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Gender and Other Disadvantages: A Review of Justice and Gender

Ruthann Robson
CUNY Law School

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Gender and Other Disadvantages: A REVIEW OF *JUSTICE AND GENDER*. By Deborah L. Rhode. Cambridge, Massachusetts: Harvard University Press. 1989. Pp. 428. \$39.50

REVIEWED BY RUTHANN ROBSON*

THE TASK Deborah Rhode sets for herself in this ambitious book is nothing less than an exploration of the law's responses to gender discrimination within their broader cultural contexts.¹ To an admirable extent, the book accomplishes this goal. Even more admirable is that it accomplishes this goal in slightly over 300 pages (excluding notes), producing a well written, highly readable, and comprehensive survey of the legal issues relevant to contemporary women. Thus, Professor Rhode's book is a valuable primer for attorneys, scholars, or law students wishing to acquaint themselves with the burgeoning topic known as "women and the law."

Rhode's *Justice and Gender*, however, is more than a comprehensive exploration. My personal penchant is for efforts that surpass examination, however useful examination may be. If feminism as critique is necessary, I find it ultimately insufficient.² Thus, I am delighted to find a feminist legal tract that takes an active theoretical stance rather than a merely reactive one. Whatever criticisms I, or others, direct at the book, the criticisms must always be mitigated by the ambition, risk, and creativity evinced in advancing a positive programmatic paradigm for feminism.

* Visiting Associate Professor of Law, CUNY Law School at Queen's College; B.A., 1976, Ramapo College; J.D., 1979, Stetson University College of Law; LL.M., 1990, University of California at Berkeley (Boalt Hall).

1. D. RHODE, *JUSTICE AND GENDER* 1 (1989).

2. I am using "critique" here in its narrow, and perhaps unfeminist, sense. Certainly, the critical process can encompass advocating change. In an introduction to their feminist anthology, theorists Jeffner Allen and Iris Marion Young describe the contributions they selected:

Critique as it appears in these papers does not take, primarily, the form of refutation, the dismantling of claims and arguments to reveal inconsistencies, invalidities, counter-examples, and absurd implications. Critique is exercised in the sense of showing the limits of a mode of thinking by forging an awareness of alternative, and more liberating, ideas, symbols, and discourse.

Introduction to THE THINKING MUSE: FEMINISM AND MODERN FRENCH PHILOSOPHY 13 (J. Allen & I.M. Young eds. 1989) [hereinafter *THE THINKING MUSE*]. Examples of this type of critique appear not only in the Allen and Young anthology exploring American feminist appropriations of French philosophies (notably post-structuralism), but also in the anthology *FEMINISM AS CRITIQUE* (S. Benhabib & D. Cornell eds. 1987) that explores many political and legal issues.

What Rhode refers to as a "primary objective" or "central strategy" of the book is to "reorient legal doctrine from its traditional focus on sex-based difference toward a concern with sex-based disadvantage."³ The reorientation to disadvantage is aimed at surmounting the sameness/difference dilemma that has confounded and occupied so many feminist legal theoreticians:⁴ Should women be accorded the same legal treatment as men, or are there some instances in which women should be afforded different legal treatment? The employment context illustrates this dilemma. The position that women are the *same* as men justified such obfuscations of reality as the Supreme Court's distinction between "pregnant and nonpregnant persons," the latter category including both women and men, that was used to uphold discrimination against a woman because she was pregnant.⁵ The position that women are *different* from men historically has justified bars on women entering certain professions, including law,⁶ and has justified protectionist legislation that limited the number of hours women could work.⁷ Yet, as Rhode correctly observes, the dilemma remains pronounced, most recently in employers' stratification of jobs that may affect the reproductive capacities of women of childbearing age⁸ and in maternity leave

3. D. RHODE, *supra* note 1, at 1, 3.

4. See, e.g., Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); Lahey, *Feminist Theories of (In)Equality*, 3 WIS. WOMEN'S L.J. 5 (1987); Littleton, *Equality Across Difference: A Place for Rights Discourse?*, 3 WIS. WOMEN'S L.J. 189 (1987); Majury, *Strategizing In Equality*, 3 WIS. WOMEN'S L.J. 169 (1987).

5. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974). The Supreme Court later solidified its conclusion that discrimination against pregnant "persons" was not discrimination against persons on account of their sex (and thus prohibited) in *General Electric Co. v. Gilbert*, 429 U.S. 125, 135-36 (1976) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Congress later passed the Pregnancy Discrimination Act, Pub. L. No. 95-555, §1, 92 Stat. 2076 (1978), that amended Title VII to include prohibitions of discrimination based on pregnancy. 42 U.S.C. § 2000e(k) (1982).

The issue of pregnancy as a "special" condition of women sparked debate among feminist legal theorists. See, e.g., Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984/85).

6. *Bradwell v. Miller*, 83 U.S. (16 Wall.) 130 (1873) (upholding Illinois' denial of a license to practice law on the grounds that the applicant was female); *In re Lockwood*, 154 U.S. 116 (1894) (following *Bradwell* and holding that Virginia's statute providing what "persons" could be admitted to the practice of law was properly defined as "male persons").

For a discussion of women in the legal profession, see K.B. MORELLO, *THE INVISIBLE BAR* (1986).

7. *Muller v. Oregon*, 208 U.S. 412 (1908).

8. D. RHODE, *supra* note 1, at 96. For a discussion of this as "protective" legislation in an historical context, see Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986). The issue of excluding women of childbearing years from potentially toxic workplaces is presently before the United States Supreme Court in *Auto Workers v. Johnson Controls, Inc.*, No. 89-1215, 59 USLW 3304 (argued Oct. 10, 1990).

provisions.⁹

Rhode's disadvantage paradigm presupposes a "substantive commitment to gender equality" that requires analysis of sex-based differences with reference to whether such differences are "more likely to reduce or to reinforce sex-based disparities in political power, social status, and economic diversity."¹⁰ In the employment context, Rhode thus argues:

From a disadvantage-oriented perspective, the preferable approach is to press for the broadest possible maternal, parental, and medical coverage for all workers. Sex-neutral strategies pose the least risk of entrenching stereotypes or encouraging covert discrimination and offer the widest range of protections for disadvantaged groups. . . .

* * * *

From this perspective, even the formulation of the "special treatment-equal treatment" debate is misconceived. To view childbirth-related policies as "special" assumes that male needs establish the norm. . . . We cannot afford a repetition of earlier struggles over preferential treatment, in which women spent too much of their energy fighting each other over the value of protection, rather than uniting to challenge the conditions that made protection so valuable.¹¹

Rhode's ultimate position is that the sameness/difference dichotomy is one of the "False Dichotomies" explored in her book and that the gender dichotomy itself may be another false dichotomy. It is gender that is finally elided in favor of "broader" based programs and reforms.

Eliding gender works much less effectively in the area of sexual violence. Rhode's adoption of the disadvantage paradigm is a specific rejection of the dominance paradigm advanced by another activist feminist legal theorist, Catharine MacKinnon. For MacKinnon, "sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission."¹² Women's

9. D. RHODE, *supra* note 1, at 119-23. The dispute over maternity leave provisions occurred in the context of *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). As Rhode notes, groups such as Equal Rights Advocates, Western Center for Law and Poverty, Mexican-American Legal Defense and Education Fund, Legal Aid Foundation of Los Angeles, and Coalition for Reproductive Equality in the Workplace supported the California pregnancy leave statute, while groups such as ACLU, NOW, National Women's Political Caucus, Women's Legal Defense Fund, and National Women's Law Center opposed the pregnancy leave statute. *Id.* at 355 n.22. The Court upheld the statute.

10. D. RHODE, *supra* note 1, at 3, 4.

11. *Id.* at 124-25.

12. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 113 (1989).

inequality is based on their collective condition of being dominated by men.¹³ Rhode finds the dominance paradigm “too often theoretically reductive and strategically counterproductive,”¹⁴ although she notes:

This is not to suggest that disadvantage is always a preferable paradigm For some theoretical, political, and legal purposes, dominance remains a crucial organizing principle; one does not, for example, speak of rape or pornography as questions of disadvantage. What again bears emphasis is the importance of contextual analysis.¹⁵

Yet when Rhode contextually analyzes rape and pornography, she does not necessarily employ the dominance paradigm. Although Rhode suggests that rape should be reconceptualized as the “product of power” and advocates that we “challenge the social understandings of sexuality that legitimate” rape,¹⁶ she never attributes the power or the social understandings specifically to male dominance.

