Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability

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I. INTRODUCTION

Feminists distrust traditional legal methods, criticizing them for: representing male power structures, considering only a male view of the world, and ignoring a female view.1 To radical feminists, including Catharine MacKinnon and Robin West, traditional legal methods represent “male ways of thinking” because they are exclusive2 and because they analyze in masculine terms by drawing on hierarchical reasoning.3 Feminists believe that it is important to purge this male bias from legal method and to inject women's real life experiences into legal analysis.4 They fear, however, that use of traditional legal methods to expose and correct the bias would perpetuate the very exclusion against which they rage.5 Therefore, feminists have turned to other

2. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE xiii (1989) (exclusionary methods, such as rights, are male, limited, and limiting).
3. See, e.g., West, supra note 1.
4. As Linda McClain put it, “[f]eminist jurisprudence has sought to bring the experience and voice of women to the jurisprudential enterprise, proposing an alternative conception of the person—or, at least, of women—based on female experience of the world, feminine nature, or a 'different voice.'” Linda C. McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1174 (1992) (citations omitted). See also Jeanne-Marie Bates, Feminist Methodology: Influencing Hostile Environment Sexual Harassment Claims, 15 WOMEN’S RTS. L. REP. 143, 145 (1994) (Feminists recognize that existing legal standards and concepts disadvantage women, and it is the goal of feminist method and theory to expose these features in the law and to suggest corrective measures. Through development of alternative conventions which take better account of women's experiences and needs, workable techniques are helping feminists to reach their goals.); West, supra note 1, at 65 (“We need to flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of law.”).
5. See generally MACKINNON, supra note 2, at 84-154; Scales, supra note 1, at 1375, 1384-85. See also Bartlett, supra note 1, at 830-81 (feminists cannot “challenge existing structures of power with the same [male] methods that have defined
methods: "asking the woman question," feminist practical reasoning, and consciousness-raising. Feminists call these methods "feminist legal methods." 6

Feminist scholarship employing feminist legal methods to transform the law abounds. 7 Many feminist scholars have, however, ac-

what counts within those structures, as they may instead 'recreate the illegiti-

6. See Bartlett, supra note 1. These three feminist legal methods are defined and discussed in Part One of this Article.

cepted and applied these methods without critical pause or question. There is an understandable appeal to hasty acceptance of these methods because “asking the woman question,” engaging in feminist practical reasoning, and experiencing consciousness-raising symbolize the goal of feminists to inject women’s life experiences into legal analysis. Feminists, however, often fail to objectively evaluate their methods, and consequently overestimate the symbolic value of those methods.

This Article uses the recently focused conflict between sexual harassment and the First Amendment to critically evaluate feminist legal methods. Extrapolating from feminist legal scholarship, I demonstrate how feminists would use their methods to analyze whether a potential First Amendment defense to sexual harassment liability represents and perpetuates the male bias inherent within traditional legal methods. This analysis then serves as the basis of my critique. I have chosen to evaluate feminist legal methods through the lens of a potential First Amendment defense to sexual harassment liability for two reasons. First, it forces careful, rather than mechanical, application of feminist legal methods because resolution of the conflict between sexual harassment and the First Amendment calls for an unwelcome compromise of principles important to feminism. In turn, this application provides the necessary objectivity from which critical evaluation of feminist legal methods can take place. Second, the Supreme Court has not resolved the conflict. Thus, recognizing

8. Of all the scholarship in Note 7 explicitly using “asking the woman question,” feminist practical reasoning, or consciousness-raising, none of the articles discuss or question the soundness of these methods. See supra note 7.

9. For example, Catharine MacKinnon describes feminist method as “recapitulating[ing] as theory the reality it seeks to capture.” MacKINNON, supra note 2, at 83. Additionally, Deborah Rhode describes the feminist legal method of consciousness-raising as “reflect[ing] the historical origins and contemporary agenda of feminist legal theory.” Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 622 (1990). See also Goldfarb, supra note 7, at 1627 ("The cooperative [meaning feminine] nature of the [consciousness-raising] exploration discourages hierarchical [meaning masculine] arrangements within the group that would reproduce, in part, the problem generating the need for gathering.") (citation omitted).

10. The First Amendment preserves freedom to protest sexual objectification of women in the workplace, and sexual harassment laws protect women from sexual objectification.

