

BEYOND THE SOLITARY SELF:[†] VOICE, COMMUNITY, AND REPRODUCTIVE FREEDOM

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PROLOGUE: A PERSONAL PREDICATE TO THEORY

The body of this paper is an attempt to find hope in hope, even as we witness the moral bankruptcy and utter inefficacy of sole reliance on individual rights.¹ To halt our downward slide, we must reject the notion of the solitary self. We must recognize instead that we draw our meaning through our connection with others and that our communities in turn exist only through their synergistic relationship with us. In order to effect change in our communities, we must facilitate these dynamic, transformative relations by encouraging the interchange of diverse voices. First, however, the disempowered must be free to speak. While it is next to impossible to speak from a state of hopelessness, voice is fueled by hope. For most women, nothing provides more hope than regaining control over their own reproductive capabilities. By locating reproductive freedom in community, we can touch voice-enabling hope, amplify silenced voices, and

[†] Alexis de Tocqueville has warned that individualism may "throw [people back on themselves] alone, . . . shut up in the solitude of [their] own heart[s]." Alexis de Tocqueville, *Democracy in America*, Volume Two 508 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (1839).

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¹ Drucilla Cornell has similarly alleged that liberal society is in a state of moral disintegration. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 292-93 (1985).

thus improve the functioning of communities.

To begin this essay at all, I first had to rekindle my own hope. Like many other advocates of reproductive freedom, I feel an almost overwhelming sense of frustration and despair.² Since 1980, when Ronald Reagan was elected President, the Department of Justice has continually intervened in litigation to ask the Supreme Court to overrule *Roe v. Wade*.³ The last Supreme Court decision that strongly affirmed *Roe* was in 1986,⁴ and with each subsequent decision, the Court has steadily chipped away at *Roe*'s foundations, all the while disingenuously pretending that it was leaving *Roe* intact.⁵

Soon after *Roe*, when the Supreme Court upheld restrictions on state and federally funded abortions, low-income women lost whatever right to reproductive freedom they once had.⁶ Then, as the Supreme Court upheld increasingly onerous parental notification provisions, young women gradually lost their ability to exercise their reproductive "rights."⁷ With the rights of the most marginalized women in society already stripped away, the

² I note that my sense of frustration undoubtedly cannot compare to that experienced by my more senior colleagues.

³ 410 U.S. 113 (1973), modified by *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). See Brief of the United States Department of Justice, *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 112 S. Ct. 2791 (1992); Brief of the United States Department of Justice, *Hodgson v. Minnesota*, 111 S. Ct. 2926 (1990); Brief of the United States Department of Justice, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

⁴ *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down various roadblocks to legal abortion, including mandatory anti-abortion information and reporting requirements).

⁵ See *infra* notes 7-22 and accompanying text.

⁶ See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding Hyde Amendment, prohibiting Medicaid funding for abortions, and finding that states have no obligation to pay for those medically necessary abortions for which the Hyde Amendment prohibits funding); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (holding that cities need not provide publicly financed hospital services for nontherapeutic abortions, even when they do provide publicly funded services for childbirth); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state denial of funding for nontherapeutic abortions, even when the state does fund childbirth); *Beal v. Doe*, 432 U.S. 438, 446, 447 (1977) (holding that states are not required to provide nontherapeutic abortion services under federal Medicaid statute).

⁷ See *Hodgson*, 111 S. Ct. at 2944 (upholding 48-hour waiting period and notification of at least one parent before a minor may obtain an abortion); *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2983-84 (1990) (finding constitutional a statute making it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age); *Bellotti v. Baird*, 443 U.S. 622, 647-49 (1979) (conditioning a minor's access to abortion on the consent of either both of her parents or of a judge).

Court began attacking all women. In 1989, the Court upheld state-mandated viability testing requirements and a prohibition on nontherapeutic abortions in public facilities.⁸ And in 1991, the Court sanctioned federal restrictions on the abortion-related speech and activities of federally funded physicians.⁹

The most recent word from the Supreme Court was the most devastating—with the possible exception of the abortion-funding cases¹⁰—in recent years. After waxing eloquent about the importance of reproductive freedom in women's lives,¹¹ the plurality in *Planned Parenthood v. Casey*¹² proceeded to gut *Roe*. Explicitly overruling two of its earlier abortion decisions,¹³ the Court in *Casey* ruled that the state has an interest in fetal life throughout pregnancy.¹⁴ After viability, the state's latitude in advancing this interest is nearly boundless.¹⁵ Before viability, state abortion restrictions are subject only to the proviso that they not "unduly interfere" with women's right to choose abortion.¹⁶

⁸ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511, 519–20 (1989).

⁹ *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991). See also *Planned Parenthood v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir. 1990) (en banc), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991).

¹⁰ *Webster*, 492 U.S. 490; *Rust*, 111 S. Ct. 1759.

¹¹ For the first time, the Court recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (citing Rosalind Pollack Petchesky, *Abortion and Woman's Choice* 109, 133 n.7 (rev. ed. 1990)).

¹² 112 S. Ct. 2791 (1992).

¹³ *Id.* at 2816 (overruling "those parts of *Thornburgh* [v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)] and *Akron I* [Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)] which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn").

¹⁴ *Id.* at 2816, 2820.

¹⁵ Even before viability, states may impose "[r]egulations designed to foster the health of a woman seeking an abortion . . . if they do not constitute an undue burden." *Id.* at 2821.

¹⁶ *Id.* at 2820. What exactly constitutes an "undue burden" is unclear. The plurality in *Casey* explained only that "an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (emphasis added). In applying this standard to the Pennsylvania law at issue, however, the Court examined only the purported *effect* of each provision, not the *purpose*. *Id.* at 2823 (finding that requiring the physician to provide the woman with materials describing the consequences of abortion to the fetus may promote the state's interest in childbirth over abortion but "cannot be considered a substantial obstacle to obtaining

Under this new analysis, *Roe's* trimester framework is history. No longer are women's interests ever necessarily superior to those of the fetus. No longer is reproductive freedom at any time a "fundamental right" subject to the strictest judicial scrutiny.¹⁷ Because the trimester framework and the pre-viability application of a strict scrutiny test were central to *Roe*, the case now survives only as "a storefront on a Western movie set, . . . a mere facade to give the illusion of reality."¹⁸ The fact that the Court has not yet uttered the magic word "overruled" does not mean that *Roe* is not lost.

Demonstrating the toothlessness of the new "undue burden" test, the Court in *Casey* used it to uphold a panoply of pre-viability abortion restrictions, including the following: "informed parental consent" requiring a parent's in-person visit to a doctor's office;¹⁹ state-mandated counseling for all patients designed to discourage women from having abortions;²⁰ a twenty-four-hour waiting period;²¹ and clinic reporting requirements.²² As of this writing, numerous cases are pending across the country that demand an application and interpretation of the "undue burden" standard. Each of these cases will give the Court yet another opportunity to further

an abortion"), at 2825 (finding 24-hour waiting period "a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden"), and at 2832 (finding that reporting requirements relate to the state's interest in "health" and do not pose "a substantial obstacle to a woman's choice").

Note that the "undue burden" test embraced in *Casey* is different from the one earlier proposed by Justice O'Connor. See *Akron I*, 462 U.S. at 453, 461-63 (O'Connor, J., dissenting) (finding an undue burden in abortion cases in "situations involving absolute obstacles or severe limitations on the abortion decision"); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (following the formulation set out in *Akron I*). Therefore, the *Casey* test should not be confused with the earlier formulations, which would have applied a strict scrutiny test where a burden is found to be "undue." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting).

¹⁷ This standard is directly contrary to *Roe*. See *Roe v. Wade*, 410 U.S. 113, 152-53, 155 (1973).

¹⁸ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in part, dissenting in part).

¹⁹ *Casey*, 112 S. Ct. at 2832.

²⁰ *Id.* at 2823.

²¹ *Id.* at 2825.

²² *Id.* at 2832. The only provision of the Pennsylvania law the Court did not uphold was a spousal notification provision. *Id.* at 2831. The Court in *Casey* remanded the case for a decision consistent with its findings. *Id.* at 2833. As of this writing, the plaintiffs are moving for new fact finding, arguing that they had not presented all of the evidence that is necessary for a complete examination under the new "undue burden" test.

whittle away whatever guarantee of reproductive freedom remains.²³

This collapse of *Roe* has led me to reassess individual rights as a tool for social change. It seems apparent that an overemphasis on individual rights contributed to the demise of *Roe*. Granted, the conservative political climate, combined with the enhanced politicization of the federal judiciary,²⁴ ensured *Roe*'s ruin. But it was *Roe*'s reliance on individual rights that made the opinion so vulnerable in the first place. The plurality in *Casey* gave lip service to the importance of reproductive freedom for enabling women to chart their own roles in society.²⁵ Why, then, did they fail to follow through with their observations? Perhaps because an individual rights analysis provides neither the proper tools for fully recognizing the centrality of reproductive freedom, nor an adequate means by which to ensure its survival.

The ultimate focus on the individual reflects an impoverished and imaginary vision of self—the solitary self. No theory based upon such a distorted view of society can withstand the test of time, at least not without great sacrifice, particularly the stunting of both individual and communal development. This Article is an attempt to develop a stronger grounding for reproductive freedom and other besieged “rights” by rejecting the solitary self.

In the first section of the Article, “The Present,” I briefly review the

²³ The laws at issue in the pending cases can be classified into two categories: abortion bans and “roadblock laws” (laws making it more difficult to obtain abortions, but not banning them outright). The leading abortion-ban cases are: *Guam Society of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (invalidating statute under which abortions banned, except for ectopic pregnancies and abortions in cases where two independently practicing physicians determine that the pregnancy will endanger the life of the woman or “gravely impair” her health; no exceptions for rape, incest, or fetal defects), withdrawn, 1992 LEXIS 7599 (9th Cir. 1992), amended, 1992 LEXIS 13490 (9th Cir. 1992), cert. denied, 61 U.S.L.W. 3399 (1992); *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992) (dismissing with prejudice claims that Utah law banning abortions except to prevent “grave” damage to a woman’s health or prevent “grave” fetal defects and in limited cases of rape and incest violates Utah constitution), summary judgment granted in part, claim dismissed, 794 F. Supp. 1537 (D. Utah 1992).

Leading “roadblock” cases include *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1991) (finding facially constitutional Mississippi Informed Consent to Abortion Act, mandating 24-hour waiting period and counselling on the benefits of childbirth and the risks of abortion), cert. denied, 61 U.S.L.W. 3418 (1992).

²⁴ See Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189, 191–94 (1988) (examining President Reagan’s “enduring institutional legacy”).

²⁵ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807, 2809 (1992) (“Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role . . .”).

limitations of "rights-talk."²⁶ I then summarize the primary feminist responses, the main of which suffer to some degree from essentialism and thus reflect an impoverished view of the self. In the second part of this article, "The Future," I propose an alternative vision which emphasizes the individual's synergistic relationship with community. Although I draw from some strains of communitarian thought, I distinguish this approach from many communitarian claims by stressing the acceptance and promotion of diversity among and between individuals and communities, and, drawing largely from Critical Race Theorists, by adding the concept of voice as process. I explore this approach, which, for lack of better language, could be termed a "community/voice" approach, by (1) explaining the centrality of communities and voice in the context of the claims of cultural feminists, (2) examining the concept of "dysfunctioning" communities—communities in which the individual's relationship with community is blocked, and (3) setting forth some measures essential to ensuring that communities function properly. Finally, I apply the concept of community and voice to reproductive freedom.

Above all, I hope to demonstrate that instead of focusing on either the community *or* the individual, we must promote and protect the individual's *relationship with* her community. This relationship is a process, built on a dynamic interchange of voices. Voices can come only from a state of hopefulness.

From this, I draw hope.

THE PRESENT: THE SOLITARY SELF—THE LIMITS OF RIGHTS-TALK AND THE MAIN FEMINIST RESPONSES

At its core, so-called "traditional" liberalism²⁷ imagines all humans

²⁶ Mark Tushnet uses this phrase in his critique of rights. Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1370 (1984). See also Michael Perry's defense of "rights-talk," Michael J. Perry, *Taking Neither Rights-Talk Nor the "Critique of Rights" Too Seriously*, 62 Tex. L. Rev. 1405 (1984).

²⁷ "Traditional" liberalism admittedly is a characterization; yet, as developed herein, it is this characterization of liberalism that has been so influential in the formulation of individualism and in the development of rights-talk. Still, I do not mean to suggest that all liberal theorists advance an atomistic view of humankind. See, e.g., R.E. Ewin, *Liberty, Community, and Justice* 6-7 (1987) ("[I]ndividual liberty is itself a community notion and a community relationship, not something opposing the individual to the community."). See generally Bruce Ackerman, *Social Justice in the Liberal State* (1980); Ronald Dworkin, *Taking Rights Seriously* 81-130 (1977).

For a general defense of liberalism in the face of the so-called "atomistic critique," see Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171 (1992). I agree that not all works of

as primarily free-floating beings. Under ideal circumstances, we glide through the world alone, defining and advancing our separate agendas of needs and desires, none of which can be adjudged more or less legitimate than those held by others. Individuals' agendas may overlap, but such incidents are most likely coincidental, rather than due to predetermined or recognizable patterns.²⁸ In this manner, traditional liberalism trumpets (and, critics may assert, reifies) the notion of self-definition and autonomy. Indeed, according to this line of thought, a central measure of freedom is the ability to be master over one's own body, to define oneself, and to act autonomously.²⁹

Rights discourse flows from individualism, evincing an adversarial, individualistic perception of social interaction. Individuals are portrayed as "separate owners of their respective bundles of rights."³⁰ One goal of liberalism, then, is to grant people equal access to the same rights, to use as they see fit. "This notion of ownership delimits the boundaries of state authority from that of individual autonomy, the self from other."³¹ Although rights theorists disagree as to which values should be protected, they largely share a commitment to preserving private zones for autonomous choices, free from state intervention.³²

liberal theorists are incompatible with "non-atomistic" visions of society. Many feminist theorists have recognized this fact as they have, at times, wittingly or unwittingly, drawn from non-atomistic liberal scholars in developing their own theories, asserting some notion of "responsibility," "care," or "connectiveness." Therefore, the connection between non-atomistic liberals and feminists (who are frequently liberal feminists) is developed, and not, as McClain contends, "unexplored common ground." *Id.* at 1175. Indeed, I am guilty of drawing from some liberal scholars in developing this Article, itself a critique of "crude" liberalism. However, McClain divides scholars into "liberals and feminists," *id.* at 1263, without any recognition that many liberals are feminists and many feminists are liberals (whether they choose to characterize themselves as such or not), and that radical feminists at times draw from untraditional liberals or liberal feminists (whether they admit it or not), and so on.

²⁸ See Charles Taylor, *Atomism*, in *Powers, Possessions and Freedom: Essays in Honour of C.B. Macpherson* 39-40 (Alkis Kontos ed., 1979); see also Morton J. Horwitz, *Rights*, 23 *Harv. C.R.-C.L. L. Rev.* 393, 399-400 (1988).

²⁹ In order to prevent social chaos, the individual agrees to give the state limited power to curtail freedom of action through laws. Isaiah Berlin, *Two Concepts of Liberty*, in *Liberalism and Its Critics* 15, 17 (Michael Sandel ed., 1987).

³⁰ Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *Tex. L. Rev.* 387, 393 (1984).

³¹ Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. L. Rev.* 589, 595 (1986) (summarizing Critical Legal Studies' critique of rights).

³² Deborah L. Rhode, *Feminist Critical Theories*, 42 *Stan. L. Rev.* 617, 628 (1990). Lawrence Friedman, for example, celebrates the right to autonomy and freedom through which "each person has the right to free development or the unfolding . . . of personality." Lawrence M. Friedman, *The Republic of Choice: Law,*

In this manner, rights-talk creates dichotomies, "such as individual and community or self and other, that divide the world into two morally exclusive spheres."³³ The world is further carved into the polarities of reason and desire, universal and particular, fact and value, is and ought.³⁴ In observing these dichotomies, at all times the state must act "neutrally," not favoring one group of rights holders over another,³⁵ and thus avoiding any appearance of corruption.

Reproductive freedom has been forced into the rubric of rights variously as the rights to "privacy,"³⁶ "bodily integrity,"³⁷ "autonomy,"³⁸ "intimate association,"³⁹ "full personhood,"⁴⁰ and "the interest in making certain kinds of important decisions."⁴¹ Because numerous

Authority and Culture 35 (1990) (quoting the basic law of the former German Federal Republic).