Similarly, in the contextual analysis of pornography, Rhode successfully employs neither the disadvantage nor the dominance paradigm. Although insightful, Rhode’s context does not provide any helpful reorientation of the law for feminists concerned with pornography. Instead, analogizing to the Equal Rights Amendment, Rhode denominates pornography a “symbolic single issue crusade” and suggests that “it is appropriate to reconsider whether pornography is the issue upon which so much energy should center.”¹⁷ To pose this question is to answer it.

The theme of contextualization seems to replace the advancement of the disadvantage paradigm whenever Rhode’s disadvantage paradigm cannot adequately reorient the law. While contextualization often accomplishes the feminist goal of focusing on the lives of real women rather than abstract principles,¹⁸ from an activist theoretical stance, contextualization as a replacement for the disadvantage paradigm accounts for some of the weakest portions of the book. Notably, the chapter on “Sex and Violence,” containing discussions of rape,

13. *Id.* at 241.

14. D. RHODE, *supra* note 1, at 83.

15. *Id.* at 85.

16. *Id.* at 252-53.

17. *Id.* at 272-73.

18. Rhode often acknowledges the impact of litigation on the lives of real women. For example, Rhode notes the costs to women of bringing claims of sexual harassment. *Id.* at 234. For an enlightening discussion of the experience of bringing an employment discrimination claim, written by a female law professor denied tenure at University of California—Berkeley (Boalt Hall), see Swift, *Becoming a Plaintiff*, 4 BERKELEY WOMEN’S L.J. 245 (1989).

pornography, sexual harassment, domestic violence, and prostitution, suffers from the lack of a theoretical framework. The territory of sexual violence has been compellingly charted by Catharine MacKinnon; Rhode's work in this area would prompt comparisons with MacKinnon, even if Rhode did not explicitly reject MacKinnon's dominance theory. Concerning the role of law, Rhode implicitly both rejects and incorporates MacKinnon by repeating both that law is crucial, but not central, to ending violence against women and that legal remedies alone are not a substitute for cultural change.¹⁹ Nevertheless, Rhode's invocation of "social realities" remains abstract, even where she invokes details.²⁰ Perhaps this is because Rhode's contextualized prose cannot match the power of MacKinnon's compelling rhetoric.²¹

19. In Rhode's discussion of pornography, for example, she implicitly adopts the position that the MacKinnon-Dworkin pornography ordinance promoted exclusively legal remedies and that "anti-pornography activists" would not accept alternative measures such as "boycotts, protests, mass-media campaigns, workshops, and curricular material for public schools." D. RHODE, *supra* note 1, at 271-72.

Yet Rhode's acknowledgment of the limits of the law is also shared by MacKinnon, who wrote in the preface to her book:

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

C. MACKINNON, *supra* note 12, at xiii.

The idea that law should be de-centered in feminist programs occurs in many feminist tracts, including a recent British contribution, C. SMART, *FEMINISM AND THE POWER OF LAW* (1989), that, relying on MacKinnon's earlier work, accuses "that MacKinnon sees no division between law, the state, and society. For here [sic] these are virtually interchangeable concepts—they are all manifestations of male power." *Id.* at 81.

20. For example, when considering domestic violence, Rhode writes:

As long as women are economically dependent on men, and both sexes are socialized to accept male aggression and female passivity, abuse will remain pervasive. Changing the conditions that foster violence requires changing cultural perspectives and priorities. It demands sustained challenges to media presentations, educational programs, and social services. In order for women to leave an abusive relationship, they must be able to support themselves and their children. Ensuring opportunities for economic independence will require restructuring a vast range of social policies regarding employment, education, divorce, legal services, childcare, housing, and welfare. Only as women achieve equality in the public sphere are they likely to break patterns of aggression and submission in the private sphere.

