence] is not the final decision . . . Your job is reviewable . . . [Defense counsel is] insinuating that your decision is the final decision and they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you make is automatically reviewable by the Supreme Court. Automatically[.]<sup>299</sup>

Marshall's majority opinion vacating the sentence focused on the likelihood that such an instruction would create unreliability and bias against the defendant. In a typically male or modern or liberal characterization of the constitutional flaw in the prosecutor's statement, Marshall concluded that:

The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone *the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right*, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance.<sup>300</sup>

O'Connor joined most of the majority opinion and concurred in the result, but she wrote separately primarily to clarify that she did not interpret *California v. Ramos*<sup>301</sup> to preclude giving accu-

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sions rendered by jurors that comprehend their "awesome responsibility," I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions.

Id. at 2650.

<sup>297</sup> See, e.g., *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) (discussed *infra* notes 298-302 and accompanying text).

<sup>298</sup> Id.

<sup>299</sup> Id. at 2637-38.

<sup>300</sup> Id. at 2640 (emphasis added).

<sup>301</sup> 463 U.S. 992 (1983).

rate and non-misleading information about appellate review to a sentencing jury. The flavor of her opinion, however, is entirely different from that of Marshall's. Where Marshall rests on the statement's detrimental effect on the defendant, O'Connor's brief opinion instead emphasizes the detrimental effect on the jury's sense of its own awesome responsibility:

In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.

. . . .

In telling the jurors, "your decision is not the final decision . . . [y]our job is reviewable," the prosecutor sought to minimize the sentencing jury's role . . . .

. . . .

Although the subsequent remarks of the prosecutor to which Justice Rehnquist refers in his dissent . . . may have helped to restore the jurors' sense of the importance of their role, I agree with the Court that they failed to correct the impression that the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate.<sup>302</sup>

This analysis seems to focus on the jury's action for its own sake, rather than simply because of its likely effect on the defendant. Responsible decisionmaking may be a virtue in and of itself, regardless of its probable consequences. Moreover, responsible decisionmaking is a relational virtue in that it reflects the jury's relationship to the defendant: the jury is in a position to be merciful, just, and compassionate toward him, and not simply in a position to enforce (or refrain from violating) his rights. A view of the sentencing decision as implicating the jury's duty to act in a just manner is paradigmatically feminine.

This contrast between rights and obligations, between rule-based demands and aspirational virtues, is also apparent in the ways that O'Connor and Rehnquist view the special role of lawyers in our society. In *Zauderer v. Office of Disciplinary Counsel*,<sup>303</sup> O'Connor, joined by Rehnquist and Burger, dissented from the majority holding that a state cannot bar nonmisleading but unsolicited legal advice. In *Supreme Court of New Hampshire v.*

<sup>302</sup> 105 S. Ct. at 2646-47 (O'Connor, J., concurring).

<sup>303</sup> 105 S. Ct. 2265 (1985).

*Piper*,<sup>304</sup> however, O'Connor joined a majority holding that, over a Rehnquist dissent, invalidated residency requirements for membership in the bar. Thus, each would have allowed the state to create special rules for lawyers—not applicable to the general public—in at least some contexts. The two cases considered together contrast O'Connor's view of lawyers as special in virtue of their greater responsibility with Rehnquist's view of lawyers as special in view of the nature of their craft.

In *Zauderer*, O'Connor found free, unsolicited legal advice qualitatively different from the advertisements or free products of other business, and consequently more regulable. She based this conclusion on the greater obligations of lawyers toward society:

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. . . . The States understandably require more of attorneys than of others engaged in commerce. Lawyers are *professionals*, and as such they have greater obligations. As Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities, there must be exacted . . . qualities of truth-speaking, of a high sense of honor, of granite discretion." The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain.<sup>305</sup>

This passage provides a stark contrast to Rehnquist's *Piper* dissent, in which he explicitly refused to subscribe to a virtue-based theory of the difference between lawyers and others:

My belief that the practice of law differs from other trades and businesses for Art. IV, § 2 purposes is not based on some notion that law is for some reason a superior profession. The reason that the practice of law should be treated differently is that law is one occupation that does not readily translate across state lines. Certain aspects of legal practice are distinctly and intentionally *non-national*.<sup>306</sup>

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<sup>304</sup> 105 S. Ct. 1272 (1985).

<sup>305</sup> *Zauderer*, 105 S. Ct. at 2295-96 (citations omitted).

<sup>306</sup> *Piper*, 105 S. Ct. at 1282-83 (footnote omitted).

In several contexts, then, O'Connor seems more willing to integrate rights and responsibilities and to command that people act not only fairly but also virtuously.

#### CONCLUSION: A SECOND LOOK AT COMMUNITY AND CONTEXT

In light of the revolutionary effect women's personality differences might have on jurisprudence, it is unsurprising to find that Justice O'Connor approaches legal issues from a different perspective than that of her male colleagues. Her voting record, however, puts her squarely in the conservative camp on most issues. This nexus between a feminine voice and a conservative voice may seem troubling to many. As an intellectual exercise, perhaps, it is useful to isolate the feminine influence, but it does not seem to change results. The current trend on the Court, with O'Connor's enthusiastic participation, is away from the liberal results of the Warren Court. In particular, the Court seems to be adopting an approach of "aggressive majoritarianism," fostering community and consensus at the expense of individual rights.<sup>307</sup> Had Justice Stewart been replaced by a male ideological soulmate of Justice Rehnquist, a similar result likely would have been achieved. The contexts in which O'Connor reaches a less politically conservative result than Rehnquist are few and well-defined; her impact is noticeable, but not notable. So why does it matter that she draws her jurisprudence from her femininity rather than her politics?