³³ Schneider, *supra* note 31, at 594.

³⁴ See generally Roberto Unger, *Knowledge and Politics* (1975); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151 (1985).

³⁵ Cf. Peller, *supra* note 34, at 1202-03. For a classic defense of the claim that law should be color-blind and sex-blind, see Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 24. Contra Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 Harv. L. Rev. 1, 21 (1976).

³⁶ *Roe v. Wade*, 410 U.S. 113 (1973) (first applying privacy to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (first articulating right to privacy). For an exhaustive discussion of how "privacy" may be framed, see Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980).

³⁷ See Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599, 614-17 (1986).

³⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (discussing contraception). See Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 Notre Dame L. Rev. 445, 446 (1983); Tom Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 236 (1977).

³⁹ See generally Kenneth Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

⁴⁰ See Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 Phil. & Pub. Aff. 26, 39-44 (1976).

⁴¹ *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (examining decisional autonomy in the context of privacy); see also Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decisions*, 64 Cal. L. Rev. 1447 (1976); Note, *Rethinking [M]otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 Harv. L. Rev. 1325, 1339-41 (1990). Reproductive freedom also has been framed as an issue of gender equality, see, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); as a matter of involuntary servitude, see Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480

commentators have debated the limitations of rights-talk elsewhere, I need only briefly summarize them here before I (again briefly) consider feminist legal scholars' responses.

A. The Limits of Rights Discourse

The concept of "rights," standing alone, holds only limited promise. First, rights create only an illusion of justice; merely "having a right" means very little in practice. The "choice" to effect rights is dependent on other factors, such as freedom from classism, racism, sexism, and heterosexism. Rights alone do little to ensure these freedoms, and, as reproductive freedom cases illustrate, it is all too easy to place conditions on rights. The right to reproductive freedom purportedly created by *Roe* was never truly granted to all women, since only women with the financial and social means could fully exercise that right. As Chief Justice Rehnquist noted in *Rust v. Sullivan*, whether reproductive freedom is conditioned on mere indigency is none of the state's business⁴²—at least, not under traditional rights discourse. The federal judiciary has continually accepted such a notion of negative rights.⁴³ For low-income women, then, the right to reproductive freedom is meaningless.

Second, rights pretend to an impossible universality⁴⁴ and, in doing so, slight real life. Perhaps these abstract truths were never intended to reflect the lived realities of any particular person. Yet, because rights are often reflective of reality neither in design nor in operation, they are especially incompetent at addressing the lives of outsiders—those who did not make the rules to begin with. By speaking in the imaginary language of rights-talk, we thus ignore lived realities. For example, we are forced to speak about "privacy" when a split between the public and the private rarely exists⁴⁵ and when what women want is frequently government intervention to improve their "private" lives; to expound "bodily integrity"

(1990); and as a matter of separation of church and state required by constitutional prohibitions against the establishment of religion. See Karen F.B. Gray, An Establishment Clause Analysis of *Webster v. Reproductive Health Services*, 24 Ga. L. Rev. 399 (1990).

⁴² *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

⁴³ See, e.g., Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1464-71 (1991).

⁴⁴ For discussions on limitations inherent in "universalizing" approaches, see generally Martha Minow, Beyond Universality, 1989 U. Chi. Legal F. 115.

⁴⁵ See Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1352 (1982).

when society continually places restrictions on women's bodies and when a woman's real concern may be her family, not her solitary body; to postulate "intimate association" when there wasn't anything "intimate" about the woman becoming pregnant in the first place; and to champion "decisional autonomy" when the woman doesn't have the economic means to make her decision count. Reified rights have little to do with our lives.

Even if rights are reframed to address women's lived realities, the "reframers" are inevitably insider women—the economically and educationally privileged, and usually the white and heterosexual women. No matter how genuine their concerns are, insider women alone cannot properly represent the concerns of outsiders.⁴⁶ This difficulty is illustrated by the feminist legal scholarship that reduces the concerns of outsiders to a footnote, an aberration, a difficult case.⁴⁷ Certainly, this criticism can be levied against all scholarship, not just rights scholarship. But the problem of exclusion may be particularly acute in rights scholarship, where part of the assignment is to create and give content to universal, purportedly neutral principles.⁴⁸

This brings us to the third difficulty with rights. Although they claim objectivity, rights advance the agenda of their creators, albeit under the guise of "perspective-lessness."⁴⁹ The holders of rights are duped into

⁴⁶ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. Chi. Legal F. 13, 67 (1989) ("Not only are women of color in fact overlooked, but their exclusion is reinforced when *white* women speak for and as *women*.").

⁴⁷ Angela Harris describes this reduction of the concerns of outsiders the "nuance theory":

By being sensitive to the notion that different women have different experiences, generalizations can be offered about "all women" while qualifying statements, often in footnotes, supplement[] the general account with the subtle nuances of experience that "different" women add to the mix. Nuance theory thus assumes the commonality of all women—differences are a matter of "context" or "magnitude"; that is, nuance.

Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 595 (1990).

⁴⁸ See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 Berkeley Women's L.J. 191, 205 (1989-90) ("[C]urrent feminist legal theory is deficient and impoverished because it has not paid sufficient attention to the real life experiences of women who do not speak the 'dominant discourse.'"). See generally Denise Riley, *Am I That Name? Feminism and the Category of "Women" in History* (1988); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 Harv. Women's L.J. 115 (1989).

⁴⁹ This term is Kimberlé Crenshaw's. Kimberlé Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L.J. 1, 2-6 (1989). For discussions of the power of exploring ideological messages underlying legal doctrines,

thinking that the law is treating them in a neutral manner which is, by definition of traditional liberalism, "fair."⁵⁰ Actually, however, they are being handled in a manner calculated to suppress, limit, or at least guide their range of possibilities. There is a deliberate content to rights that serves the existing social structure, complete with power imbalances and economic inequities. As Mark Tushnet has observed, "the set of rights recognized in any particular society is coextensive with that society. The conditions of the society define exactly what kind of rights-talk makes sense, and the sort of rights-talk that makes sense in turn defines what the society is."⁵¹ For example, the concept of "choice" itself is gendered, and thus "the rhetoric of choice diverts attention from the constraints within which an individual's choice occurs onto the act of choice itself."⁵² Therefore, any strategies dependent upon the rhetoric of "choice" are inherently limited.

Fourth, as rights are inherently subjective, they cannot be applied without recourse to some higher sense of "fairness." One person's rights are inevitably balanced against another's. The right of a battered woman to be free from abuse might be weighed against the right of the battering husband to privacy in "his" home or his right to see "his" children.⁵³ In the context of reproductive freedom, the right of the woman to "bodily

see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205 (1979); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983); Peller, *supra* note 34, at 1189-90; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1 (1984).

⁵⁰ For a recent discussion arguing on behalf of "government neutrality on matters affecting reproductive choice," see Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making Rights Real*, 402, 418-21 (1992) ("[G]overnment evenhandedness is the hallmark of this component of reproductive liberty."). I question the extent to which purported "evenhandedness" actually is evenhanded. In fact, as Pine and Law admit, "the Court has rejected equality-based challenges to laws restricting women's access to government benefits for abortion, pregnancy or abortion information, and specifically, has sanctioned government bias against the exercise of the right to abortion" *Id.* at 421 (citations omitted).

⁵¹ Tushnet, *supra* note 26, at 1370.

⁵² Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *N.Y.U. L. Rev.* 1559, 1564 (1991). Curiously, although Williams seeks to challenge the rhetoric of choice and the norm of selflessness in the context of the work/family conflict, she does not do so in the abortion context. Instead, she would merely "adjust" choice rhetoric to focus on children's entitlement to nurturing, thus buying into the "rhetoric of domesticity, of women yearning to be good mothers." *Id.* at 1594. This tack, I suggest, should be advanced with caution, particularly because Williams' "rhetoric of domesticity" fits neither all women nor all contexts that frame women's lives.

⁵³ Carol Smart, *Feminism and the Power of Law* 145 (1989).

integrity," "autonomy," or "privacy" may be weighed against the "right to life" of the fetus,⁵⁴ the right of the biological father to "his" children,⁵⁵ or even the right of some other third party to assert the interests of the fetus.⁵⁶ We may at times agree which rights trump, but rights discourse itself provides little guidance.⁵⁷

A related problem with rights discourse lies in its treatment of those who could assert conflicting rights. These parties are seen as adversaries, even when their interests may in fact be intertwined. By setting up a false, adversarial dichotomy, rights theory threatens to obscure reality and oversimplify complex power relations. As Carol Smart has observed:

[T]he acquisition of rights in a given area may create the impression that a power difference has been "resolved." Yet the exercise of power in, for example, the private sphere, may have little to do with legal rights. That women have the right to apply to the courts for injunctions to remove a man who is violent from the family home has not stopped the problem of domestic violence. This is not because women are ignorant of the law (although they may be), nor is it because the law is defective (although it undoubtedly is), rather it is because the legal right can treat the man and woman involved only as adversaries.⁵⁸

The woman may stay in her battering relationship because she is economically dependent on her husband and because she has nowhere else to go. Legal "rights" do not solve her problems. On the contrary, they create an

⁵⁴ Fetal rights theorists contend that once a woman "has chosen to lend her body to bring a child into the world," she may not take actions that could harm the fetus. See, e.g., John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 Va. L. Rev. 405, 456 (1983) (admitting that women should have a choice in the first trimester of pregnancy only). Others have advocated a balancing approach in which the woman's rights are weighed against those of the fetus. See, e.g., Deborah Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 Harv. J.L. & Pub. Pol'y 19, 45-54 (1985); Note, *Parental Liability for Prenatal Injury*, 14 Colum. J.L. & Soc. Probs. 47, 77-80 (1978).

⁵⁵ See, e.g., *Doe v. Roe*, 551 N.Y.S.2d 75 (N.Y. App. 1990) (finding balance in favor of mother); *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), cert. denied, 492 U.S. 919 (1989) (finding balance in favor of mother); *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), aff'd, 526 N.E.2d 958 (Ind. 1988), cert. denied, 488 U.S. 955 (1988) (finding balance in favor of mother); *Lewis v. Lewis*, No. 111440 (Mich. Ct. App. filed Sept. 15, 1988), cert. denied, 488 U.S. 967 (1988) (finding balance in favor of mother).

⁵⁶ See, e.g., *In re Fry*, No. 80-135 (Cass Cty. Mich. P. Ct. filed Aug. 31, 1990); *In re Klein*, 145 A.D.2d 145 (N.Y. App. 1989).

⁵⁷ Karl Klase, *Rights as Praxis*, 40 Telos 123, 132 n.28 (1979); see also Adelaide Villamore, *The Left's Problems with Rights*, 9 Legal Stud. F. 39 (1985).

⁵⁸ Smart, *supra* note 53, at 144.

alluring illusion of a solution where none exists.⁵⁹

Similarly, the adversarial relationship posited by rights discourse does not adequately describe the pregnant, drug-addicted woman's relationship to her fetus. The health of both woman and fetus are intricately related and usually not in opposition.⁶⁰ That a woman continues to use drugs during pregnancy does not demonstrate a lack of concern for the fetus, but more likely the lack of social programs to address her needs.⁶¹ Reproductive freedom advocates must bring home this crucial point to the public. Yet the rights model, far from facilitating communication, only perpetuates the myth that woman and fetus are antagonists with competing rights.⁶²

In sum, rights discourse does little to address complex power arrangements that underlie our social context. On the contrary, rights, at least as presently envisioned, only divert attention from our lived realities and obscure the basis on which we are silenced and ignored. In the reproductive freedom context, rights, at most, are a second-best solution.⁶³ Granted, rights serve a purpose at times in guarding against majority tyranny, and this purpose is particularly important for those who find themselves outside the majority. Yet rights suffer several limitations, and we cannot take solace in rights alone.

B. Feminist Responses⁶⁴

In their responses to the limitations of rights discourse, feminist legal scholars have had great difficulty shaking the focus on the solitary self. The dominant strain in feminist theory has followed traditional liberalism and consistently championed women's rights as individuals. In determining how best to advance women's rights, debate has centered on whether

⁵⁹ See Olsen, *supra* note 30, at 391.

⁶⁰ See Martha Fineman, *Contexts and Comparisons*, 55 U. Chi. L. Rev. 1431, 1444 (1988); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale J.L. & Feminism 7 (1989); Note, *supra* note 41, at 1326.

⁶¹ *Born Hooked: Confronting the Impact of Perinatal Substance Abuse*: Hearing Before the Select Committee on Children, Youth and Families, 101st Cong., 1st Sess. 2 (1989) (opening statement of Congressman George Miller, Chairman Select Committee on Children, Youth and Families).

⁶² Joan Williams finds a way to work within the rhetoric of choice, by emphasizing that women in fact consider the well-being of current and existing children. See Williams, *supra* note 52, at 1584-96.

⁶³ See Frances Olsen, *Unraveling Compromise*, 103 Harv. L. Rev. 105, 110-17 (1989).

⁶⁴ This summary is in no way intended to be comprehensive. I have tried not to misrepresent the theories; they are all complex and merit more thorough analysis and criticism.

feminists should emphasize women's similarities to or differences from men. Those who stress similarities contend that women need only be granted equal access to the same rights as men.⁶⁵ Underlying much of this theory is the belief that "people are fundamentally alike, that it is only through the historical accidents of 'social history, oppression, and privilege' that differences are produced, and that those differences are irrelevant to how the person should be treated by the law."⁶⁶ As Nancy Ehrenreich explains, this view is troubling:

One of the problems with this traditional American view of equality is that it fails to recognize the extent to which what a person *is* is a product of his or her various group memberships. Thus, the argument that those memberships are irrelevant, while at one level an appealing articulation of the concept of tolerance for diversity, at another level strips people of their very identity. . . .

This conception of equality also prevents members of devalued groups from ever eliminating negative stereotypes, because their conduct is always seen as that of individuals and therefore as not undermining the validity of the group identification itself.⁶⁷

On the other hand, those feminists who recognize women's differences from men assert that women will not be equal unless their own particular needs are fulfilled.⁶⁸ To the extent that the "differences" approach departs from rights discourse and advances a broader vision of equality, it does so only with substantial difficulty. At the outset, it invites discrimination against women based on the differences it identifies. The "peculiarities" of the female have long been used to "imprison [woman] in her subjectivity, circumscribe her within the limits of her own nature."⁶⁹ There is no

⁶⁵ See, e.g., Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* (1988); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rep.* 175 (1982).

⁶⁶ Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177, 1232-33 n.202 (1990) (citations omitted).

⁶⁷ *Id.* (citations omitted).

⁶⁸ See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39, 41-42 (1985); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 70-95 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543 (1986). One claim of "difference" theorists—that women have an "ethic of care" and enhanced need for connectiveness—is discussed in greater detail herein, *infra* notes 132-48 and accompanying text.

⁶⁹ Simone de Beauvoir, *The Second Sex* xv (H.M. Parshley trans., 1953) (1953). Justice O'Connor recently voiced a similar concern, reminding a law school audience

reason to believe that this course of history will suddenly change. Indeed, the danger of a backlash under the difference approach is particularly great since "difference" theory accepts that women are in fact different from men without first examining whether the differences may be socially constructed. As a result, all differences appear to be grounded in biological inexorabilities, when in fact most are not.⁷⁰

Yet the greatest limitation of the difference approach is that, like rights discourse, it adopts universal notions that have little to do with most women's lives. Quite simply, we must first homogenize women to compare them to men. Additionally, to say "women are different from men" accepts that the male is the norm against which all should be measured,⁷¹ and in doing so "confounds feminine difference with the dominant masculinist gender stereotypes."⁷² In making this comparison, which is faulty to begin with, difference theorists suggest that all women differ from men in a similar manner—women are childbearers and caretakers; men are not.⁷³ Yet no universal Woman's experience exists, even within the scheme of caretaking and childbearing. To posit a "woman's difference" in this manner only renders invisible women who have traditionally been outsiders—that is, women of color,⁷⁴ low-income women,⁷⁵ and lesbians.⁷⁶

that the same "feminine" traits celebrated by difference feminists were earlier used by the courts in a long series of opinions restricting women's access to the public sphere. See Nat Hentoff, Justice O'Connor and the Myth of the "True Woman," *Wash. Post*, Nov. 23, 1991, at 27.