D. RHODE, *supra* note 1, at 244.

21. For example, although Rhode and MacKinnon share some observations concerning rape reform, their rhetorical emphasis is different:

The crime of rape must be reconceptualized as the product of power, which can be exercised in ways other than physical force. The injury of rape must be redefined to reflect the experience of fear, betrayal, and degradation that results from sexual coercion by social acquaintances as well as strangers. Attention must center on the coerciveness of the act rather than the relationship of the parties. Such redefinitions cannot occur only through statutes. They require other measures such as rape counsel-

Or perhaps this is because Rhode's work might be an example of MacKinnon's observation that "it has become customary to affirm that sexuality is socially constructed. Seldom specified is what, socially, it is constructed of, far less who does the constructing or how, when, or where."²²

ing and crisis centers and educational programs for judges, law-enforcement personnel, and the general public.

The point of reform is not simply to improve remedies for reported rapes but to alter their preconditions. Regional and cross-cultural comparisons suggest that sexual assault rates are lower in societies where women have gained greater influence, respect, and socioeconomic status. Studies of American rapists' attitudes have revealed a striking absence of guilt and a consistent perception of their conduct as normal sexual behavior. One critical function of law reform campaigns is to politicize those perceptions and focus attention on their broader ideological roots.

D. RHODE, *supra* note 1, at 252-53 (citations omitted).

Rape is a sex-specific violation. Not only are the victims of rape overwhelmingly women, perpetrators overwhelmingly men, but also the rape of women by men is integral to the way inequality between the sexes occurs in life. Intimate violation with impunity is an ultimate index of social power. Rape both evidences and practices women's low status relative to men. Rape equates female with violable and female sexuality with forcible intrusion in a way that defines and stigmatizes the female sex as a gender. Threat of sexual assault is threat of punishment for being female. The state has laws against sexual assault but it does not enforce them. . . .

Rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime. Expanding this analysis would support as sex equality initiatives laws keeping women's sexual histories out of rape trials and publication bans on victims' names and identities. The defense of mistaken belief in consent—which measures whether a rape occurred from the standpoint of the (male) perpetrator—would violate women's sex equality rights by law because it takes the male point of view on sexual violence against women. Similarly, the systematic failure of the state to enforce the rape law effectively or at all excludes women from equal access to justice, permitting women to be savaged on a mass scale, depriving them of equal protection and equal benefit of the laws.

C. MACKINNON, *supra* note 12, at 245-46 (citations omitted).

22. C. MACKINNON, *supra* note 12, at 131. MacKinnon continues with a particularly effective metaphor:

Power is everywhere therefore nowhere, diffuse rather than pervasively hegemonic. "Constructed" seems to mean influenced by, directed, channeled, as a highway constructs traffic patterns. Not: Why cars? Who's driving? Where's everybody going? What makes mobility matter? Who can own a car? Are all these accidents not very accidental?

Id.

At the beginning of the passage, MacKinnon describes this tendency as "post-Lacan, actually post-Foucault," invoking two very different French postmodernists. For a discussion of postmodernist influence on feminism, see *infra* note 24. For a further elaboration of MacKinnon's point that postmodernist influence may be debilitating to the feminist agenda, see Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in *FEMINISM/POSTMODERNISM* 133 (L. Nicholson ed. 1990).

MacKinnon's observation is applicable to Rhode's work. Concerning domestic violence, Rhode indicts the socialization of "both sexes" and places the semantic responsibility for breaking "patterns of aggression" on "women." D. RHODE, *supra* note 1, at 244. Concerning rape,

Rhode's book, however, is much less likely to incur the sharp criticism that MacKinnon's work has evoked.²³ It is important to note that Rhode's emphasis on contextualization occurs in a hospitable intellectual climate. Critical theory in general has embraced postmodern theory, with its rejection of "grand narratives."²⁴ Many feminists have also expressed disenchantment with feminism's grand narratives that totalize and essentialize women.²⁵ Likewise, some feminist legal

although Rhode refers to "social acquaintances," "strangers," and "rapists," these perpetrators are gendered. *Id.* at 252-53.