11. The Supreme Court has, however, under narrow circumstances approved the constitutionality of Title VII against First Amendment attacks. See Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (upholding an aggravated battery criminal stat-
the strengths and weaknesses of using feminist legal methods to deconstruct the relationship between sexual harassment and First Amendment law provides timely insight.

ute that enhanced the maximum sentence of two years imprisonment to seven years if the defendant intentionally selected the victim based on race; R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (invalidating a bias-motivated disorderly conduct criminal ordinance). The majority opinion in R.A.V., authored by Justice Scalia and joined by Justices Rehnquist, Kennedy, Souter, and Thomas, hinted in dicta that Title VII's prohibition of sexual harassment would survive First Amendment scrutiny under the "secondary effects" doctrine. Id. at 2546. The concurring opinion authored by Justice White, and joined by Justices Blackmun, O'Connor, and Stevens, agreed in principle, but differed in rationale. Id. at 2557. The White opinion, citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), stated that offensive speech may be regulated when it merges into conduct. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2560 n.13 (1992). A year later, however, in a unanimous decision, the members of the Court merged their positions, at least with respect to sexually derogatory fighting words, and stated, again in dicta, that Title VII is a permissible content-neutral regulation of conduct. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993).

Other courts have summarily discussed the conflict between Title VII and the First Amendment. See Berman v. Washington Times Corp., No. 92-2738, 1994 WL 750247, at *5 n.4-5 (D.D.C. Sept. 23, 1994); Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 431 (E.D. Mich. 1984), aff'd, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) ("At once it must be recognized that a constitutional First Amendment issue is raised. This issue can be framed as follows: can Title VII prohibit people from verbally expressing themselves with language that is not "obscene" under the legal definition of that term? It will be seen that this issue need not be considered in this case. Nevertheless, it should be noted that this issue is raised by the present kind of case."). Also, in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534 (M.D. Fla. 1991), the court rejected without discussion the defendant's argument that the First Amendment impedes the remedy of injunctive relief. However, it did sua sponte state explicitly why the hostile environment claim in that case would survive First Amendment scrutiny:

No first amendment concern arises when the employer has no intention to express itself. . . . [T]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of hostile environment. . . . [T]he regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech. . . . The standard for this type of regulation requires a legitimate governmental interest unrelated to the suppression of speech, content neutrality, and a tailoring of means to accomplish this interest. The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. . . . [F]emale workers at JSI are a captive audience in relation to the speech that comprises the hostile work environment. . . . The free speech guarantee admits great latitude in protecting captive audiences from offensive speech. [I]f the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest.

Id. at 1534-35 (citations omitted).
Part One of this Article defines "asking the woman question," feminist practical reasoning, and consciousness-raising. It also explains that feminists use these methods in three ways: 1) to expose bias against women in traditional legal methods, 2) to rebuild decision-making by including the woman's point of view, and 3) to convince decisionmakers to employ feminist legal methods as a means to identify (and perhaps to legitimately justify) bias inherent in their decisionmaking.

Part Two begins with a brief introduction to sexual harassment and First Amendment law. It then explores how some feminists might apply feminist legal methods to argue that a successful First Amendment defense to sexual harassment liability embodies the maleness of traditional legal methods.

In Part Three, however, I use this same application to demonstrate two weaknesses inherent in feminist legal methods: 1) the methods cannot distinguish bias against women ("bad bias") from bias that may be advantageous to women ("good bias"), and 2) the methods cannot convince many decisionmakers to employ them. This Part also identifies and responds to several possible objections by feminists to my critique.

Having demonstrated that there are weaknesses inherent in feminist legal methods, Part Four encourages feminists to abandon the belief that feminist goals in law must be obtained exclusively through feminist legal methods. It suggests, instead, that feminists employ various methods, such as traditional legal methods, feminist legal methods, or a combination thereof, that resonate with decisionmakers. By using reasoning familiar to decisionmakers, feminists may improve communication with decisionmakers, and, in turn, may make their arguments for feminist reform more persuasive. To illustrate this point, Part Four offers arguments grounded in First Amendment precedent by which feminists may defeat a First Amendment defense to sexual harassment liability.

II. PART ONE: FEMINIST LEGAL METHODS: "ASKING THE WOMAN QUESTION," FEMINIST PRACTICAL REASONING, AND CONSCIOUSNESS-RAISING

Feminists use feminist legal methods to pursue certain goals on the feminist agenda. Feminists use "asking the woman question" to expose bias against women in legal decisionmaking. Feminists then

12. "Asking the woman question" is a feminist method also used in other disciplines, including philosophy and political theory. See Bartlett, supra note 1, at 837 n.23 (citing Carol C. Gould, The Woman Question: Philosophy of Liberation and the Liberation of Philosophy, in Women and Philosophy: Toward a Theory of Liberation 5 (C. Gould & M. Wartofsky eds. 1976) (philosophy) and M.E. Hawkes-
employ feminist practical reasoning and consciousness-raising to re-
build, or at least to imagine, unbiased decisionmaking. Feminists
also use feminist legal methods to urge decisionmakers to employ
those methods in order to strip bias against women from their deci-
sionmaking. Below, I describe feminist legal methods more fully and
their role in obtaining feminist goals in law.