⁷⁰ Janet L. Dolgin, Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett, 12 *Women's Rts. L. Rep.* 103, 112–13 (1990); see also Joan C. Williams, Deconstructing Gender, 87 *Mich. L. Rev.* 797, 800 n.11 (1989).

⁷¹ See Catharine A. MacKinnon, *Feminism Unmodified* 34 (1987).

⁷² Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, 70 *Tex. L. Rev.* 109, 123 (1991). Schroeder terms this flaw in difference arguments the "Masculinist Definitions Misstep." She observes:

Different voice feminism bases its concept of gender differentiation on the universal human experience that women "assume primary responsibility for the physical care and psychological nurturance of young children." And yet this theory, developed by modern middle-class American white women, concludes that the *universal* ideal masculinity which results from this *universal* experience just happens to be the very modern, very American, very middle-class, and very white idea of the autonomous individual as imagined by classical liberal political theory.

Id. (citations omitted).

⁷³ See Robin West, Jurisprudence and Gender, 55 *U. Chi. L. Rev.* 1, 13 (1988) ("[T]o cultural feminists, the important difference between men and women is that women raise children and men don't."); see also Jane Flax, Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics, in *Discovering Reality* 245, 245 (Sandra Harding & Merrill B. Hintikka eds., 1983).

⁷⁴ See Deborah King, Multiple Jeopardy, Multiple Consciousness: The Context

Alternatives to rights discourse that accept the notion of a unitary Woman only perpetuate the myth of formal equality. This fallacy, adopted in traditional equal protection jurisprudence, is one that feminist thinkers have long striven to avoid. By standardizing people into neat boxes,⁷⁷ equal protection jurisprudence has posed unique problems for women who do not fit into them. For example, under the various civil rights acts, women of color may argue that they have been discriminated against on the basis of sex, race, or sex plus race, but not as women of color as such.⁷⁸ Catharine MacKinnon recently summarized the dilemma as follows:

First the doctrine had apoplexy trying to decide if their inequality was sex or race. When it faced the fact that it is both at once, women of color were sometimes regarded as different twice over: from the male standard of race and the white standard of sex. This reveals a racism in the law of sex and a sexism in the law of race. White women meet the white male standard as white, if not male, and men of color meet the white male standard as

of a Black Feminist Ideology, 14 *Signs* 42, 43-46 (1988). Similarly, by analogizing racism with sexism, political movements have rendered women of color invisible as well. See bell hooks, *Feminist Theory: From Margin to Center* (1984); Gloria Joseph & Jill Lewis, *Common Differences: Conflicts in Black and White Feminist Perspectives* (1981); Margaret A. Simons, *Racism and Feminism: A Schism in the Sisterhood*, 5 *Feminist Stud.* 384 (1979); Althea Smith & Abigail Stewart, *Approaches to Studying Racism and Sexism in Black Women's Lives*, 39 *J. Soc. Issues* 1 (1983).

⁷⁵ By ignoring the intersection of classism with all other "isms," political movements have also rendered class interests invisible. See Ellen Willis, *Radical Feminism and Feminist Radicalism*, in *The 60's Without Apology* 110-11 (Sonya Sayres et al. eds., 1984). See generally Zillah R. Eisenstein, *Capitalist Patriarchy and the Case for Socialist Feminism* (1979).

⁷⁶ Lesbians have been largely ignored in most of the anti-essentialist discourse. For example, in reviewing the sameness/difference debate, Joan Williams uncritically observed that "the key thrust of anti-essentialism is to remind feminists of the existence of *race*" because of "[t]he importance of race in American life." Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 *Duke L.J.* 296, 316. Absent is any mention of the importance of heterosexism (or classism, or able-ism, or anything else) in the existence of American life. For discussions of the exclusion of lesbians from feminist thought, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); Cain, *supra* note 48, at 212-13; Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 *Women's Rts. L. Rep.* 39, 40-46 (1990); Ruthann Robson, *Lesbian Jurisprudence?*, 8 *Law & Ineq. J.* 443 (1990).

⁷⁷ Patricia Williams similarly speaks in terms of boxes. See Patricia Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* 130 (1991).

⁷⁸ See, e.g., *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part and rev'd in part*, 558 F.2d 480 (8th Cir. 1977); *Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979). *Contra Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983).

male, if not white. Although a good many women of color can meet any substantive standard around, women of color as such meet neither.⁷⁹

The relationships between different types of discrimination cannot be reduced to an additive analysis. Women of color experience discrimination uniquely as women of color, not somehow as the sum of their parts.⁸⁰ For example, "[p]ortraying African-American women as stereotypical mammies, matriarchs, welfare recipients, and hot mamas has been essential to Black women's oppression."⁸¹ White women do not face similar stereotypes. Nor do white women contend with the legacy of slavery,⁸² nor an economic exploitation that compounds sexism and classism with racism.⁸³ Further, as bell hooks pointedly observes, white women "do not walk out of [women's studies] classes into a void where they are still invisible, their history unknown, their reality denied."⁸⁴

⁷⁹ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1291 (1991) (citation omitted).

⁸⁰ Elizabeth Spelman refers to the need to reject an additive analysis in her essay, Elizabeth V. Spelman, *Theories of Race & Gender: The Erasure of Black Women*, 5 *Quest: A Feminist Quarterly* 36 (1982). She later expanded this analysis in Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 114 (1988) [hereinafter Spelman, *Inessential Woman*]. See also Harris, *supra* note 47, at 608-12; Barbara Smith, *Notes for Yet Another Paper on Black Feminism, or Will the Real Enemy Please Stand Up?* 5 *Conditions* 123, 123 (1979).

⁸¹ Patricia Hill Collins, *Black Feminist Thought* 67 (1990). Collins also observes that "[t]he status of African-American women as outsiders or strangers becomes the point from which other groups define their normality." *Id.* at 68.

⁸² See Barbara Omolade, *Black Women, Black Men, and Tawana Brawley—The Shared Condition*, 12 *Harv. Women's L.J.* 11, 12-14 (1989) (attributing the silencing of African-American women about sexual abuse to sexual exploitation under slavery). See generally *Black Women in White America: A Documentary History* (Gerda Lerner ed., 1973) (history of oppression of African-American women); Linda Brent, *Incidents in the Life of a Slave Girl* (L. Marie Child ed., 1972) (personal account of slavery as experienced by an African-American woman); Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (1984) (history of African-American women, including an account of the effect of slavery). Other women of color face their own history of oppression wrought by colonization, a history not shared with white women.

⁸³ See Diane K. Lewis, *A Response to Inequality: Black Women, Racism, and Sexism, in Black Women in America* 41 (Micheline R. Malson et al. eds., 1988) (comparing status of African-American women and white women by various indicators); *Slipping Through the Cracks: The Status of Black Women* (Margaret C. Simms & Julianne Malveaux eds., 1986); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place; Asserting Our Rights*, 24 *Harv. C.R.-C.L. L. Rev.* 9, 27-30 (1989) (illustrating how African-American women pressed into jobs most similar to the duties they performed as slaves); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 *Yale L.J.* 1457, 1461-63 (1989) (presenting history of pushing African-American women into the most difficult and dirtiest jobs).

⁸⁴ bell hooks, *Talking Back: Thinking Feminist, Thinking Black* 149 (1989); see

Nevertheless, just as no single "woman's experience" can be identified, no single "African-American woman's standpoint" can be located that will express all dimensions of all African-American women's experiences.⁸⁵ Yet speaking in terms of any generalized group, such as "African-American women" or "women" or "lesbians," permits self-identification and fosters a collective identity that enhances dialogue for at least some members of the group.⁸⁶ For women who have been particularly silenced, such an opportunity for self-identification and collective identity can be particularly powerful.⁸⁷

As Elizabeth Spelman observes, this conflict is "the paradox at the heart of feminism. Any attempt to talk about all women in terms of something we have in common undermines attempts to talk about the differences among us, and vice versa."⁸⁸ All identifiable groups may face this paradox.⁸⁹ The degree to which differences undermine a group's attempts to talk about commonalities, however, depends upon the extent to which voices within the group have been silenced in the past. The paradox is particularly acute for women today because many white women, wittingly or unwittingly, have continually claimed to speak for all women, perpetua-

also Maxine Baca Zinn et al., *The Cost of Exclusionary Practices in Women's Studies, in Making Face, Making Soul (Haciendo Caras): Creative and Critical Perspectives by Women of Color* 29 (Gloria Anzaldúa ed., 1990).

⁸⁵ Harris, *supra* note 47, at 608-09. African-American scholars are not immune from the trap of essentialism. See, e.g., Collins, *supra* note 81, at 30-33 (arguing for "rearticulating a Black women's standpoint"); Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* 90-93 (1989) (examining use of essentialism in writings of African-American literary critics); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1782-83 (1989) (positing that Mari Matsuda and others engage in essentialism).

⁸⁶ Collins, *supra* note 81, at 31-32; see also Combahee River Collective, *A Black Feminist Statement*, in *This Bridge Called My Back: Writings by Radical Women of Color* 13, 21 (Cherríe Moraga & Gloria Anzaldúa eds., 1981) (discussing the political realization that comes from the seemingly personal experiences of African-American women's lives).

⁸⁷ See Pamela J. Smith, *We Are Not Sisters: African American Women and the Freedom to Associate and Disassociate*, 66 Tul. L. Rev. 1467, 1492 (1992) ("[I]f African-American women do not gather together to discuss and address their own problems, excluded from the watching eye of society at large, they will remain chained by the conspiracy of silence."); see also Combahee River Collective, *supra* note 86, at 21.

⁸⁸ Spelman, *Inessential Woman*, *supra* note 80, at 3.

⁸⁹ For an exploration of difference dividing "the black community," see Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992). Austin notes that "[t]hrough the ubiquitous experience of racism provides the basis for group solidarity, differences of gender, class, geography, and political affiliations keep blacks apart." *Id.* at 1817.

ting "white solipsism" and effectively silencing women of color.⁹⁰ The question then, as Elizabeth Spelman and Martha Minow have observed, is, "Who will define the agenda for the women's movement?"

Some white and middle-class women may feel that a focus on the myriad of contexts of women's lives in America dislodges their agenda for women's rights and disables their ability to organize a movement. But if the movement depends upon submerging some women's interests to the interests of those with more access to the leadership ranks, then the problem is not the focus on context but the conflict between privilege and democracy.⁹¹

Some commentators have attempted to avoid this dilemma by focusing, not on difference, but on "the difference difference makes."⁹² This approach, exemplified in MacKinnon's writing, has been termed the "dominance" approach. Like the difference approach, the dominance approach recognizes that women are in fact different from men. Rather than claiming that women share the same unique needs, however, it emphasizes that women need to be freed from the practices that subordinate them.⁹³ In addition, this approach recognizes that abstract rights historically are biased because they have been created and are enforced by men. The goal then is to move away from a rights analysis, toward a framework attacking women's subordination more directly.

But try as it may, the dominance approach, particularly as articulated by MacKinnon, also tends to universalize women, and does little to resolve the conflict between lack of privilege and participation. Granted, MacKinnon does at times explicitly or implicitly recognize the particular flavor of oppression faced by women of color.⁹⁴ Although the concept of

⁹⁰ See Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, and Gynephobia*, in *On Lies, Secrets, and Silence* 275, 299 (1979) (defining white solipsism as the tendency to "think, imagine, and speak as if whiteness described the world").

⁹¹ Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1634 (1990).

⁹² Rhode, *supra* note 32, at 625 (citing Deborah Rhode, *Justice and Gender* 81-111 (1989)).

⁹³ See Catharine A. MacKinnon, *Toward a Feminist Theory of State* (1989); MacKinnon, *supra* note 71; see also bell hooks, *Ain't I a Woman?: Black Women and Feminism* 194 (1981) ("To me feminism is not simply a struggle to end male chauvinism or a movement to ensure that women will have equal rights with men; it is a commitment to eradicating the ideology of domination that permeates Western culture on various levels.").

While MacKinnon calls such an approach a "dominance" approach, see MacKinnon, *supra* note 71, at 213-34, other feminist scholars have termed their similar approaches the "anti-subjugation" approach. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986).

⁹⁴ See, e.g., Andrea Dworkin & Catharine A. MacKinnon, *Pornography and Civil*

experience "as a woman"⁹⁵ is not in and of itself essentialist, it threatens to obscure the very different historical and political contexts in which such experiences arise. Indeed, when MacKinnon claims that we can never discover women's real voices until they are free from male dominance, she is criticized for continually speaking of women in unitary terms of "woman's 'distinctive contribution,' of standards that are 'not ours,' of empowering women 'on our own terms,' and of what we 'really want.'" These references all suggest a reality beyond social construct that women will discover once freed from the bonds of oppression."⁹⁶

Furthermore, MacKinnon apparently demands that women's "real voices" be in agreement with her; discordant voices are ignorant or traitorous.⁹⁷ As Angela Harris has observed, "MacKinnon is quick to insist that there is only one 'true,' 'unmodified' feminism: that which analyzes women *as women*, not as subsets of some other group and not as gender-neutral beings."⁹⁸ MacKinnon rejects the notion that many types of feminism exist, searching instead for the only true feminism, one which comes from consciousness raising—"a feminism unqualified by preexisting modifiers."⁹⁹ In its search for a True Feminist Theory, the dominance approach, like the difference approach, standardizes women and neglects the conflict between lack of privilege and participation.

This brief summary of feminist responses to rights discourse serves to highlight the main problem with alternative approaches—acceptance of universal truths and, in particular, the homogenization of women's

Rights: A New Day for Women's Equality 11 (1988) ("It is especially important to understand that *Blacks* includes Black women and that *women* includes Black women."); see also e. christi cunningham, Unmaddening: A Response to Angela Harris, 4 Yale J.L. & Feminism 155, 160-63 (1991) (pointing to MacKinnon's discussion about "how the way the boot feels to us may depend on whether we are Black or Native American or white or Asian or Latina").

⁹⁵ See Catharine A. MacKinnon, From Practice to Theory, or What Is a White Woman Anyway?, 4 Yale J.L. & Feminism 13, 21 (1991).

⁹⁶ Katharine T. Bartlett, MacKinnon's Feminism: Power, on Whose Terms?, 75 Cal. L. Rev. 1559, 1566 (1987) (book review) (citations omitted).

⁹⁷ For example, MacKinnon has called women who disagree with her about the proper approach to pornography "elitist[t]" and non-feminists, full of "thundering ignorance about the way women are treated." See MacKinnon, *supra* note 71, at 205.

⁹⁸ Harris, *supra* note 47, at 59 (citing MacKinnon, *supra* note 71, at 32, 45). But see cunningham, *supra* note 94, at 159 (disagreeing with Harris and defending MacKinnon).

⁹⁹ See MacKinnon, *supra* note 71, at 15-16. MacKinnon's assertion is contrary to the recognition, now standard in most women's studies classes, that many types of feminism exist. See, e.g., Zillah R. Eisenstein, *The Radical Future of Liberal Feminism* (1981) (exploring feminist theories and positing a liberal feminism inherently radical and not purely liberal); Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (1989) (identifying several branches of feminist thought).

experiences. Although the dominance model avoids many of the pitfalls of rights discourse, it too falls short. Our goal, as Deborah Rhode has observed, should be to discover "understandings that can resonate with women's shared experience without losing touch with our diversity."¹⁰⁰ The problem lies in finding a way to unleash diverse voices without focusing solely on the individual. It is to this task that I now turn.

THE FUTURE: COMMUNITY AND VOICE—TOWARD A STRONGER VISION FOR REPRODUCTIVE FREEDOM

Any alternative approach to reproductive freedom, however framed, must both address the difficulties inherent in rights and equality theories and draw from their strengths. Accordingly, a checklist for the ideal alternative would include the following goals:

- a) recognizing that women as a "class" are harmed by denial of reproductive freedom, but are harmed in different ways, since no unitary "Woman" exists;
- b) promoting the hearing of different voices within the group of women, while fostering "communication across those differences";¹⁰¹
- c) recognizing the conflict between privilege and participation and enhancing the hearing of diverse voices within all communities, while safeguarding against the tyranny of the majority within those communities;
- d) addressing access problems by including an affirmative element, yet maintaining negative protection against government actions; and
- e) in doing all of the above, drawing attention to the real impact of reproductive freedom on women's lives.

An alternative that works toward these goals considers one's dynamic relationship with communities, rather than the existence of an atomistic individual, as the locus of values and needs in society. While the individual cannot be forgotten, a new approach to reproductive freedom would acknowledge the centrality of communities, and thus would more accurately

¹⁰⁰ Rhode, *supra* note 32, at 626.