Although there are many differences—as well as similarities—between Rhode and MacKinnon, the assignment of blame and responsibility is crucially distinct. For Rhode, women are disadvantaged, but it makes little sense to say "men disadvantage women." For MacKinnon, women are dominated, and the sense of that is that "men dominate women."

23. See, e.g., *infra* note 25. See also Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559 (1987); Harris, *Categorical Discourse and Dominance Theory* (Book Review), 5 BERKELEY WOMEN'S L.J. 181 (1990).

In the preface to *Toward a Feminist Theory of the State*, MacKinnon implicitly responds to critiques of her work as being totalizing. While MacKinnon apparently accepts that feminism is "an epic indictment in search of a theory, an epic theory in need of writing," C. MACKINNON, *supra* note 12, at xi, she nevertheless states:

To look for the place of gender in everything is not to reduce everything to gender.

For example, it is not possible to discuss sex without taking account of Black women's experience of gender. To the considerable degree to which this experience is inseparable from the experience of racism, many features of sex cannot be discussed without racial particularity. I attempt to avoid the fetishized abstractions of race and class (and sex) which so commonly appear under the rubric "difference" and to analyze experiences and demarcating forces that occupy society concretely and particularly—for example, "Black women" instead of "racial differences." All women possess ethnic (and other definitive) particularities that mark their femaleness; at the same time their femaleness marks their particularities and constitutes one. Such a recognition, far from undermining the feminist project, comprises, defines, and sets standards for it. It also does not reduce race to sex.

Id. at xi-xii.

24. J-F. LYOTARD, *THE POSTMODERN CONDITION* 15, 31-47 (1984). For an excellent discussion explaining postmodernism as an aesthetic and a politic, see Huyssen, *Mapping the Postmodern*, in *FEMINISM/POSTMODERNISM*, *supra* note 22, at 234.

Rhode herself invokes the "postmodernist currents" that have "underscored the inadequacy of traditional universalist approaches in social criticism" to support her conclusion that "we need theory without Theory; we need fewer universal frameworks and more contextual analysis." D. RHODE, *supra* note 1, at 315-16.

25. As expressed by two contemporary feminists:

Partly because of the challenges by women of color and by Third World women to the white women's movement, and partly because of the critique lesbians have brought to heterosexist assumptions of the feminist movement, a critique of essentialism and a formulation of theories of difference have become integral to feminist discussion in the United States. Claims, frequently French inspired, that to define a common women's oppression is inappropriately essentialist, have motivated many American feminists to withdraw from the categorical claim that there is a single system of patriarchal expression.

THE THINKING MUSE, *supra* note 2, at 12-13. The indictment of feminism as being essentialist with regard to race is elaborated in E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION*

theorists are beginning to criticize feminist legal theory as being exclusionary, totalizing, and essentialist.²⁶ Thus, Rhode's insistence on contextualization situates the book within current critical theory; contextualization also situates the book within feminist realizations that not all women are identical and that one theory cannot explain all women.²⁷

In order to realize her project, Rhode attempts to do more in *Justice and Gender* than recite contextualities such as class, race, sexual orientation, ethnicity, and age—she attempts to integrate them into her theory. Because of Rhode's own methodology—and because I also believe that such contextualization is necessary—each contextuality merits critical discussion. The book's attention and insight into these various contextualities is disparate: compelling on class, inconsistent on race, predictable on sexual orientation, limited on age, and scant on both ethnicity and disability.

Class consciousness permeates *Justice and Gender* in a refreshing manner. Rhode does not merely differentiate deviances from the middle-class, she characterizes legal problems and formulates paradigmatic solutions with attention to class consequences. To again use the employment context as an example, Rhode not only necessarily discusses noncommission sales clerks at Sears, federal employees, tuna fishers, and women in "law, management and academia," but also confronts the class-based accusation that comparable worth schemes necessitate that the "maintenance man will be paid less so the [female] librarian can be paid more."²⁸ Class, including poverty, also informs

IN FEMINIST THOUGHT (1988).

The articles in the past fifteen years engaging in an internal critique of feminism as being classist, heterosexist, anti-Semitic, racist, and Anglophile are too numerous to cite here. Nonetheless, two recent anthologies collecting works by women of color, Third World women, and lesbians (as well as by many women who fit into all of these categories) are extraordinary and do bear citation: *LESBIAN PHILOSOPHIES AND CULTURES* (J. Allen ed. 1990) and *MAKING FACE, MAKING SOUL/HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR* (G. Anzaldúa ed. 1990).