1. “Asking the Woman Question”

“Asking the woman question” has three essential features. It seeks:
1) to identify bias against women implicit in legal rules and practices
that appear neutral and objective, 2) to expose how the law excludes
the experiences and values of women, and 3) to insist upon applica-
tion of legal rules that do not perpetuate women’s subordination.
Employing this method, feminists search for bias against women hid-

worth, Feminist Rhetoric: Discourses on the Male Monopoly of Thought, 16 Pol.
Theory 444, 452-56 (1988) (political theory)).

13. Imagination plays a fundamental role in feminist legal methods generally. See,

14. Bartlett, supra note 1, at 837, 846. Inasmuch as legal rules and practices reflect

15. Bartlett, supra note 1, at 837-38. Inasmuch as legal rules and practices reflect

16. Id. at 843.

Heather Wishik, in her often-cited law review article *To Question Everything: The Inquiries of Feminist Jurisprudence*, provides as examples the following “woman questions”:

1. What have been and what are now all women’s experiences of the “life situation” addressed by the doctrine, process, or area of law under examination?
2. What assumptions, descriptions, assertions and/or definitions of experience, male, female, or ostensibly gender neutral, does the law make in this area?
3. What is the area of mismatch, distortion, or denial created by the differences between women’s life experiences and the law’s assumptions or imposed structures?
4. What patriarchal interests are served by the mismatch?
5. What reforms have been proposed in this area of the law or women’s life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?
6. In an ideal world, what would this woman’s life situation look like, and what relationship, if any, would the law have to this future life situation?
7. How do we get there from here?

Others have also set forth “woman questions.” Janet Ainsworth offers, “What would the law be like if women had been considered by the drafters and interpreters of the law?” and Sharon K. Hom argues that “woman questions” lead to other questions such as:

Who are the policy-makers? What values and experiences are they reflecting and drawing upon? What are the intended and unintended consequences of a monopoly of power by predominately male decision-makers in realms which have a foreseeable disparate impact on women? How can future policy-making be informed by the excluded voices and perspectives of those at the bottom of the political, economic, or patriarchal social hierarchy? How can these voices and perspectives claim and exercise social transformative power without becoming complicitous in resorting to the “Master” discourses, ideologies, and political strategies?

If the answers to these “woman questions” reveal bias against women, feminists discredit the decisionmaking process. Feminists then use feminist practical reasoning and consciousness-raising to locate and provide a woman’s point of view to counterbalance the bias.

2. **Feminist Practical Reasoning and Consciousness-raising**

Feminist practical reasoning is a form of reasoning grounded in contextualized and concrete reality. It focuses on reality and recog-
Feminism and Disciplinarity: The Curl of the Petals, 27 Loy. L.A. L. Rev. 225, 243 (1993) (Feminist practical reasoning is a “form of contextualized deliberation that takes into account the material conditions of women’s lives.”).


23. See id. at 866 (“Consciousness-raising provides a substructure for other feminist methods—including the woman question and feminist practical reasoning—by enabling feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality.”); Scales, supra note 1, at 1401.

Some of the most popular definitions of “consciousness-raising” include: Catharine MacKinnon’s, “the collective critical reconstitution of the meaning of women’s social experience, as women live through it.” MacKinnon, supra note 2, at 83; Mari Matsuda’s, “the collective discussion and consideration of the concrete, felt experience of gender in order to identify commonalities and build a theory of the cause, effect and means of eradication of sexist oppression.” Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 359 (1987); Martha Minow’s, “personal reporting of experience in communal settings to explore what has not been said.” Martha Minow, The Supreme Court, 1986 Term: Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 64 (1987); and Katharine Bartlett’s, “interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences.” Bartlett, supra note 1, at 863-64.

In consciousness-raising, the articulation by a speaker of an experience to another who has had a similar experience validates the experience for both speaker and listener. The practice of talking about experiences enables women to better understand their seemingly isolated impressions and feelings by placing such impressions and feelings in juxtaposition with other women’s similar experiences. It also helps women develop a new language to describe feelings previously unnamed. See generally Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 50 (1990).

24. Bartlett, supra note 1, at 863.

25. Id. at 863.

consciousness-raising turn previously biased decisionmaking into a more "intellectually honest" process that includes a woman's point of view. Because this point of view may not always be admissible under evidence rules, feminists generally advocate expanding relevancy rules to include a woman's perspective.27

Feminists want decisionmakers to acknowledge the insights derived from "asking the woman question" and to use feminist practical reasoning to correct bias against women within their decisionmaking.28 Thus, feminists use feminist legal methods to get decisionmakers to "ask the woman question" about their own decisionmaking, and if the answers reveal bias, to employ feminist practical reasoning.29 With the exception of radical feminists,30 however, most feminists do not advocate that the traditional legal method be completely supplanted by feminist legal methods; instead they urge the integration of feminist legal methods with traditional jurisprudence.31

27. See generally Bartlett, supra note 1, at 836-37, 856-57. For a feminist critique of other evidence rules, see Kit Kinports, Evidence Engendered, 1991 U. Ill. L. Rev. 413.