¹⁰¹ This phrase is Iris Marion Young's. Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *Feminism and Political Theory* 117, 125 (Cass R. Sunstein ed., 1990).

reflect both the development and ordering of values and needs in our society—acknowledging our “agendas,” as well as the actual construction of personal identity. Such a focus on relationship with communities would amplify the voices of the disempowered and encourage communities to listen to their constituents who reside—in Mari Matsuda’s terms—“at the bottom.”¹⁰² Concurrently, such a focus would also demand that communities listen to other communities that have been relegated to a position “at the bottom.”

This focus on relationship with communities acknowledges and respects difference head on, while simultaneously providing space for collective action, thus lending power and substance to what Regina Austin and others have termed a “politics of identification”:

a politics . . . which works with and through difference, which is able to build those forms of solidarity and identification which make common struggle and resistance possible but without suppressing the real heterogeneity of interests and identities, and which can effectively draw the political boundary lines without which political contestation is impossible, without fixing those boundaries for eternity.¹⁰³

The construction of identity is an act of will, not a passive endeavor.¹⁰⁴ As explained more fully below, this approach empowers individuals to construct their identities through free and full interaction with communities of their choosing;¹⁰⁵ enables communities to begin to address all constitu-

¹⁰² Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987) (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

¹⁰³ Austin, *supra* note 89, at 1775 (quoting Stuart Hall, *New Ethnicities*, in *Black Film*, British Cinema 27–28 (Lisa Appignanesi ed., 1988)).

¹⁰⁴ See, e.g., Harris, *supra* note 47, at 612–13 (“recognizing that wholeness of the self and commonality with others are acts of will and creativity, rather than of passive discovery”).

¹⁰⁵ See Smith, *supra* note 87, at 1490–95 (presenting the benefits of free and full association for African-American women). Note that because our jurisprudence is dominated by “rights-talk,” a conflict is posed between the “right” of individuals and groups to associate and the “right” of other individuals and groups to disassociate. While this dilemma can be resolved within the framework of rights analysis, see *id.* at 1496–1514; see also William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 102–05 (1986), it largely dissolves under either an anti-subjugation approach, which asks which solution most empowers a subjugated group, or the community/voice approach advanced here, which seeks to expand the dynamic process of community and voice by encouraging speech from individuals and communities who reside “at the bottom.” Under both the anti-subjugation approach and the community/voice approach, political or cultural groups that limit participation to

ents' concerns and to fashion elements of justice which will adequately reflect their needs; and thus provides hope for turning "dysfunctioning communities"—communities in which the individual relationship with community is blocked—into functioning communities.¹⁰⁶

This alternative is grounded in two theories: communitarian thought and the concept of "voice" developed by Critical Race Theorists. "[C]ommunitarian philosophy as a whole [has always been] a perilous ally for feminist theory. . . . [Many] communities have harbored social roles and structures which have been highly oppressive for women" ¹⁰⁷ In recognition of this peril, I modify what could be termed "crude" communitarian thinking¹⁰⁸ in two crucial respects. First, I assert that the central

African-American women (or men, or other people of color, or lesbians, or gay men, or differently-abled people, etc.) would not only be permitted but, in fact, encouraged. At the same time, I suggest that neither the anti-subjugation nor the community/voice approach would alter the gains that have been made for women, people of color, and religious groups in obtaining entrance to all-white-male clubs. In contrast, application of rights analysis might not reach the same result. See Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. Pitt. L. Rev. 143, 182–85 (1987) (discussing Hannah Arendt's analysis of school desegregation cases). A detailed application of the community/voice approach is left to another day, yet I add this explanation now to address at least partially the concerns of my present law students, who fear that an emphasis on community would allow dominant communities to exclude them.

¹⁰⁶ The definition of functioning community is my own. See *infra* at notes 158–66 and accompanying text. It is by definition a "circular" proposition. As explained further herein, relationship with community is a synergistic process: communities and individuals develop through full interaction between and among each other. Such a concept does not lend itself to the question, "O.K., which comes first, community or individual development?" The answer, in the abstract at least, is, "I don't know."

¹⁰⁷ Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in *Feminism and Political Theory*, *supra* note 101, at 145.

¹⁰⁸ "Crude" communitarianism is an over-simplification of all that could be termed "communitarian." As Jeanne Schroeder has recognized, "there are probably as many different concepts of community and theories of what would be communitarianism as there are philosophers and jurisprudes." Schroeder, *supra* note 72, at 129 n.45. Indeed, many commentators conflate varied and at times conflicting schools of communitarian thought. In an effort to sort out this mess, Stephen Gardbaum identifies three distinct communitarian claims: (1) antiatomism—"that the picture of the freely-choosing individual is false"; (2) strong communitarianism—"that 'we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life'"; and (3) metaethical communitarianism—"that 'political discourse [proceeds] within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings.'" Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 Mich. L. Rev. 685, 691 (1992) (quoting Michael J. Sandel, Introduction, in *Liberalism and Its Critics* 5, 10 (Michael J. Sandel ed., 1984) [hereinafter Sandel, *Critics*]). For other recent overviews of communitarian thought in constitutional theory, see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1, 6 (1989) (dividing scholars into

focus should be on an individual's relationship with community, not on community alone, and thus do not advocate complete abandonment of counter-majoritarian protections. In particular, in light of the political and historical context in which we live, protections may be necessary to facilitate minority participation in communities.¹⁰⁹ Second, I incorporate the concept of "voice" into communitarian analysis, thus facilitating the inclusion of those "at the bottom" in the creation and definition of community.

In doing so, I attempt to harmonize certain communitarian claims with one interpretation of "relationalism"—the recognition that "even though we are defined as human only in relation to each other and are dependent on each other, it is a form of violence and violation if we force our own subjectivity on the other and do not listen to the other's call to recognize his moment of independent subjectivity."¹¹⁰ Jeanne Schroeder succinctly explains the difference between relationalism and "crude" communitarianism as follows:

Communitarianism . . . tends to see the community as an entity in and of itself, having existence and significance superior to the interactions of the individual members constituting the community. In crude individualism, the abstract individual is prior

"the new republicans" and "the interpretivists"); James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 *Ind. L. Rev.* 1, 18-21 (1990) (dividing communitarian thought into discussion of "big" and "small" communities).

A diverse array of significant communitarian-influenced (but not necessarily "communitarian") works include the following: Alasdair MacIntyre, *After Virtue* (2d ed. 1984); Michael J. Sandel, *Liberalism and the Limits of Justice* (1982) [hereinafter Sandel, *Liberalism*]; Mark Tushnet, *Red, White, and Blue—A Critical Analysis of Constitutional Law* (1988); Drucilla Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 *Cardozo L. Rev.* 989 (1987); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4 (1986); Cass R. Sunstein, *Interest Groups In American Public Law*, 38 *Stan. L. Rev.* 29 (1985). See generally Symposium, *The Republican Civic Tradition*, 97 *Yale L.J.* 1493 (1988) (including articles by Michelman and Sunstein and comments by several others); Symposium, *Law and Community*, 84 *Mich. L. Rev.* 1373 (1986).

¹⁰⁹ See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *Harv. C.R.-C.L. L. Rev.* 401, 403 (1987) [hereinafter Williams, *Alchemical Notes*] ("CLS has a good deal of powerful theory-magic of its own to offer; but I think it has failed to make its words and un-words tangible, *reachable* and applicable to those in this society who need its powerful assistance most."); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 *Law & Ineq. J.* 103, 128 (1987) [hereinafter Williams, *Taking Rights Aggressively*] (emphasizing responsibility of minority legal scholars to utilize Critical Legal Studies methodology to "transform the conditions oppressing our . . . peoples").

¹¹⁰ Schroeder, *supra* note 72, at 129.

to the community. In crude communitarianism, the abstract community is prior to the individual, who is defined by her status in the community. In relationalism, the individual and the community are seen to be indispensable to each other—the same yet different.¹¹¹

While relationalism, as defined above, is contrary to “crude” communitarianism, it is in line with the claims of two other branches of communitarian thought: (1) that the community is a causal factor in the constitution of personal identity (“antiatomism”); and (2) that values can rarely, if ever, be grounded in universal terms, but rather should be tied to the contexts and traditions of particular communities.¹¹² The goal of this vision of communities is not to divine a social consensus.¹¹³ On the contrary, this vision of community explicitly rejects universal truths, accepts difference within and between communities,¹¹⁴ and encourages community as a critical, dialogic enterprise.¹¹⁵ By doing so, it actively

¹¹¹ Id. at 129–30.

¹¹² I draw these two categories from those identified by Gardbaum as “antiatomism” and “metaethical communitarianism.” See Gardbaum, *supra* note 108, at 692. My first claim fits well within Gardbaum’s category of “antiatomism”; my second claim lies within his category of “metaethical communitarianism.”

¹¹³ The notion that social consensus will emerge from reasoned deliberation by rationally thinking individuals is a main tenet of civic republicanism. Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 *Yale L.J.* 1609, 1610 (1988). Bell and Bansal are aptly skeptical of such a proposition, noting that “[f]or centuries in this country, however, blacks have served as the group whose experiences and private needs have been suppressed in order to promote the ‘common good’ of whites.” Id. at 1610–11. See also Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *Yale L.J.* 1713, 1714 (1988) (“reject[ing] any quest for agreement upon a single common good, and locat[ing] social interaction and value formation principally in settings other than citizenship”).

¹¹⁴ To the extent that I stress recognition of differences, I disagree vehemently with James Torke’s declaration that “[a] ‘difference community’ is an oxymoron.” Torke, *supra* note 108, at 33. While some communities do emphasize sameness rather than difference, differences exist within nearly all communities, and it is precisely these differences which must be recognized. I also disagree with Torke’s assertion that “most of the very goods we seek in community” can be found only in an exclusive, intolerant community. Id. at 32. See Iris Marion Young, *The Ideal of Community and the Politics of Difference*, 12 *Soc. Theory & Prac.* 1, 22 (1986) (envisioning an “unoppressive city . . . defined as openness to unassimilated otherness”).

¹¹⁵ For developed theories of a dialogic community (which are similar to yet very different from my own), see generally Drucilla Cornell, *The “Postmodern” Challenge to the Ideal of Community*, in *The Philosophy of the Limit* 39, 41 (1992) (drawing from Theodore W. Adorno & Jacques Derrida and “speculat[ing] on the dream of communicative freedom”); Richard Rorty, *Consequences of Pragmatism* (Essays: 1972–1980) 195 (1982) (emphasizing “the utility of narrative and vocabularies rather than the objectivity of laws and theories”); Cornell, *supra* note 108 (earlier article on the same theme as *The “Postmodern” Challenge to the Ideal of Community*). By

guards against the specter of "crude" communitarianism—"the hell of idealistic totalitarian bureaucratic oppression."¹¹⁶

To further guard against the "dark side" of community, I modify "crude" communitarianism further by adding the concept of "voice," a notion of synergistic interaction between individuals and communities—a concept explained in full below. Drawing particularly from the work of Critical Race Scholars,¹¹⁷ I emphasize the importance of voice for the

stressing differences, and thus elevating the cultural setting of dialogue to a place of considerable significance, my vision of community contrasts sharply with the notion of the dialogic community as an ideal speech situation. See Torke, *supra* note 108, at 20 (discussing various views of dialogic communities). As Torke notes, "[p]urified discourse requires a thoroughgoing conformity." *Id.* at 23. By encouraging discourse "polluted" by diversity of cultural context, I strive to avoid such conformity.

¹¹⁶ Ian R. Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 *Nw. U. L. Rev.* 900, 924 n.87 (1985) (noting that every "successful" idealistic revolution since 1789 has fallen prey to such oppression, and refusing to exempt Critical Legal Studies' vision of equality from that danger); see also Friedman, *supra* note 107, at 149 (noting that "[m]any communities are characterized by practices of exclusion and suppression of nongroup members" and that "the practices and traditions of numerous communities are exploitative and oppressive toward many of their own"); Torke, *supra* note 108, at 22–28 (detailing the "vices of community"); Young, *supra* note 114, at 12–13 (acknowledging that "striving for mutual identification and shared understanding among those who seek to foster a radical and progressive politics . . . can and has led to denying or suppressing differences within political groups or movements").

¹¹⁷ Scholars who have written articles employing the methodology of Critical Race Theory, or who have been identified as doing so by others, include the following: Williams, *supra* note 77; Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987); Regina Austin, *Sapphire Bound!*, 1989 *Wis. L. Rev.* 539; Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 *Harv. L. Rev.* 1864 (1990); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *Duke L.J.* 365; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 *Harv. L. Rev.* 1331 (1988); Harlon Dalton, *AIDS in Blackface*, *Daedalus*, Summer 1989, at 205; Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 *Va. L. Rev.* 95 (1990); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1989); Harris, *supra* note 47; Alex M. Johnson, *The New Voice of Color*, 100 *Yale L.J.* 2007 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987); Mari J. Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *Yale L.J.* 1329 (1991); Matsuda, *supra* note 102; Judy Scales-Trent, *Commonalities: On Being Black and White, Different and Same*, 2 *Yale J.L. & Feminism* 305 (1990); Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *Duke L.J.* 625; Williams, *Alchemical Notes*, *supra* note 109.

An emphasis on voice is also prevalent in feminist theory, what could be termed an emerging gay and lesbian theory, and other scholarship which is critical of universalism and which emphasizes the importance of context. See, e.g., Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* 206–10 (1989)

functioning of communities and develop the notion of voice as process. Thus, instead of substituting community values for "women's rights," and rather than blindly accepting the existing power structures operating within communities, I seek to use the individual's relationship with community to challenge constructs designed to pacify and exclude. In doing so, I hope to locate and support the empowerment of all women, including those silenced "at the bottom."

Yet the conflict between privilege and participation remains.¹¹⁸ The dialogic possibilities of the community have been grossly impaired, as existing power constructs and social conditions render many of those "at the bottom" hopeless and disabled, denied full participation. It is those "at the bottom" who face the greatest obstacles to entry to and existence in communities of their own choosing.¹¹⁹ Accordingly, I also seek to contribute to the discussion of voice by identifying certain "enabling/excluding" elements for unleashing voice and bringing about full participation.¹²⁰

(stressing importance of inquiry into context within philosophy); Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991) (examination and defense of feminist narrative scholarship); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 Nova L. Rev. 355 (1989) (drawing from personal experiences in examining law on reproduction); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997 (1985) (examining meaning of contract doctrine in context); Susan Estrich, *Rape*, 95 Yale L.J. 1087 (1986) (drawing from personal experience in her analysis); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992) (discussing the importance of storytelling in gay advocacy); Minow & Spelman, *supra* note 91 (exploring importance of "context" and responding to objections to its use); Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758 (comparing integrationist with nationalist approaches and discussing importance of race consciousness); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990) (discussing importance of women's stories in understanding and applying Title VII); Symposium, *Storytelling*, 87 Mich. L. Rev. 2073 (1989) (collection of articles emphasizing storytelling).

¹¹⁸ Minow & Spelman, *supra* note 91, at 1634 (identifying a "conflict between privilege and democracy").

¹¹⁹ Marilyn Friedman suggests that "chosen communities" are most valuable for helping us define ourselves.

It is likely that chosen communities, lesbian communities, for example, attract us in the first place because they appeal to features of ourselves which, though perhaps merely found or discovered, were inadequately or ambivalently sustained by our unchosen families, neighborhoods, schools, or churches. Thus, unchosen communities are sometimes communities which we can, and should, leave, searching elsewhere for the resources to help us discern who we really are.

Friedman, *supra* note 107, at 157.

¹²⁰ While these elements, which I term "enabling/excluding," seem akin to rights,

Although one of these elements, I contend, is reproductive freedom, my goal is to open discussion on what may prove to be a promising alternative focus in other troubled areas of jurisprudence as well.¹²¹

A. Rethinking Voice and Community

In this section, I adopt the proposition, set forth above, that the foundation of our society is the functioning of *communities*,¹²² and explore that proposition's ramifications for a re-conceptualization of individual rights. This discussion is broken into three sections. First, in the context of cultural feminists' emphasis on "connection," I examine the importance of communities and explain the necessity of voice for all constituents' full participation. Next, I introduce the concept of the "dysfunctioning" community through examination of one of its paradigms, the institution of marriage. Finally, I propose the steps necessary to make communities function properly, and in doing so, I distinguish this alternative approach from any approach previously advanced by process-based and pluralist theorists.