26. See, e.g., Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989) (focusing on the perspective of lesbians); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990) (focusing on the perspective of black women); Kline, *Race, Racism and Feminist Legal Theory*, 12 *HARV. WOMEN'S L.J.* 115 (1989) (focusing on race from the perspective of a member of the "dominant" race).

27. Rhode is, of course, not alone in seeking to situate her legal theory within current intellectual practices. In addition to the sources cited *supra* note 26, other examples include Z. EISENSTEIN, *supra* note 4 (advocating a "radical pluralist method for thinking about how difference constitutes the meaning of equality") and C. SMART, *supra* note 19 (rejecting the "unity of law" and proposing that feminists concentrate on the law's power rather than reforming the law).

28. D. RHODE, *supra* note 1, at 194 (quoting Scales-Trent, *Comparable Worth: Is This a Theory for Black Workers?*, 8 *WOMEN'S RTS. L. REP.* 51 (1984) (quoting Michael Horowitz)).

Rhode's inclusion of welfare policies, a subject too often missing in "gender" studies,²⁹ and is also integrated into treatment of reproductive issues such as abortion³⁰ and surrogacy.³¹

Class consciousness does not compensate, however, for the lack of age and disability as relevant contextualizations except in terms of class: the section on welfare policy, "Benign and Invidious Discrimination in Welfare Policy: Elderly Women and Social Security,"³² and a few other scattered passages, address both age and disability only in terms of economic dependency. Yet age is more than an economic matter,³³ as is disability.³⁴ The absence of disabled politics is especially regrettable in a discussion of reproductive issues that mentions fetal "deformities" and "defects."³⁵ Ethnicity is often listed as a relevant contextuality, but it remains unexplored. Any references to anti-Semitism escaped my notice.³⁶

Race is a consideration throughout *Justice and Gender*, but it proves problematic both theoretically and practically. Theoretically,

See also *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (judicial acceptance of Sears' claims that women preferred the flexibility of lower paying non-commission sales positions and that underrepresentation of women in the higher paying commission sales positions was not gender discrimination), *aff'd*, 839 F.2d 302 (7th Cir. 1988). See D. RHODE, *supra* note 1, at 180, for Rhode's brief discussion of *EEOC v. Sears*. For a more extensive discussion of the case, see Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813-21 (1989).

29. For an exception, see Phinney, *Feminism, Epistemology and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151 (1989) (discussing the United States Supreme Court case which upheld a Congressional amendment that altered allowable exclusions of otherwise supported children from "family units," and thus drastically impacted AFDC recipients).

30. D. RHODE, *supra* note 1, at 213-14.

31. *Id.* at 228-29. Rhode's analysis of abortion and her analysis of surrogacy are not sufficiently radical in terms of class. For example, in the surrogacy context, Rhode acknowledges the existence of "class exploitation," but seems to excuse it because it is "not unique to the surrogacy context." *Id.* at 229.

32. *Id.* at 112-17.

33. For discussions of ageism within feminist theory, see B. COOPER, *OVER THE HILL: REFLECTIONS ON AGEISM BETWEEN WOMEN* (1988); B. MACDONALD & C. RICH, *LOOK ME IN THE EYE: OLD WOMEN, AGING AND AGEISM* (1987).

34. For discussions of disability, see *WITH THE POWER OF EACH BREATH: A DISABLED WOMEN'S ANTHOLOGY* (S. Browne, D. Connors & N. Stern eds. 1985) [hereinafter *WITH THE POWER OF EACH BREATH*].

35. D. RHODE, *supra* note 1, at 208, 212. For an excellent discussion of feminist reproductive rights rhetoric from the perspective of a disabled person, see Finger, *Claiming All Of Our Bodies Reproductive Rights and Disability*, in *WITH THE POWER OF EACH BREATH*, *supra* note 34, at 292.