There are three significant differences. First, regardless of the *content* of a feminine perspective, recognition of its existence and its different voice might itself change the outcome of some cases. Where political or intellectual diversity is a legal issue, whether one treats men and women as fundamentally similar or fundamentally different may have a significant effect. Two recent examples are *Roberts v. United States Jaycees*<sup>308</sup> and *Steele v. FCC*.<sup>309</sup> In *Roberts*, the Court held that the first amendment did not protect the Jaycees' policy of excluding women from full membership. The appellate court had sustained the Jaycees' argument that admission of women would infringe the organization's first amendment

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<sup>307</sup> See Sherry, *supra* note 264; Stone, O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition, 19 Ga. L. Rev. 15 (1984).

<sup>308</sup> 104 S. Ct. 3244 (1984).

<sup>309</sup> 770 F.2d 1192 (D.C. Cir. 1985).



rights by changing the content of the group's message. The Supreme Court explicitly rejected this argument on the ground that it rested "solely on unsupported generalizations about the relative interests and perspectives of men and women."<sup>310</sup> Similarly, in *Steele*, the FCC sought to support its policy of preferentially granting broadcast licenses to women on the ground that female ownership and management would increase programming diversity. The Court of Appeals for the District of Columbia rejected that argument, again explicitly rejecting any notion of a feminine perspective:

[I]t simply is not reasonable to expect that granting preferences to women will increase programming diversity. Women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs, for example, women in fact appear to be just as divided among themselves as are men. Therefore it is not reasonable to expect that a woman would manifest a distinctly "female" editorial viewpoint.<sup>311</sup>

Thus, recognition of a feminine perspective—regardless of its content—might alter the decisions of male judges.

Second, an even more significant difference lies in the potential for development of a feminine jurisprudence. The Court's move toward aggressive majoritarianism is only one translation of a communitarian philosophy or a perspective of connection. If, as Unger has suggested, liberalism corrupts consensus (thus undermining community),<sup>312</sup> one response is to reconstruct the authority of consensus by fiat. Enforced homogeneity, however, although it may inject consensus and community into the jurisprudential paradigm, is not the only—nor the most sophisticated—conception of community.<sup>313</sup> It represents what Claire Dalton has called a "cor-

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<sup>310</sup> *Roberts*, 104 S. Ct. at 3255. O'Connor concurred only in the judgment, suggesting that even if admission of women would change the content of the organization's message, she would find the conduct unprotected as primarily commercial association. She was thus unwilling to accept the majority's blithe assumption that admission of women would have no effect on the content of the Jaycees' expression. See *id.* at 3257-58.

<sup>311</sup> *Steele*, 770 F.2d at 1199. Judge Patricia Wald dissented, finding the FCC hypothesis of diversity reasonable. This suggests that women are more likely to accept the idea of a feminine perspective.

<sup>312</sup> R. Unger, *Law In Modern Society* 169 (1976).

<sup>313</sup> See R. Dworkin, *supra* note 94, at 134-37.

rupting form" of community, stressing a community of sameness rather than a community of diversity.<sup>314</sup>

Feminine jurisprudence is in its infancy, both in terms of application by judges and its elaboration by scholars and teachers. Like all moral, legal, and political theories, it needs time to develop. As Michael Perry has noted, the American legal self-image, like the American religious self-image, is one of evolution:

Our religious self-understanding has generally involved a commitment—though not necessarily a fully conscious commitment—to the notion of moral evolution, because in the main we have avoided the pretense that our current understanding of the moral universe . . . was perfect and complete. Rather, we know that we are fallible and that we must struggle incessantly to achieve a better—a broader and deeper understanding. We also know that we are frail and that our frailty necessitates an ongoing struggle to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding.<sup>315</sup>

The moral and jurisprudential theories sketched out in this article have not had the time, or the give and take of serious scholarship, to develop. This article is itself only a very tentative first step: once the paradigm has been exposed, the hard work of constructing a feminine jurisprudence (and refining its content through evolution) lies ahead.

Finally, recognition of Justice O'Connor's unique perspective, and the unique perspective of women in general, might aid us in ameliorating the distortions of an overly individualist liberal paradigm. Insufficient attention to connection promotes naked self-interest at the expense of altruism, impoverishes our self-perception, and stunts our capacity for growth. Merely communicating a feminine emphasis on connection may be enlightening: "Teaching is not always a matter of either arguing or providing evidence. . . . It

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<sup>314</sup> C. Dalton, Remarks on Personhood 7 (Jan. 5, 1985) (paper presented at meeting of Jurisprudence Section, AALS 1985 Annual Meeting).

<sup>315</sup> M. Perry, *The Constitution, the Courts, and Human Rights* 99 (1982) (footnotes omitted). See also B. Pascal, *Thoughts on Religion and Philosophy* 243 (I. Taylor trans. 1894) ("Those whom we term the Ancients, were in fact novices in everything, and formed, properly speaking, the infancy of Humanity; and, as we have added to their knowledge the experience of succeeding ages, it is in ourselves we must find that antiquity we so reverence in others.").

is sometimes rather a matter of imparting a way of looking at things."<sup>316</sup>

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<sup>316</sup> Eldridge, *On Knowing How to Live: Coleridge's "Frost At Midnight,"* 7 *Philos. & Lit.* 213, 227 (1983).