1. *The Centrality of Communities and Voice for All*

Ideally, communities are organic, "based on merging, on shared values, on shared attributes in contrast to atomized individuals."¹²³ More frequently, however, communities are imposed or circumscribed by external forces, including law and tradition. With both external and internal forces limiting dialogue in compelled communities, these communities rarely represent the concerns of their constituents. In any event, the history of both men and women has been the history of several overlapping communities,¹²⁴ not one universal human community,¹²⁵ and men and women

they are actually *prerequisites* for civil rights. See *infra* at pages 293–95. Unlike traditional American rights-talk, these elements are affirmative and not subject to a zero-sum analysis.

¹²¹ For example, in a work in progress, I apply a similar "community/voice" approach to state-mandated "family values," a debate with particular resonance for many women "at the bottom." I also suggest that the community/voice approach could be applied to housing and health-care issues.

¹²² I speak of "communities" in the plural in recognition of the several overlapping communities that do and must exist in our society.

¹²³ Elizabeth Fox-Genovese, *Feminism Without Illusions: A Critique of Individualism* 33 (1991).

¹²⁴ *Id.* at 38–39.

¹²⁵ Rorty, *supra* note 115, at 207.

continue to perceive themselves as members of communities defined by a variety of criteria.¹²⁶

Communities have always been essential, therefore, not only for the development of communal interests, but also for the development of the individual.¹²⁷ Individual agendas mean little unless they are contextualized within their communities.

[T]o say that the members of society are bound by a sense of community is not simply to say that a great many of them profess communitarian aims, but rather that they conceive their identity—the subject and not just the object of their feelings and aspirations—as defined to some extent by the community of which they are a part.¹²⁸

Contrary to traditional liberal theory, individual needs, wants, and desires do not spring from atomized individuals.¹²⁹ Rather, they arise out of, and remain a part of, the communities in which the individual belongs or with which the individual identifies.¹³⁰ At the same time, the community is dependent upon its constituents to form its agenda. In this sense, the community evolves through a symbiotic relationship with the individual in which both stand to gain.¹³¹

¹²⁶ Fox-Genovese notes that belonging to a community is both a legal status and a feeling, creating a group “[which] may be bound together by anything from a legal obligation to mutual sympathies.” Fox-Genovese, *supra* note 123, at 34. Affiliations with a group may be formal or informal, based on extrinsic evidence of commonalities, such as age, gender, race, and geographic location, or on active association or participation, such as membership, sponsorship, attendance at meetings, or signing petitions.

¹²⁷ For communitarian theorists’ recognition of this principle, see generally MacIntyre, *supra* note 108, at 220; Sandel, *Liberalism*, *supra* note 108, at 179–80. Social contract theorists observe the importance of the community in a significantly different manner. They imagine that individuals may contract away certain items on their personal agendas out of necessity. In contrast, according to a communitarian approach, the individual does not carry her own agenda to the community, but arrives at an agenda only through interaction with the community. In this sense, for communitarians (and some liberals) the community is a value in and of itself, or at least is the source of value. See Michael Walzer, *Welfare, Membership and Need*, in Sandel, *Critics*, *supra* note 108, at 201.

¹²⁸ Sandel, *Liberalism*, *supra* note 108, at 150.

¹²⁹ Alison M. Jaggar, *Feminist Politics and Human Nature* 29–32 (1988).

¹³⁰ Sandel, *Critics*, *supra* note 108, at 5–6; see MacIntyre, *supra* note 108, at 220; Sandel, *Liberalism*, *supra* note 108, at 179–80. For a related argument that group membership is necessary for the construction of individual identities, see Ehrenreich, *supra* note 66, at 1232–33 & n.202.

¹³¹ Such an argument, however, is contested by James Torke’s and other scholars’ assertions that “[there] is an ineradicable tension between the individual and the community. As we gain one we lose the other.” Torke, *supra* note 108, at 33

The feminist thought most closely identified with this notion of community importance is cultural feminism. Cultural feminist theory suggests that women have a special need to feel "connectedness" to community. This need derives from women's distinctive moral and psychological development and, at the same time, must be met in order for women to develop morally and psychologically.¹³² Because feminist counterculture is defined in opposition to male culture, thereby assuming that male culture is the norm from which to deviate,¹³³ individualism holds promise for men only: "Women intuitively seek connection and relationships, while men struggle for autonomous individualism."¹³⁴ Women are said to value an "ethic of care," whereas men are said to place a higher premium on all of the basic tenets of traditional liberalism: "abstraction, rights, autonomy, separation, formality, and neutrality—an 'ethic of justice.'"¹³⁵

(citations omitted).

¹³² Gilligan has written perhaps the most influential work in this area. Carol Gilligan, *In a Different Voice* (1982) (exploring the extent to which two different moral orientations—an "ethic of justice" and an "ethic of care"—affect the identification and treatment of moral issues). Other commentators have drawn on Gilligan's analysis. See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* (1989); Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 *Duke L.J.* 848, 901-08; Menkel-Meadow, *supra* note 68, at 41-42; Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1380-93 (1986); Sherry, *supra* note 68, at 580-616; West, *supra* note 73, at 14-21.

¹³³ Unquestioned acceptance of "male culture" as the norm against which all is measured has dangerous implications. See, e.g., Joan Cocks, *Wordless Emotion: Some Critical Reflections on Radical Feminism*, 13 *In Pol. & Soc'y* 27, 33-34 (1984). Cocks has elaborated this critique in Joan Cocks, *The Oppositional Imagination: Feminism, Critique and Political Theory* 9, 175-76 (1989).

¹³⁴ Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 *Tulsa L.J.* 775, 786 (1989-90).

¹³⁵ Cass R. Sunstein, *Feminism and Legal Theory*, 101 *Harv. L. Rev.* 826, 827 (1989) (reviewing MacKinnon, *supra* note 71). Many feminist legal scholars propose that rights theory be reformed to incorporate "feminine" values, such as responsibility, generosity, and nurturance. See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L.J.* 293 (1988) (incorporating responsibility and relationship into rights discussions in child custody laws); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 *Cal. L. Rev.* 1593, 1593 (1987) (arguing "that current fourth amendment jurisprudence is impoverished and distorted by neglecting the ways in which privacy embodies chosen sharing"); see also Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Consciousness and Wisdom*, 77 *Cal. L. Rev.* 1011, 1017-18 (1989) (a feminist theological perspective rejecting a separation between the self and others, in favor of an "authentic self" that aspires toward love, compassion, and wisdom); Lucinda M. Finley, *Transcending the Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *Colum. L. Rev.* 1118, 1163-80 (1986) (suggesting an analysis of parental leave policies that "supplements existing notions of rights" with acceptance of human interaction as "support, enrichment, and the establishment of sustaining bonds of community").

If women do indeed share greater need for connectedness to community, it may be either a "natural" reflection of "feminine morality,"¹³⁶ or a product of socialization.¹³⁷ On the one hand, Robin West argues that an enhanced need for "connectedness" derives from women's biological, reproductive role. "To the considerable degree that our potentiality for motherhood defines ourselves, women's lives are relational, not autonomous. As mothers we nurture the weak and depend upon the strong. More than do men, we live in an interdependent and hierarchical natural web with others of varying degrees of strength."¹³⁸ On the other hand, commentators caution against confusing reproductive biology with its cultural expressions.¹³⁹ As Zillah Eisenstein has observed: "Sex is the realm of biological raw material, and gender reflects human social intervention. But we need to recognize that even what is thought of as raw biology is socially constructed."¹⁴⁰ Gender roles and all "rules" allegedly emanating from them therefore are particularly suspect.¹⁴¹ "Laws of nature" should be

¹³⁶ See Sherry, *supra* note 68, at 584-89.

¹³⁷ See generally Nancy Chodorow, *The Reproduction of Mothering* (1974). Gilligan herself has recognized the role of socialization in influencing a person's moral orientation. See Carol Gilligan, Preface, in *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* ii-v (Carol Gilligan et al. eds., 1988).

¹³⁸ Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women's L.J.* 81, 141 (1987); see also Robin West, Foreword: *Taking Freedom Seriously*, 104 *Harv. L. Rev.* 43, 84-85 (1990); West, *supra* note 73.

¹³⁹ See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955, 1033 (1984).

¹⁴⁰ Zillah R. Eisenstein, *The Female Body and the Law* 81 (1988). At the same time, Eisenstein recognizes that we cannot reduce everything to socialization. When all is said and done, the body still has a "reality" of its own.

My point is not that the body—as established in biological "fact"—determines its own meaning outside discourse or the relations of patriarchal society. There is no "outside or biological 'fact'" as such. But we should not reduce the question of the body to its contextualized meaning within discourse if doing so results only in recognizing diversity—the difference(s) created in discourse—and silencing the unity of meaning in the body. Both the body as "fact" and the body as "interpretation" are real, even if we cannot clearly demarcate where one begins and the other ends.

Id. at 80.

Most feminist critics of what could be termed biological determinism do not observe the complexity of this dialectic. For a materialist analysis, see Alison M. Jaggar, *Human Biology in Feminist Theory: Sexual Equality Reconsidered*, in *Beyond Domination: New Perspectives on Women and Philosophy* 21-41 (Carol C. Gould ed., 1983) (arguing for use of a dialectical approach in coming to an understanding of the relationship between sex and gender).

¹⁴¹ MacKinnon has been particularly influential in emphasizing the centrality of

seen as more than simple expressions of the results of objective inquiry or of political and social pressures: "they must also be read for their personal—and, by tradition, masculine-content."¹⁴²

Thus, in a male-dominated society, caring and "connectedness" may be women's strategy for survival, not a natural reflection of feminine character.¹⁴³ And, in a white- and middle-class-dominated society, any notion of caring and "connectedness" is likely to be most apt for white, middle-class women, not for others who do not fit this mold.¹⁴⁴

If women were not subjugated by men, would their need for connectedness disappear? MacKinnon suggests that until women's state of subjugation has ended, we will never be able to discover the true voice of women.¹⁴⁵ Her point, which is well taken, is that women's voices are constructed from a position of subordination and, therefore, are not truly their own.¹⁴⁶ But we cannot easily step outside of our own culture to discover our real voices.¹⁴⁷ Waiting for the end of dominance to hear

sexuality as a tool of oppression, noting that, "[s]exuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *Signs* 515, 515 (1982).

¹⁴² Evelyn Fox Keller, *Reflections on Gender and Science* 10 (1985). For varied feminist critiques of biological determinism, see Holly Devor, *Gender Bending: Confronting the Limits of Duality* (1989); Barbara Ehrenreich & Deidre English, *For Her Own Good! 150 Years of the Experts' Advice to Women* (1978); Sondra Farganis, *Social Reconstruction of the Feminine Character* (1986); *The Future of Difference* (Hester Eisenstein & Alice Jardine eds., 1985); Susan Griffin, *Woman and Nature* (1978); Carolyn G. Heilbrun, *Toward a Recognition of Androgyny* (1964); *Women Look at Biology Looking at Women* (Ruth Hubbard et al. eds., 1979).

¹⁴³ For an interesting examination, developed through game theory, of women's so-called "taste for cooperation," see Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 *Va. L. Rev.* 421, 426 (1992).

¹⁴⁴ Cf. Harris, *supra* note 47, at 588; Cain, *supra* note 48, at 206 (pointing out how essentialism in feminist theory benefits white middle-class women to the detriment of all other women).

¹⁴⁵ See MacKinnon, *supra* note 71, at 61-62.

¹⁴⁶ This leads to the notion of false consciousness, the idea that some members of an oppressed group may be so shaped by the ideology of the dominant group that they are unable to perceive the true nature of their oppression. See Minow, *supra* note 68, at 73 & n.290. Several commentators have critiqued MacKinnon's treatment of false consciousness. See, e.g., Bartlett, *supra* note 96, at 1599; Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 *Nw. U. L. Rev.* 352, 380 (1988) (reviewing MacKinnon, *supra* note 71); Harris, *supra* note 47, at 590-95 (criticizing MacKinnon's dominance theory as essentialist and totalitarian, effacing, among others, African-American women); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 45 *Stan. L. Rev.* 751 (1987) (reviewing MacKinnon, *supra* note 71).

¹⁴⁷ See Lynne Segal, *Is the Future Female?* 61 (1987):

women's voices presupposes that a unitary, "natural," pre-subjugation voice of Woman exists somewhere and that it can eventually be unearthed. "[T]he question that this then provokes is whether we can ever avoid the omnipotent grip of the patriarch who is in our hearts, bodies, and minds."¹⁴⁸ If women cannot use the only voice they have, they are left with nothing but male dominance.

Others posit the opposite scenario: Women's state of domination will never end unless women's voices are first heard. This could prove a paralyzing dialectic. I suggest that neither approach is correct, as both improperly assume that communities are static entities and that women's "true" voices are uniform and somehow static as well. No absolute, objective voice persists throughout the ages. Rather, society is in a continual state of transformation—"a continuous, a seamless web."¹⁴⁹

The process of ending dominance and improving women's lives is synergistic. In order to end subjugation, we must hear and address all women's voices, however constructed.¹⁵⁰ Women must speak in whatever

[I]f we rely on personal experience alone we cannot explore how that experience is itself shaped by the frameworks of thought of those immediately around us. These frameworks are not static or inflexible, there is conflict and disagreement within the groups we are born or move into over ways of living and relating to others, ways of interpreting and experiencing the world. We cannot, however, easily step outside our own specific culture.

¹⁴⁸ Smart, *supra* note 53, at 76. MacKinnon asserts that no interior ground and few, if any, aspects of life are free from male power. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635, 638 (1983). Or, more tersely, male power produces the world before it distorts it. MacKinnon, *supra* note 141, at 542. Yet for women attempting to break free of their state of subjugation, this overstates the case. As Smart aptly observes:

In other words, women are completely overdetermined. They have no consciousness other than that which male power allows them to have, any actions they take are only those that serve male interests. This raises the question then of how feminism is possible at all? How is it possible to think otherwise if male power determines us all? Is male power an undivided whole which moves inexorably through history? Have women really no power?

Smart, *supra* note 53, at 77. MacKinnon's argument seems to be based on the assumption that male voices, unlike female voices, are natural. Yet men, like women, act inside culture and are necessarily influenced by their surroundings.

¹⁴⁹ Tushnet, *supra* note 26, at 1363 n.3; see also Harris, *supra* note 47, at 590–95; Williams, *supra* note 70, at 813.

¹⁵⁰ See Maria Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for "The Women's Voice,"* 6 *Women's Stud. Int'l* 573 (1983).

In attempting to eradicate the subjugation of women, MacKinnon herself examines women's voices. In defining what constitutes subjugation and in assessing its harm, she examines women's needs and experiences. See, e.g., MacKinnon, *supra* note 71, at

voice they have.¹⁵¹ The acknowledgement and response to these diverse voices will, by its very nature, work to end subjugation. Despite the fact that voices have been conditioned by a state of inequality, a process of transformation occurs when silenced voices are taken seriously. Like society, voices are also in a constant contradictory state of becoming.¹⁵² As male dominance is eroded by this continual process, women's voices will begin to reflect more accurately their full range of concerns—apart from those that arise from a state of subjugation. The bottom line is that in order for women to further their varied interests and needs, women's voices, however evolving, must consistently be heard as society itself continues to evolve.

We can draw from cultural feminists' recognition of the importance of voice in community without accepting the notion of a universal feminine culture and a single woman's voice. Whether or not women have a special need for connectedness, relationship to community is crucial for the functioning of society as a whole. The development of agendas for all

127–33, 146–62 (discussing pornography). Indeed, in an earlier work MacKinnon wrote:

The personal as political is not a simile, not a metaphor, and not an analogy It means that women's distinct experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to *know* the *politics* of woman's situation is to know women's lives.

MacKinnon, *supra* note 141, at 534–35.

Although she brings important insight to many issues, MacKinnon has not resolved what she should do when women's voices disagree with her own. As Jeanne Schroeder has noted, "[p]erhaps MacKinnon's most virulent criticism is of women who call themselves feminists yet disagree with MacKinnon's views." Schroeder, *supra* note 72, at 158–59 (citing MacKinnon, *supra* note 71, at 205 (MacKinnon telling feminists who defend pornography that they cannot be feminists)). MacKinnon has not reconciled the tension between her early calls for consciousness raising and her suggestions that women's voices cannot be heard from their state of subjugation. Cf. Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 867 & n.156 (1990); Colker, *supra* note 135, at 1035–36.