36. For discussions concerning anti-Semitism, see *NICE JEWISH GIRLS: A LESBIAN ANTHOLOGY* (E.T. Beck ed. 1982); *THE TRIBE OF DINA: A JEWISH WOMEN'S ANTHOLOGY* (M. Kaye/Kantrowitz & I. Klepfisz eds. 1986).

the problem is the interchangeability of race and gender as legal classifications. Gender discrimination has never achieved the status of entitlement to strict scrutiny that racial discrimination has, because—as Rhode quotes from Justice Powell’s opinion in the *Bakke*³⁷ reverse discrimination case—gender discrimination does not share the “lengthy and tragic history” of racial classifications.³⁸ Rhode notes the continuing debate concerning whether race and sex are co-extensive legal categories, but then explicitly refuses to endorse an “unqualified analogy” and concludes that “race-based paradigms. . . cannot capture the complexities of gender.”³⁹ Rhode, however, nevertheless often implicitly equates race and gender classifications by using race as a yardstick to measure gender. For example, Rhode argues that “sex but not race has constituted a permissible occupational qualification suggests limitations both in our commitment to eradicating gender discrimination and in our understanding of its origins.”⁴⁰ She also states that “[w]e do not require plaintiffs in race-discrimination cases to prove that management was aware of subordinates’ racism; plaintiffs in sex-harassment cases should be treated no differently.”⁴¹

Practically, the problem is the enmeshment of race and gender as lived realities. Rhode honors the category of “woman,” so that minority is not the exclusively male or ungendered male-female category reflected in the phraseology “women and minorities.”⁴² The task, as Rhode seems to realize, is not merely to include the experience of Afra-American women within an Angla concept of women, for example. Yet at too many points, with little or no explication, descriptive passages include statements such as “biases against racial and ethnic minorities have left women of color doubly disadvantaged.”⁴³

More than a further explication of disadvantage, however, I often wanted a sense of the ramifications of that disadvantage for the solution posed. For example, how does the confluence of race and sex

37. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978).

38. D. RHODE, *supra* note 1, at 88.

39. *Id.* at 89-90.

40. *Id.* at 96.

41. *Id.* at 235-36.

42. See, e.g., Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988). In the eighteen statistical tables as well as the text of this otherwise informative article, “minorities” are never gendered, and “women” are never raced or ethnicized.

43. D. RHODE, *supra* note 1, at 168. The “doubly” disadvantaged methodology is persuasively criticized by Elizabeth Spelman in her chapter on “Gender & Race: The Ampersand Problem in Feminist Thought,” in which she argues that the “additive analysis” of race and gender (as well as class) obscures and confuses rather than clarifies. E. SPELMAN, *supra* note 25, at 114-32.

discrimination laws operate to obscure discrimination on the race/sex axis—and how can such obfuscation be redressed?⁴⁴ And how do constructions of women's sexuality by the dominant culture along racial lines, e.g., Asian women as submissive and Latin women as highly sexual, affect the call to “challenge the social understandings of sexuality that legitimate” rape?⁴⁵ While the tactic of isolating the experiences of women of color (or others) into a separate section can be ghettoizing, in this case I craved an extensive and coherent treatment of the subject.

The lesbian experience does merit its own six page section, but this section does not counteract the inconsistent cataloguing of sexual orientation among other relevant contextualities. More distressingly, this section does not serve as an antidote to the heterosexism inherent in conclusions that it is “disturbing” that more career women do not marry and have children,⁴⁶ or that “working couples” means husbands and wives,⁴⁷ or that male children need fathers,⁴⁸ or that sex-segregated education for women is “compensatory” and “separatist education requires rethinking.”⁴⁹ Further, within Rhode's section about “Lesbian-Gay Rights,” lesbians, unlike other women, are categorized with “their” men: gay men. This strategy is a predictable—and disappointing—one that de-genders the category sexual orientation.⁵⁰ Not surprisingly, such a de-genderization has gendered consequences. For example, in the discussion of marriage as a legally denied option to lesbians and gay men, Rhode concludes that the legal “framework preoccupied with difference [between homosexuals and heterosexuals] has thus served to perpetuate disadvantage.”⁵¹ The disadvantage Rhode identifies is the denial “not only [of] formal recog-

44. I am thinking here of a specific example from my own previous practice of law. A huge multi-national employer in a relatively rural area employed over a thousand people, none of whom were black women although the geographic employment area was significantly (if not predominantly) composed of black women. The company's defense to employment discrimination was that it did not commit race discrimination because 30% of its workforce was black—the fact that all blacks were men and in labor positions was irrelevant, and it did not commit sex discrimination because 30% of its workforce was female—the fact that all women were white and in clerical positions was irrelevant. Certainly Rhode's contextualizations assist in the perception of the problem, yet the emphasis on disadvantage does little to assist in the construction of a remedy.