¹⁵¹ As philosopher/poet Audre Lorde has observed, "[T]he transformation of silence into language and action is an act of self-revelation" Audre Lorde, *The Transformation of Silence into Language and Action*, in *Sister Outsider* 40, 42 (1984).

¹⁵² Harris, *supra* note 47, at 584. Drucilla Cornell similarly emphasizes a process of transformation, writing of "Woman" as the "not yet." Drucilla Cornell, *Beyond Accommodation* 118 (1991). Ann Ferguson's "aspect theory of self" also finds that "conscious selfhood is an ongoing process in which both unique individual priorities and social constraints vie in limiting and defining one's self-identity." Ann Ferguson, *Sexual Democracy: Women, Oppression, and Revolution* 104 (1991); see similarly Tasmin E. Lorraine, *Gender Identity and the Production of Meaning* 22 (1990) (developing a "theory of self that views the self as a process engaged in a continuous struggle to maintain itself within and through the discourses and social practices at its disposal").

individuals is skewed unless they can develop their voices and freely participate in communities of their own choosing.¹⁵³ In turn, the agendas of all communities are distorted unless communities can enjoy the fullest participation of all who desire to be members.

Promotion and protection of voice is an essential element of this process. Full dialogue acts as an important "filter" on agendas, "reducing the likelihood that laws will amount to naked transfers of wealth or exercises of power."¹⁵⁴ At the same time, when previously silenced members speak from the "authority of lived experiences,"¹⁵⁵ full dialogue enables communities to represent constituent concerns with greater accuracy, and allows individuals room for growth. In such a community, "the dance of sameness and difference"¹⁵⁶ need not be denied. If communitarianism stretches across differences, the resulting community agendas are more likely to be accepted by the constituents they attempt to address, and communities will be better positioned to interact with each other.¹⁵⁷ In

¹⁵³ De Tocqueville observed that the isolated individual is rendered powerless and vulnerable:

What can even public opinion do when not even a score of people are held together by any common bond, when there is no man, no family, no body, no class, and no free association which can represent public opinion and set it in motion?

When each citizen being equally impotent, poor, and isolated cannot oppose his individual weakness to the organized force of the government?

De Tocqueville, *supra* note †, at 314; see also Henrietta L. Moore, *Feminism and Anthropology* 3 (1988) (discussing Edwin Ardener, *The "Problem" Revisited*, in *Perceiving Women* 19-27 (Shirley Ardener ed., 1975) ("[D]ominant groups in society generate and control the dominant modes of expression. Muted groups are silenced by the structures of dominance. . . . Any group which is silenced or rendered inarticulate in this way (gypsies, children, criminals) may be considered a 'muted' group, and women are . . . one such case.")).

¹⁵⁴ Cass R. Sunstein, *Routine and Revolution*, 81 Nw. L. Rev. 869, 886 (1987).

¹⁵⁵ bell hooks used this phrase in the context of discussing the potential unique contributions of nonwhite scholars. "Often a scholar with the same intellectual qualifications as his or her white colleague, who also has the authority of lived experience, is in the best possible position to share information about that group." hooks, *supra* note 84, at 44.

¹⁵⁶ Cornell, *supra* note 115, at 40.

¹⁵⁷ Certainly communities (and individuals within communities) will be most effective if they either speak in a language the target communities (and individuals) already understand, and/or they teach their languages to the target communities (and individuals). This is a point nonmajority scholars, activists, and lawyers have long understood. As Regina Austin writes:

[T]he black feminist legal scholar must be able to think political and talk legal if need be. Her pedagogical mission should extend to educating black women about the political significance of their ordinary lives and struggles. She must translate their frustrations and aspirations into a language that both reveals their

turn, once community agendas become more accurate, more constituents will begin to participate and to develop their own voices. As the community evolves in this sense, promotion of voice continues to be of paramount importance.

2. "Dysfunctioning" Communities

To continue to function properly, communities must ensure that all constituents' voices are fully heard—examined, at the very least, with equal respect. Legally protected communities pose a particular problem, as they tend to dysfunction when association is closed outright to some or compelled for others by external forces and, in either situation, remain nonresponsive to constituents' concerns. In addition, legally protected communities dysfunction when all who are or desire to be members do not have input on the rules of entry, exit, and operation.

Because women's voices have not been heard in either the formation or perpetuation of many legally protected communities, the abstract view of justice that guides these communities "sees and treats women the way men see women."¹⁵⁸ Similarly, since the voices of people of color, gay men and lesbians, and poor people have not been heard in legally protected communities, the abstract view of justice that guides many of these communities similarly treats them in a fashion that has little relation to their lived realities.¹⁵⁹ It is no accident then that state-sanctioned communities

liberatory potential and supports the legal legitimacy of their activism and their demands.

Austin, *supra* note 117, at 548.

¹⁵⁸ MacKinnon, *supra* note 148, at 644. One example of the law treating women as men see women is the area of sexual harassment. What is "reasonable" behavior for men and women in the workplace is of constant debate, with feminist advocates constantly attempting to guard against legal adoption of male standards of reasonableness. See Ehrenreich, *supra* note 66, at 1205-10.

¹⁵⁹ A compelling example of such treatment of African-American women appeared in the Clarence Thomas/Anita Hill hearings, in which Professor Hill was "completely decolorized." Smith, *supra* note 87, at 1468; see also Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. Cal. L. Rev. 1467, 1470 (1992) (discussing how pervasive stereotypes about Black women "not only shape the kind of harassment that Black women experience but also influence whether Black women's stories are likely to be believed"); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. Cal. L. Rev. 1367, 1381 (1992) ("[I]n Justice Thomas's manipulation of the symbol of race, Professor Anita Hill became, somehow, 'de-raced' and partially erased."); Estelle B. Freedman, *The Manipulation of History at the Clarence Thomas Hearings*, 65 S. Cal. L. Rev. 1361, 1363 (1992) (explaining how "the predominant stereotypes influencing the outcome of the hearings were stereotypes involving black women"); Tania Modleski,

can be the primary oppressors of women and others who reside "at the bottom";¹⁶⁰ after all, because they incorporate an incomplete vision of justice, they are, by design, "dysfunctioning."

The state's control of the institution of marriage¹⁶¹ is a paradigm of a "dysfunctioning" community. Although two people can (and hopefully should!) freely commit to each other, their decision to apply for a marriage license is rarely freely undertaken. Given the numerous benefits that adhere to married couples in this society—from YMCA "family memberships" and hospital visitation rights,¹⁶² to substantial health and life insurance benefits,¹⁶³ survivorship benefits,¹⁶⁴ immigration policies,¹⁶⁵ and inheritance laws¹⁶⁶—many who would not otherwise marry are effectively coerced

Melodrama and Memory, 65 S. Cal. L. Rev. 1353, 1355 (1992) (examining how media treatment of Hill was reminiscent of title words of a classic anthology of black feminist criticism: "All the women are white, all the blacks are men.").

¹⁶⁰ See Fox-Genovese, *supra* note 123, at 47.

¹⁶¹ The state exercises control in marriage from the very beginning, starting with the licensing procedure. The state not only regulates who receives a marriage license, see *infra* note 167, but also determines what prerequisites must be fulfilled for issuance of the license. See Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 Va. L. Rev. 663, 677–82 (1976).

¹⁶² For a further understanding of the horrors that can await when a same-sex partner is hospitalized, see *In re Guardianship of Sharon Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986), cert. denied, 475 U.S. 1085 (1986) (reversing District Court order denying powers of guardianship over a woman incapacitated in automobile accident to her lesbian lover); Nan D. Hunter, *Sexual Dissent and the Family: Family Tries to Keep Lesbian Lovers Apart*, *The Nation*, Oct. 7, 1991, at 406.

¹⁶³ Few employers provide health and life insurance benefits to significant others, unless they are legally married. See, e.g., *Houston v. National Gen. Ins. Co.*, 817 F.2d 83 (10th Cir. 1987); *State Farm Mut. Auto Ins. Co. v. Pizzi*, 505 A.2d 160, 161–62 (N.J. Super. Ct. 1986). One notable exception is New York's Montefiore Medical Center, which cited "principles of fairness and equity" in explaining its decision to extend to lesbian and gay employees and their spouses health benefits which were already available to married heterosexual employees. Montefiore's policy is different from other domestic partnership policies in that it is available *only* to lesbians and gay men "who are unable, by law, to marry because of laws prohibiting marriage of persons of the same sex." Steve Tarevella, *Hospital Extends Benefits to Gay Couples*, *Modern Healthcare*, Apr. 1, 1991, at 3. For a comprehensive compilation of materials pertaining to the provision of health and life insurance benefits for domestic partners, see Lambda Legal Defense & Education Fund, *Domestic Partnership: Issues and Legislation* (1992) (Lambda L.D.E.F., New York, NY).

¹⁶⁴ Employers regularly deny death benefits to surviving same-sex partners. See *Rovira v. AT&T*, 760 F. Supp. 376 (S.D.N.Y. 1991); *The Courts Are Again Asked to Redefine Family*, *N.Y. Times*, Sept. 23, 1990, at D7.

¹⁶⁵ See Sandra E. Lundy, "I Do" but I Can't: Immigration Policy and Gay Domestic Relationships, 5 *Yale L. & Pol'y Rev.* 185 (1986).

¹⁶⁶ See Sol Lovas, *When Is a Family Not a Family?: Inheritance and the Taxation of Inheritance Within the Nontraditional Family*, 24 *Idaho L. Rev.* 353 (1988).

into marriage. Marriage legitimizes relationships, both legally and socially. Those couples who are denied the right to marry¹⁶⁷ are put at a significant disadvantage.¹⁶⁸

This state-controlled institution of marriage has long been unresponsive to women's concerns, perpetuating gender roles and sanctioning male control within the "privacy" of the marital home.¹⁶⁹ In fact, many gay men and lesbians do not seek a state-sanctioned "right to marry" specifically because they do not want any part of such an oppressive institution.¹⁷⁰ The virtually unlimited sexual access that husbands have enjoyed to wives is only the most graphic illustration of institutionalized power imbalances

¹⁶⁷ The Supreme Court has found unconstitutional statutes requiring people under obligation to pay child support to obtain court permission to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and prohibiting interracial marriages, *Loving v. Virginia*, 388 U.S. 1 (1967), but it has not passed on the fundamental right of all people to marry, such as gay and lesbian couples.

¹⁶⁸ See *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1603-28 (1989) (examining disadvantages faced by same-sex couples); Lambda Legal Defense & Education Fund, *Custody Visitation Packet: Issues and Court Briefs* (1991) (Lambda L.D.E.F., New York, NY) (highlighting disadvantages faced by same-sex couples in connection with child custody matters); see also Barbara Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Legal System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & Pol. 5 (1991); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage*, 3 Berkeley Women's L.J. 134 (1988); David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 Loy. L.A. L. Rev. 1055 (1990); Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors*, 14 Hastings Const. L.Q. 111, 115-16 (1986); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459 (1990). But see *East 10th St. Assocs. v. Estate of Goldstein*, 552 N.Y.S.2d 257 (1990) (extending protection under rent stabilization law to gay life partner); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (extending protection to gay life partner under rent control law).

¹⁶⁹ Heidi Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, in *Feminism & Methodology* 109 (Sandra Harding ed., 1987); Okin, *supra* note 132, at 17-22 (examining hierarchical relations within family). Given this state of affairs, perhaps it is not surprising that under the current institution of marriage, men, more than women, report being understood by their spouses. Beth E. Vanfossen, *Sex Differences in the Mental Health Effects of Spouse Support and Equity*, 22 J. Health & Soc. Behavior 130 (1981); see also Ellen McGrath et al., *Women and Depression: Risk Factors and Treatment Issues* 23-24, 27-28 (1990).

¹⁷⁰ See, e.g., Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law* 125-26 (1992) (rejecting not only the institution of marriage, but also quasi-marriages, such as domestic partnerships); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK 60 (Feb. 1989) ("Marriage will constrain us, make us more invisible, force our assimilation to the mainstream, and undermine the goals of gay liberation; the affirmation of gay identity and culture; and the validation of many forms of relationships.").

in marriage.¹⁷¹ Laws pertaining to child rearing and divorce have also been premised on male dominance.¹⁷² Marriage and divorce reforms will never fully address women's concerns as long as marriage is effectively compelled and women's voices within the institution of marriage are not fully heard.¹⁷³

An examination of "dysfunctioning" communities demonstrates how relationship with community, and not the atomized individual, drives society,¹⁷⁴ and that the dynamic interrelationship between voice and community must be protected. Few mentions are made of the collective in American case law, except in the discrete areas of public property, environmental law,¹⁷⁵ and, at times, education law.¹⁷⁶ Moreover, even

¹⁷¹ See generally David Finkelhor & Kirsti Yllo, *License to Rape: Sexual Abuse of Wives* (1985); Diana E.H. Russel, *Rape in Marriage* (1982); Melinda S. DiCarlo, *The Marital Rape Exemption in Pennsylvania: "With this Ring . . ."*, 86 *Dick. L. Rev.* 79 (1978); Nadine Taub, *Adult Domestic Violence*, 8 *Victimology* 152 (1983).

¹⁷² See Okin, *supra* note 132, at 134-86; Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Consequences for Women and Children in America* (1985). But see Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 *U.C. Davis L. Rev.* 829, 862 (1989).

¹⁷³ For discussions of the failure of divorce reforms in meeting women's needs, see Martha L. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *Tul. L. Rev.* 953 (1991); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. Rev.* 1103, 1104 (1989); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 *Tex. L. Rev.* 689 (1990).

¹⁷⁴ See Michelman, *supra* note 108, at 27; Sunstein, *supra* note 108, at 29.

¹⁷⁵ See, e.g., Harry N. Scheiber, *Law and the Imperatives of Progress: Private Rights and Public Values in American Legal History*, in *Nomos XXIV: Ethics, Economics, and the Law* 303 (1982); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich. L. Rev.* 471 (1970); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 *Cal. L. Rev.* 217 (1984); Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 *Wis. L. Rev.* 1403.

¹⁷⁶ For example, when we speak of academic freedom, we are advancing communal, not individual, goals. For a suggestion of relying on the concept of community in education, see Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 *Duke L.J.* 705, 712-36. For a related argument, see Michael W. McConnell, *Multiculturalism, Majoritarianism and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 *U. Chi. Legal F.* 123. Some commentators have suggested a communitarian approach to group libel laws, but most courts have refused to take this tack. See Donald Alexander Downs, *Nazis in Skokie: Freedom, Community and the First Amendment* 154-69 (1985); Note, *A Communitarian Defense of Group Libel Laws*, 101 *Harv. L. Rev.* 682 (1988). For a discussion on the importance of voice in examination of racist speech, see Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320 (1989). For a suggestion of the tort of community destruction, see Richard Lewis, *Destruction of Community*, 35 *Buff. L. Rev.* 365 (1986).

the commentators who do recognize the importance of community fail to appreciate its dynamic relationship with the individual. Instead, many pose a dichotomy between individual and community, as if one must choose between the two. Yet because the community is symbiotically intertwined with the individual, one can rarely choose to benefit or burden only one of the two. Therefore, in transforming "dysfunctioning" communities, we must remember that both the individual and the community are important actors in a synergistic relationship.

3. *Toward Functioning Communities*

The elements central to the creation and maintenance of functioning communities share one common characteristic: they all exist to ensure full participation to the benefit of *both* individual and community—in other words, to facilitate the development and interchange of diverse voices and to address "the conflict between privilege and participation."¹⁷⁷ Although process-based constitutional theorists have identified some of the elements essential for functioning communities, they have failed to provide a complete picture because their definition of what constitutes participation in communities, as well as their very goals for advancing such participation, are far too limited. Before I define the elements most essential for community participation in greater detail, I start with a discussion of what they are not, in an attempt to provide context.

First, the functioning of communities demands more than enhanced procedural guarantees for participation in the political arena established by the Already Powerful.¹⁷⁸ Whether people can participate in this single community—which can be described as The Community—tells only part of the story. Even if the procedural channels are cleared—by, for example, granting the right to vote and to run for office—they are cleared only for individual participation in The Community under the terms and conditions set by the Already Powerful. Individual participation in other communities and the various communities' interactions do not count. Yet such varied forms of participation must be considered in order to give all voices a chance to speak and develop and all communities the opportunity to

¹⁷⁷ Minow & Spelman, *supra* note 91, at 1634. Although Minow and Spelman invoke "a readiness to challenge ongoing patterns of power," *id.* at 1651, they do not offer concrete suggestions as to how to address the conflict between privilege and democracy.