45. D. RHODE, *supra* note 1, at 253.

46. *Id.* at 175.

47. *Id.* at 167.

48. *Id.* at 123.

49. *Id.* at 299.

50. *Id.* at 141-46. For similar feminist discussions that de-gender sexual orientation, see C. MACKINNON, *supra* note 12, at 248; Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

51. D. RHODE, *supra* note 1, at 145 (citations omitted).

nition of their relationships but also a host of economic benefits that follow from marital status, including tax, inheritance, insurance, welfare, support, Social Security, and pension entitlements."⁵² Yet lesbian theory and experience may not perceive formal recognition as necessarily advantageous and may further challenge economic benefits directed at the few, such as employee "spousal" insurance, in favor of broader based concepts such as national health care, especially in light of the gendered practical existence of many lesbians as underemployed when compared with gay men.⁵³ Rhode's failure to recognize distinctions between lesbians and gay men is especially egregious given her recognition that in other contexts, such as pregnancy, what is more appropriately desired is more accessible health care for everyone.⁵⁴

Lesbian conceptions of justice might be distinct, just as conceptions of justice may vary by racial, ethnic, cultural, religious, disability, and age identities. While *Justice and Gender* ends with the inspirational thought that "[b]y broadening our aspirations to justice, we may come closer to attaining it,"⁵⁵ as it began with the prospect that "we may deepen our perceptions of justice and the strategies for achieving it,"⁵⁶ what remains unclear is the version of justice to be attained and achieved. Rhode never defines justice, which is consistent with the emphasis on context, but which is inconsistent with the definitional confrontation of feminism and gender that preoccupy the text, however briefly.⁵⁷ It is justice—despite its contextual permutations—that is totalized and essentialized,⁵⁸ rather than gender.

Justice and Gender is a book that deserves critical attention: this is a compliment that I do not make lightly. With its activist theoretical

52. *Id.* at 145.

53. For voices on lesbian theory and experience, see Robson & Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 64 *TEMPLE L. REV.* 90 (1990); Ettlebrick, *Since When Is Marriage a Path to Liberation?*, 6 *OUT/LOOK* 9 (1989).

54. See *supra* notes 8 & 9 and accompanying text.

55. D. RHODE, *supra* note 1, at 321.

56. *Id.* at 6.

57. D. RHODE, *supra* note 1, at 5. Rhode seeks to "avoid semantic tangles" by using the term "feminist" in its most general sense and "by distinguishing where appropriate among distinctive strands of feminist thought or activity." *Id.* (citation omitted). For an elaboration of the "distinctive strands" of feminist thought, including definitions of liberal, radical, cultural and poststructuralist (postmodern), see Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS: J. OF WOMEN CULTURE & SOC'Y* 405 (1988); Offen, *Defining Feminism: A Comparative Historical Approach*, 14 *SIGNS: J. OF WOMEN CULTURE & SOC'Y* 119 (1988).

Rhode uses "gender" to refer to "predominantly cultural dynamics" and "sex" to refer to "clear biological classifications." D. RHODE, *supra* note 1, at 5.

58. For possible meanings of justice, see Robson, *Lesbian Jurisprudence?*, 8 *J.L. & INEQUALITY* ____ (1990) (forthcoming).

stance, it advances ideas in a systematic and comprehensive manner. Whether or not one agrees with the direction of the book's reorientation from difference to disadvantage, or with particular suggestions, *Justice and Gender* is a worthwhile contribution to feminist legal scholarship. Such contributions enable us to theorize, practice, and realize justice—whatever that may be—for all of our selves.