¹⁷⁸ The "Already Powerful" represents dominant group(s) in society—traditionally white, heterosexual, property-owning men (but, of course, land ownership is not enough in and of itself).

construct accurate, representative agendas.¹⁷⁹ Therefore, the call for full participation must be more than a demand for "equal citizenship."¹⁸⁰ At a minimum, we must safeguard both the ability of individuals to associate with communities and the free flow of dialogue within and between communities.

For this reason, the focus of John Hart Ely and others on procedural guarantees for political participation,¹⁸¹ such as voting and proportional representation, is incomplete.¹⁸² A group that can freely vote and run for office is hard-pressed ever to argue successfully that they face impermissible inequalities under Ely's process-based argument. Indeed, Ely asserts, women can no longer advance many discrimination claims (at least not under a heightened level of judicial scrutiny) because they comprise a majority of the voting population¹⁸³ and already mingle freely with the Already Powerful.¹⁸⁴ Even with voting and proportional representation, women still suffer inequalities.¹⁸⁵ Ely's process-based argument falls short because it does not ensure participation in the various communities essential to developing voice and setting agendas in the first place.¹⁸⁶

¹⁷⁹ Cf. Nancy C.M. Hartsock, *Money, Sex, and Power: Toward a Feminist Historical Materialism* (1983) (examining possibilities for meaningful dialogue in public life).

¹⁸⁰ See H.N. Hirsch, *The Threnody of Liberalism*, 14 *Pol. Theory* 423, 425 (1986). See generally Kenneth Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1 (1977).

¹⁸¹ See generally John Hart Ely, *Democracy and Distrust* (1980); see also Jesse Choper, *Judicial Review and the National Political Process* (1980).

¹⁸² A detailed discussion of process-based theories is beyond the scope of this project. For a useful critique, see Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *Yale L.J.* 1037, 1045–57 (1980).

¹⁸³ For this reason, Ely asserts that women are not a "discrete and insular" minority. Ely, *supra* note 181, at 164–70; see also *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). For a criticism of *Carolene Products*, see Lea Brilmayer, *Carolene*, *Conflicts and the Fate of the "Inside-Outsider,"* 134 *U. Pa. L. Rev.* 1291 (1986).

¹⁸⁴ Ely writes: "'Some of my best friends are Negro' got to be a parody of white hypocrisy, but the best friend of most men really is a woman . . ." Ely, *supra* note 181, at 257 n.94.

¹⁸⁵ For recent discussions of the economic condition of women, see, e.g., Sara M. Evans & Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (1989); Jerry A. Jacobs, *Revolving Doors: Sex Segregation & Women's Careers* (1989); *Pay Equity: Empirical Inquiries* (Robert T. Michael et al. eds., 1989); Sara E. Rix, *The American Woman 90–91: A Status Report* (1990). For a discussion on the limited gains that resulted from women winning the right to vote, see generally Nancy Cott, *The Grounding of Modern Feminism* (1987).

¹⁸⁶ Process-based theories are also incomplete because they fail to examine the substantive values that give meaning to effective process. See Laurence H. Tribe, *The*

Just as this Article's vision of functioning communities is not a call for Ely's process-based argument, it does not agree with classic pluralism, a system in which majority coalitions are formed by shifting alignments. The benefit of pluralism lies in its purported tolerance of diversity, which protects society from totalitarianism.¹⁸⁷ Although pluralism does recognize the importance of interest groups, in its purest form¹⁸⁸ it envisions only self-interested groups battling in The Community for a limited supply of rights. However, individuals and communities should interact outside of The Community for many purposes, not just to compete for scarce resources. In a functioning society, communities would convene to listen to one another, to learn, and to develop both common and divergent agendas. Enhanced dialogue, not combative deal making, will increase the chances for desirable lawmaking that maximizes public good, and at the same time advances individuals' ability to construct their own identity.

This article is also not a call for enhanced pluralism. Classic pluralist theory places virtually no limits on the pursuit of self-interest by political actors. Instead, the interests of the public are determined by coalitions through an open-market bargaining process. Allegedly, the likelihood of flux among coalitions adequately protects weaker groups from oppression. But this open-market system has been widely criticized because all people are not equals in the marketplace to begin with, and therefore those with more power ultimately prevail.¹⁸⁹ For this reason, contrary to pluralist ideals, some interests are declared off-limits to government and placed beyond manipulation by the "tyrannies of governing majorities."¹⁹⁰

The present call for a focus on relationship with communities leaves room for such protections. While scholars have hotly disputed exactly what should be safeguarded from majority control,¹⁹¹ many agree that, at the

Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1064 (1980) ("The process theme by itself determines nothing unless its presuppositions are specified, and its contents are supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.").

¹⁸⁷ Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* 24 (1967).

¹⁸⁸ I am referring to what could be termed "pure" pluralism. For a more generous reading (and interesting application) of pluralism, which is more akin to the approach to communities taken herein, see Ehrenreich, *supra* note 66, at 1189 n.48.

¹⁸⁹ See Sunstein, *supra* note 108, at 33.

¹⁹⁰ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). In addition, adjustments could be made in recognition of the fact that a discrete and insular minority could be subject to prejudice on the part of the majority. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).

¹⁹¹ For a feminist dialogue on the location of constitutionally protected values, see *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 Buff. L. Rev.

very least, some elements may be placed beyond collective control, "not in the interest of calcification, but in the interest of democracy itself."¹⁹² We may therefore accept that our system of democracy is nonnegotiable¹⁹³ and safeguard institutional arrangements, so that "the public is liberated to resolve other problems without having to reevaluate these constitutional questions."¹⁹⁴ The substantive value of civic participation—defined broadly as participation in communities, as outlined above—is one such element that underlies our system of government.¹⁹⁵

Granted, the drafters of our Constitution did not attempt to maximize the participation of all people in their communities; they sought merely to maximize the participation only of white, male, free, landowning members of society.¹⁹⁶ Still, while the United States has been slow in addressing manifestations of racism, sexism, and classism, it has expanded somewhat the concept of civic participation to envision the full participation of all people.¹⁹⁷ Nevertheless, very little has been done to convert that concept into action. Too many barriers exist for those who reside "at the bottom" to participate; therefore, what should be a dynamic interchange between individual and community is plodding along at a laborious pace.

If society is really interested in converting concept into action—as it should be—certain elements of participation in communities demand

11 (1985) (dialogue between Ellen DuBois, Mary Dunlap, Carol Gilligan, Catharine MacKinnon, and Carrie Menkel-Meadow).

¹⁹² Sunstein, *supra* note 154, at 890.

¹⁹³ A discussion of alternative visions is left to a later day.

¹⁹⁴ Sunstein, *supra* note 135, at 890.

¹⁹⁵ See Torke, *supra* note 108, at 45–63 (exploring the constitutional context for "taking groups seriously"). Participation in communities may be seen alternatively as an element of "liberty" or a fundamental right akin to the right to vote. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 338 (1986); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 Pol. Theory 81, 90 (1984); see also John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 Va. L. Rev. 833, 833 n.4 (1991) (claiming that courts are given license by the Constitution only to "'create' or 'discover' rights necessary to effectuate representation and participation in democracy").

¹⁹⁶ Bell, *supra* note 117, at 26–50.

¹⁹⁷ Disagreement today lies mainly in what is needed to effect full civic participation. Compare Posner, *supra* note 35, at 22 (advocating an Equal Protection analysis prohibiting the government from distributing benefits and costs on racial or ethnic grounds and requiring a "color blind" determination of individuals' fitness for employment, admission to public universities, etc.) with Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 80–81 (1986) (arguing that affirmative action should be employed to promote "a variety of goals dependent on racial balance, . . . [such as] securing workplace peace . . . [and] eliminating workplace caste").

particular attention. I call them "enabling/excluding" elements because of their powerful influence over whether individuals and groups can participate in communities and, in turn, have input into our social agendas. Not only can the denial of these elements exclude certain individuals and groups from participation in communities, but at times only the presence of these elements can enable full participation.

Some of these enabling/excluding elements have already been identified by The Community. Indeed, in recognition of the power these elements wield over participation in communities, our society has largely eliminated debate, not only over our structure of government, but also over certain substantive elements that are essential for its operation. For example, free "speech" and "association" have generally been placed beyond control of the majority on this basis.¹⁹⁸ Although "speech" and "association" are commonly envisioned as "individual rights," their significance lies also in their importance to communities.¹⁹⁹ Denial of "speech" and "association" not only impairs individuals' ability to construct their own identity, but also cripples communities' ability to develop agendas. Communities simply cannot function if people are unable to associate freely with and within them and to speak with and within them; without free association and speech, the voices of communities are not true to their members' concerns.²⁰⁰

Given how effectively those who reside "at the bottom" have been silenced, the change would be dramatic indeed if the state actually safeguarded enabling/excluding elements. Yet because of our society's

¹⁹⁸ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Believing in the power of reason as applied through public discussion, they [the framers] eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

¹⁹⁹ See Thomas I. Emerson, *The System of Free Expression* 7 (1970) (arguing that the value of free speech includes "provid[ing] for participation in decision making by all members of society" and "achieving a more adaptable and hence more stable community"); Alexander Meiklejohn, *Political Freedom* (1960) (examining the value of free speech to political process). Even the First Amendment's contribution to individual "self-realization" and "full personhood" is beneficial to communities, as it aids the individual's ability to function in the community; in particular, it facilitates in the process of voice. Cf. Martin H. Redish, *Freedom of Expression: A Critical Analysis* 11 (1984) (arguing that self-realization is the main value of the First Amendment).

²⁰⁰ For arguments applying distinct yet somewhat related communitarian notions to the issue of pornography, see Ruth Colker, *Pornography and Privacy: Towards the Development of a Group-Based Privacy Theory for Sex-Based Intrusions into Privacy*, 1 *Law & Ineq. J.* 191 (1983) (addressing the viability of group libel laws in the context of communitarianism); Christina Spaulding, *Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism and Community*, 4 *Berkeley Women's L.J.*, 128 (1988-89).

myopic concentration on the individual, we have not gone far enough in protecting and promoting the functioning of communities. Perhaps the Already Powerful are afraid of the transformation that would occur if *all* people were indeed free to develop their own identities through full participation in communities, and all communities were able to set forth representative agendas. But even the Already Powerful can no longer afford the impoverished dialogue that exists within and between communities today. Other elements essential to the functioning of communities must be safeguarded and affirmatively promoted. One such enabling/excluding element, I propose, is reproductive freedom.

B. Reproductive Freedom as an Element Central to Participation in Communities²⁰¹

Reproductive freedom is an enabling/excluding element for participation in community both because denial of reproductive freedom greatly hinders women from participation and because the granting of reproductive freedom empowers women so that they may begin to participate. In this section, I draw from psychological and sociological studies in arguing that loss of control over important life decisions disables both individuals and communities. In doing so, I explain why control over matters pertaining to sexuality holds particular sway over the functioning of communities and emphasize the importance of this focus for those who are already the most marginalized in society.

Loss of control over important life decisions is caused by and, in turn, perpetuates, nonparticipation in community. Indeed, the most common response to denial of control over life decisions is apathy and hopelessness. On the one hand, when individuals lose hope over their own life decisions, they stop attempting to exercise control over other aspects of their lives.²⁰² On the other hand, hope of control fosters participation in communities and, hence, enhances community efficacy.²⁰³ For example,

²⁰¹ This section has benefitted from my conversations with Dr. Nancy Felipe Russo and Dr. Nancy Adler, nationally recognized experts on the psychological effects of abortion and forced childbearing, as well as with Dr. Rhonda Lehr, a Utah psychologist with extensive clinical experience treating depressed women. They helped me to understand the social and psychological impact of loss of control over reproductive freedom. Still, the conclusions I draw in applying their studies are my own, and I accept any responsibility for misapplications of their work.

²⁰² See David G. Myers, *Social Psychology* 105-06 (2d ed. 1987); Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 *Am. Psychol.* 122 (1982).

²⁰³ See generally Herbert M. Lefcort, *Locus of Control: Current Trends in Theory and Research* (1976).

studies on nursing home patients have found that patient health improved after they were given control over visitation hours and other daily matters.²⁰⁴ Not only did the individuals benefit from gaining control, but the institutions also improved as patients became more concerned with their surroundings.²⁰⁵

Communities cannot function properly if their constituents feel helpless. "Although it is commonly thought that hopelessness breeds militant social action, the truth is that it more often breeds apathy."²⁰⁶ It is no accident that around the world university students have traditionally spearheaded revolutionary change²⁰⁷—they are the ones who have the most hope. One researcher summarized the findings of many in noting that "[p]eople who have a sense of collective efficacy will mobilize their efforts and resources to cope with external obstacles to the changes they seek. But those convinced of their inefficacy will cease trying even though changes are attainable through concerted effort."²⁰⁸

While it is detrimental to lose control over any life matters, loss of control over matters pertaining to sexuality and to relationships defining and regulating sexuality²⁰⁹ is particularly detrimental; because control over

²⁰⁴ See generally Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 *J. Personality & Soc. Psychol.* 191 (1976); Judith Rodin & Ellen J. Langer, *Long-Term Effects of a Control-Relevant Intervention with the Institutionalized Aged*, 35 *J. Personality & Soc. Psychol.* 897 (1977); Richard Schulz, *Effects of Control and Predictability on the Physical and Psychological Well-Being of the Institutionalized Aged*, 33 *J. Personality & Soc. Psychol.* 563 (1976).

²⁰⁵ For an overview of research regarding autonomy-supporting versus controlling behaviors and their relation to self-determination, see Edward R. Deci & Richard M. Ryan, *The Support of Autonomy and the Control of Behavior*, 53 *J. Personality & Soc. Psychol.* 1024 (1987). Studies on prisoners and employees also illustrate the benefits of gaining control. See, e.g., R. Barry Ruback et al., *Perceived Control in Prison: Its Relation to Reported Crowding, Stress, and Symptoms*, 16 *J. Applied Soc. Psychol.* 375 (1986). For a leading study on the effects of loss of control on rats, see Martin E. Seligman & Madelin A. Visintainer, *Tumor Rejection and Early Experience of Uncontrollable Shock in the Rat, in Affect, Conditioning and Cognition: Essays on Determinants of Behavior* 203 (Robert T. Brush & J. Bruce Overmier eds., 1985).

²⁰⁶ Myers, *supra* note 202, at 106. See generally Martin E. Seligman, *Helplessness: On Depression, Development and Death* (1975).

²⁰⁷ The latest series of "revolutions" in Eastern Europe and the former Soviet Union have proven no exception.

²⁰⁸ Bandura, *supra* note 202, at 144. See generally Edward L. Deci & Richard M. Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* 29-40 (1985); Camille B. Wortman & Jack W. Brehm, *Responses to Uncontrollable Outcomes: An Integration of Reactance Theory and the Learned Helplessness Model*, in *Advances in Experimental Social Psychology* 297 (Leonard Berkowitz ed., 1975); James W. Pennebaker et al., *Lack of Control as a Determinant of Perceived Physical Symptoms*, 35 *J. Personality & Soc. Psychol.* 167 (1977).

²⁰⁹ Hereinafter, I will refer to the interest in control over sexual matters and matters

sexuality is so highly valued, deprivation of control in this area has great psychological, economic, and social consequences.²¹⁰ Forced childbearing is one case in point.²¹¹ Few women are psychologically harmed by choosing to have an abortion; but many are psychologically, physically, and socially harmed if they are denied control over the decision in the first place.²¹²

The harm is not felt by just the woman: unwanted pregnancy and childbirth carry "substantial health, psychological, social, and economic

defining and regulating sexuality alternatively as "control over matters pertaining to sexuality" or simply "control over sexuality." I am not pleased with this abbreviation because it does not adequately embrace the spectrum of issues at stake. Moreover, it fails to emphasize the definitional and relational nature of the interests involved. Despite these difficulties, however, I use these abbreviations in the interest of brevity. At this time I am more interested in expressing the concept than in quibbling over semantics. Nevertheless, I remain open to better formulations.

²¹⁰ This argument was central to the ACLU Reproductive Freedom Project's challenge to Utah's abortion ban. For an illustration of how it can be applied in litigation, see *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992) (complaint, briefs, and proposed findings of fact on file with author).

²¹¹ Another case in point is discrimination on the basis of sexual orientation. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 U.C.L.A. L. Rev. 915 (1989) (discussing importance of control over sexuality in applying Ely's process-based argument to gay men and lesbians); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 740 (1989) (recognizing affirmative consequences of laws restricting decisions pertaining to sexuality).

²¹² See Ellen McGrath et al., *Women and Depression: Risk Factors and Treatment Issues 10-12* (1990) (finding that the ability to obtain an abortion led to women's sense of autonomy and efficacy, while an unwanted pregnancy may lead to the exacerbation of psychological problems for women with a history of psychological disorders); Nancy Felipe Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *Abortion Medicine and the Law* (J. Douglas Butler & David F. Walbert eds., 4th ed. forthcoming 1993) (discussing psychological and sociological effects of unwanted childbearing); Nancy E. Adler et al., *Psychological Responses After Abortion*, 248 *Science* 41, 41 (1990) (citing study finding that teenagers who aborted unwanted pregnancies showed a more positive psychological profile two years after obtaining their abortions than teenagers who had carried unwanted pregnancies to term and teenagers who had received negative pregnancy test results). See generally Brenda Major et al., *Perceived Social Support, Self-Efficacy, and Adjustment to Abortion*, 59 *J. Personality & Soc. Psychol.* 452 (1990); Pallas Mueller & Brenda Major, *Self-blame, Self-efficacy, and Adjustment to Abortion*, 57 *J. Personality & Soc. Psychol.* 1059 (1989).

A study commissioned by then-Surgeon General C. Everett Koop cites a review paper prepared by the American Psychological Association concluding that there is "little evidence" of psychiatric problems following abortion. The subcommittee's report also quotes Dr. Koop as expressing doubts about the existence of a "Postabortion Stress Syndrome." More on Koop's Study of Abortion, 22(1) *Family Planning Perspectives* 36 (1990) (excerpts from "The Federal Role in Determining the Medical and Psychological Impact of Abortion on Women," Report of the Subcommittee on Human Resources and Governmental Operations).

implications for the child, the mother, her family, and society."²¹³ The harm of unwanted childbirth is magnified by a labor market that is hostile to working women,²¹⁴ stigmatizes single mothers,²¹⁵ and denies access to health care for all members of society.²¹⁶ In such a society, laws that dictate procreative matters "*take over* the lives of the persons involved: they occupy and preoccupy."²¹⁷

Loss of control over procreative matters affects every aspect of a woman's life, from her physical health to her economic status to her ability to educate herself. Reproductive freedom concerns more than forced childbearing and denied abortion. It also encompasses women's ability to have healthy children and the broad agenda necessary to realize this goal.²¹⁸ By stripping women of any sense of control over their own and their families' destiny and through their expression of social disapproval, restrictions on reproductive freedom contribute significantly to feelings of hopelessness and, in turn, to apathy.²¹⁹ For many women, this sense of hopelessness and loss of control can become self-perpetuating.²²⁰

²¹³ Russo, *supra* note 212, at 1.

²¹⁴ See Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. Rev. 55 (1979); see also Williams, *supra* note 152, at 1596-612 (arguing that the rhetoric of "choice" is used to mask a gender system "that defines childrearing and the accepted avenues of advancement as inconsistent and then allocates the resulting costs of childrearing to mothers"); Williams, *supra* note 52.

²¹⁵ This stigmatization of single mothers was dramatically illustrated during the 1992 Presidential campaign, when then Vice President Dan Quayle suggested that the Los Angeles riots were "directly related to the breakdown of family structure, personal responsibility and social order in too many areas of society" and went on to criticize television character Murphy Brown for "mocking the importance of fathers by bearing a child alone, and calling it just another 'lifestyle choice.'" See Douglas Jehl, *Quayle Deplores Eroding Values; Cites TV Show*, L.A. Times, May 20, 1992, at 1.

²¹⁶ John J. Harrigan, *Empty Dreams, Empty Pockets: Class and Bias in American Politics* 3 (1993) ("In 1991, one-third of the families earning less than \$26,720 (twice the poverty level) had neither private health insurance nor government-supported medical assistance. By contrast, only 6 percent of those with incomes above \$53,440 (four times the poverty level) lacked such health-care coverage.").

²¹⁷ Rubinfeld, *supra* note 211, at 784. For an excellent summary of the historical context of reproductive freedom, see Linda Gordon, *Women's Body, Women's Right* (rev. ed. 1990).

²¹⁸ See Kathryn Kolbert, *A Reproductive Rights Agenda for the 1990s*, in *From Abortion to Reproductive Freedom* 297, 301-06 (Marlene Gerber Fried ed., 1990).

²¹⁹ McGrath et al., *supra* note 212, at 10. Studies of the differences between women who have experienced unwanted pregnancy and those who have avoided it have consistently found that avoidance of unwanted pregnancy is correlated with a heightened sense of self-competence and control. See, e.g., Nancy E. Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, 12(1) Prof. Psychol. 56 (1981).

²²⁰ Sadjia Goldsmith et al., *Teenagers, Sex, and Contraception*, 4 Fam. Planning Persp. 32 (1972). Young women who have the lowest sense of self-esteem are less

Lack of control over one's reproductive destiny has long hindered women's participation in the political community. As Jed Rubenfeld has observed:

The centuries-long prohibitions of contraception and abortion, precisely by assuring that women's lives would be substantially taken up with the functions of child-bearing, must have made it difficult, if not impossible, for many women to discover or to assert their political will and for men and women alike to reconceive women's societal role.²²¹

The impact of denied abortion and forced childbearing reaches far beyond women's role in the political sphere. Indeed, in the words of the plurality of the Court in *Casey*:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.²²²

Prohibitions on reproductive freedom have disabled women from participation in *all* communities, and it is the participation in *all* communities that is imperative for exchange of voices, the construction of individual identities, and development of social agendas.

Communities can never function properly when their constituents are prevented from fully participating.²²³ Yet loss of control over sexuality

likely to use contraceptive methods and are more likely to carry an unwanted pregnancy to term. Nancy Felipe Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: The Psychological and Legal Issues* 40-73 (1986); Theodore Joyce, *The Social and Economic Correlates of Pregnancy Resolution Among Adolescents in New York City, by Race and Ethnicity: A Multivariate Analysis*, 78 *Am. J. Pub. Health* 626 (1988) (finding that fewer adolescent pregnancies are carried to term in communities that provide access and financial support for abortion and that teenagers in poverty are less likely to seek abortion than their more educated and financially better off counterparts).

²²¹ Rubenfeld, *supra* note 211, at 806. Rubenfeld's approach differs greatly from the one proposed here. Although he recognizes the impact of restrictions on sexuality, Rubenfeld limits his attention largely to the effect on the political sphere—The Community of the Already Powerful. In addition, although he at times sees the importance of what I have called "relationship with community," he ultimately focuses on the individual in his assertion that laws which dictate the course of individuals' lives are totalitarian in nature. Therefore, while I agree that Rubenfeld asks the right questions, I suggest he has not gone far enough.

²²² *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992).

²²³ Full and varied participation in communities not only contributes to the

is particularly detrimental to the functioning of communities because the groups already most disabled from participation—outsiders by race, sex, class, and sexual orientation—are also the ones most denied control over these matters.²²⁴

Not only has wealth become a real determinant for reproductive freedom, particularly since the federal government no longer provides Medicaid funds to the states for most abortions,²²⁵ but overt racism²²⁶ has proven to be a factor as well. A physician's policy of requiring sterilization of non-white women with more than one child and who participate in Medicaid programs as a condition of receiving obstetric care is a particularly blatant example.²²⁷ Another is today's "new eugenics,"²²⁸ the criminal sentencing of primarily non-white, low-income women to birth control²²⁹ coupled with legislative proposals to induce

development of accurate, representative agendas, but also facilitates community cohesiveness, a trait that in turn fosters social responsibility. See Gregory K. Rutkowski et al., *Group Cohesiveness, Social Norms, and Bystander Intervention*, 44 *J. Personality & Soc. Psychol.* 545 (1983); see also Shalom Schwartz, *The Justice of Need and the Activation of Humanitarian Norms*, 31 *J. Soc. Issues* 111 (1975).

²²⁴ For discussions of historical racism and classism in the birth control movement, see Angela Davis, *Racism, Birth Control and Reproductive Rights*, in *From Abortion to Reproductive Freedom*, supra note 218, at 15; Jessie M. Rodrigues, *The Black Community and the Birth-Control Movement*, in *Unequal Sisters: A Multicultural Reader in U.S. Women's History* 333 (Ellen Carol DuBois & Vicki L. Ruiz eds., 1990); Leslie J. Reagan, "About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago 1867-1940, 77 *J. Am. Hist.* 1240, 1246-47 (1991). For discussions of racism and reproductive freedom generally, see Angela Y. Davis, *Women, Race and Class* 204, 213-15 (1981); Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *Reproductive Laws for the 1990's* 17 (Nadine Taub & Sherrill Cohen eds., 1988); Deborah J. Krauss, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 *Harv. C.R.-C.L. L. Rev.* 523 (1991); Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 *Women's Rts. L. Rep.* 59 (1990).

²²⁵ This practice was found constitutional in *Harris v. McRae*, 448 U.S. 297 (1980). See also Kathryn Kolbert et al., *Reproductive Freedom*, in *The Rights of Women* (Susan Deller Ross et al. eds., forthcoming 1993); *The Reproductive Health of Black Women*, in *From Abortion to Reproductive Freedom*, supra note 218, at 157.

²²⁶ I use the words "overt racism" in recognition of the fact that economic barriers to reproductive freedom are at times racism in disguise.

²²⁷ See *Walker v. Pierce*, 560 F.2d 609 (4th Cir. 1977), cert. denied, 434 U.S. 1075 (1977); *Abortion and Sterilization in the Third World*, in *From Abortion to Reproductive Freedom*, supra note 218, at 63; Adele Clarke, *Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis*, in *Test-Tube Women* 188 (Rita Ardititi et al. eds., 1984); Nsiah-Jefferson, supra note 224, at 44-48.

²²⁸ For a discussion of "new eugenics," see Julie Mertus & Simon Heller, *Norplant Meets the New Eugenics: The Impermissibility of Coerced Contraception*, 11 *St. Louis U. Pub. L. Rev.* 359 (1992).

²²⁹ See, e.g., *People v. Johnson*, No. 77,831 (Fla. S. Ct. filed July 23, 1992) (on

low-income women to use certain kinds of long-lasting birth control.²³⁰ Still another illustration is the discriminatory prosecutions of drug-addicted pregnant women for not, among other things, providing an adequate fetal environment.²³¹ That women of color have been systematically denied reproductive freedom²³² has contributed to feelings of hopelessness and, in turn, impaired women of color's ability to fully participate in communities.²³³

In sum, loss of control over sexuality is one factor that cripples the ability of women to participate in community; women are harmed in

review from *Johnson v. State*, 578 So. 2d 419, 420 (5th Cir. 1992)) (briefs on file with author). See generally Jan Hoffman, *Pregnant, Addicted—and Guilty?*, N.Y. Times, Aug. 19, 1990, § 6 (Magazine), at 34; Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. Times, July 20, 1990, at A13; Tamar Lewin, *Drug Use in Pregnancy: New Issue For the Courts*, N.Y. Times, Feb. 5, 1990, at A14; Katha Pollitt, *Fetal Rights: A New Assault on Feminism: Laws Protecting the Fetus from the Mother*, *The Nation*, Mar. 26, 1990, at 409.

²³⁰ For example, one state representative in Kansas proposed offering Norplant free of charge to women on welfare, in order to induce them to use it through payment of a \$500 "start up" fee and a \$50 per year bonus as long as they kept the device in place. The same legislator proposed forcibly implanting women who are convicted of certain drug offenses with Norplant. Both bills failed. Civil liberties groups opposed the laws as "threat[s] to low-income women's dignity, decisional autonomy, and reproductive freedom" and noted the race-bias inherent in the legislation. ACLU Reproductive Freedom Project, *Statement on Kansas HB 2089*, Submitted to the Kansas Legislature (Feb. 12, 1991) (on file with author).

²³¹ "Although patterns of illegal drug use are similar across race and class lines, prosecutors have targeted women of color and low-income women in [prosecution of women for giving birth while suffering drug or alcohol addictions]." Center for Reproductive Law and Policy, *Reproductive Freedom in Focus: Punishing Women For Their Behavior During Pregnancy: A Public Health Disaster 1* (Fall 1992); see also Dorothy E. Roberts, *The Bias in Drug Arrests of Pregnant Women*, N.Y. Times, Aug. 11, 1990, at A25. Women of color are particularly susceptible to government monitoring and supervision because the government is more involved in their lives. Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. Rev. L. & Soc. Change 277, 319 (1987-88). Even controlling for the disproportionate number of women of color receiving social services, African-American women are 10 times more likely to be reported to health officials for drug use than white women. Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New Eng. J. Med. 1202, 1204 (1990).

²³² Roberts, *supra* note 43, at 1436-44.

²³³ For a discussion of the political powerlessness of African-American women, see Scales-Trent, *supra* note 83, at 30-34. This is not to suggest that African-American women have never been powerful. For discussions of Black women leaders, see *Black Women in White America*, *supra* note 82, at 319-57, 435-56, 487-520; *The Montgomery Bus Boycott and the Women Who Started It: The Memoir of Jo Ann Gibson Robinson* (David Garrow ed., 1987); Mary Helen Washington, *Invented Lives: Narratives of Black Women 1860-1960* (1987).

different ways by denied abortion and forced childbearing, but all suffer from loss of control and feelings of hopelessness. Control (or hope of control) over sexuality is an essential element of participation in communities, not just because of the impact on individuals, but because of its crippling effect on communities. As explained above, to function properly, communities need to engage in a synergistic interchange with their constituents and with each other. Yet for this process to work, all voices must be given the opportunity to develop, and, as the voices develop, they must be heard by their communities.²³⁴ Individuals stripped of hope by lack of control over sexual matters are disabled from testing their voices in the first place. And, when so many of their members cannot fully participate, communities hear very little.

This dilemma can be largely solved if control over sexuality is not only safeguarded from government coercion, but also affirmatively promoted as an enabling/excluding element.²³⁵ To provide genuine access to a wide range of reproductive health care—including safe and legal abortion, contraceptives, and prenatal care—would be to provide women with hope of control over their lives.²³⁶ Such action would enable many voices, previously silenced by hopelessness, to begin to participate, thus unleashing in full the transformative process of voice and community.²³⁷ In empha-

²³⁴ See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *Women's Rts. L. Rep.* 7 (1989). As Robert Cover has observed in another context, "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture." Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4 (1983); see also James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985).

²³⁵ A full discussion of how control over sexuality should be affirmatively promoted is beyond the scope of this article. A partial list of elements includes: provision of a wide range of affordable (or free) birth control in areas readily accessible to women and girls (such as near schools); enhanced government financing of prenatal care for all women and of drug treatment programs for pregnant, drug-addicted women; funding of low-income women's abortions, prenatal care, and childbirth; enactment of state and federal laws prohibiting discrimination in public and private employment and housing on the basis of sexual orientation; and state recognition of same-sex unions.

²³⁶ Cf. Byllye Avery, *Empowerment Through Wellness*, 4 *Yale J.L. & Feminism* 147 (1991) (relating her experience in helping to form the National Black Women's Health Project and the process of "breaking the silence" around health issues for African-American women in order to reassert their own reproductive control).

²³⁷ If reproductive freedom is not considered an enabling/excluding element, the dynamic process of relationship with community would creep toward social change. Nevertheless, for the women who can participate, the dynamic process of voice and community would press forward. Women who still have hope for reproductive freedom—mainly middle- to upper-class white women—would continue to draw strength from what reproductive freedom they have and to fight for whatever reforms they see fit. As this interchange continues, women's voices would develop and become stronger

sizing the centrality of reproductive freedom for women's lives as well as the state's responsibility in affirmatively securing this freedom, the alternative focus on *relationship with* community holds great promise.

CONCLUSION

Sole reliance on individual rights theory has been, and will continue to be, ultimately destructive. The idea of the selfish, atomized individual paralyzes rights discourse by reifying abstract Truths that have little or nothing to do with our lives. Although rights offer some protection against majority tyranny, rights-talk obscures the complex power imbalances that must be challenged to effect real change. Many alternative equality approaches also engage in fictions because they imagine a homogenized Woman and fail to address the conflict between lack of privilege and participation. In contrast, locating the individual in community allows us to examine the diverse voices that are essential for communities to function and frees us to examine what elements are necessary to empower those who reside "at the bottom." Reproductive freedom, I suggest, is one of these empowering elements.

and more diverse, thus leading to further changes . . . and so on