28. Martha T. McCluskey, Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case, 44 Me. L. Rev. 261, 265 (1992) ("Feminist legal analysis hopes to contest not simply particular laws but also the agents and terms of legal reality-making—and to change reality. Feminist method can help demonstrate that justice requires dismantling a process of systemic denial, not simply establishing new rules or presenting new facts.").

29. See generally Dennis, supra note 7, at 10 ("Feminist theory strives to introduce better problem-solving methods than those currently employed in the male dominated world.").


31. See, e.g., Kathryn Abrams, Feminist Lawyering and Method, 16 Law & Soc. Inquiry 373, 375 (1991) (feminist method contributes to the ongoing reformulations of legal method); Bartlett, supra note 1, at 834, 836 ("Although permeated by bias, these traditions . . . have elements that should be taken seriously. . . . In doing law, feminists like other lawyers use a full range of methods of legal reasoning—deduction, induction, analogy, and use of hypotheticals, policy, and other general principles.") (citations omitted); Littleton, supra note 1, at 2 ("[F]eminist jurisprudence criticizes the law's omission of and bias against women's concerns, offering its insights as supplemental and corrective.") (emphasis added).
III. PART TWO

This Part applies the three feminist legal methods explored in Part One to the conflict between sexual harassment liability and the First Amendment. It begins by providing background on and connections between sexual harassment and First Amendment law, and then demonstrates that “asking the woman question” about a successful First Amendment defense to sexual harassment liability does identify some bias against women. It also demonstrates that by incorporating the woman’s point of view through feminist practical reasoning, the bias is somewhat corrected. The ability of feminist legal methods to correct bias within legal reasoning is a strength of the methods. This strength, however, must be evaluated in juxtaposition with the inherent weaknesses of feminist legal methods. These weaknesses are discussed in Part Three.

1. Sexual Harassment and the First Amendment

Sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act. In order to prove sexual harassment, a plaintiff must demonstrate that the harassment was unwelcome and grounded in sexual hostility that is “sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” The plaintiff usually offers sexually hostile speech, including spoken or written words, as factual evidence of the harassment. The court then evaluates these facts with subjective, ob-

32. Recall that feminists use the “asking the woman question” method to expose bias against women in legal decisionmaking. See supra note 12 and accompanying text.


There is a second type of sexual harassment, “quid pro quo” harassment, which is beyond the scope of this Article. “Quid pro quo” harassment exists where submission to or refusal of unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature, is the basis of an employment decision. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (relying on 29 C.F.R. § 1604.11(a) (1985) and Karibian v. Columbia Univ., 14 F.3d 778, 777 (2d Cir. 1994)).
jective, and “totality of the circumstances” tests. If the court finds sexual harassment, it may grant injunctive relief or order the employer to pay damages, including compensatory and punitive damages. Obviously, through these remedies, the court regulates, or in some instances prohibits, the speech of the employer.

Under the First Amendment, however, the government cannot regulate speech based on its content (which is usually the basis of a sexual harassment claim) unless the regulation: 1) is narrowly tailored to serve a compelling governmental interest, 2) targets speech traditionally held to be “low value,” or 3) falls under the “secondary effects” doctrine. Arguing that certain sexually harassing speech does not fall into any of the categories of speech that can be proscribed based on content, some commentators assert that current sexual harassment law is inconsistent with the First Amendment. Not sur-

35. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

... Whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive.


40. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992) (regulation of a content-defined subclass of proscribable speech permissible if the subclass is “associated with particular ‘secondary effects’ ... so that the regulation is ‘justified without reference to the content ... of the speech.’”) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

prisingly, other commentators argue that the First Amendment should, in some circumstances, be a successful defense to sexual harassment liability. To date, no court has formally agreed.

2. Application of Feminist Legal Methods: Would a First Amendment Defense to Sexual Harassment Liability Represent the Male Bias of Traditional Legal Methods?

In this section I demonstrate how feminists could use feminist legal methods to analyze and critique the effects of a successful First Amendment defense to sexual harassment liability. Here, the import of feminist legal methods would be to investigate whether the defense, or the policies underlying it, embodies the maleness of traditional legal methods. If the feminists' answers to "woman questions" reveal that a successful First Amendment defense is biased against women, then feminists would employ feminist practical reasoning and consciousness-raising to supply a woman's perspective to counterbalance the bias.

Feminists hope that by using their methods in this way, a court faced with the issue of whether the First Amendment could be a defense to sexual harassment liability would be compelled, at a minimum, to employ feminist practical reasoning, if not "asking the woman question" or consciousness-raising, to ensure that its decision-making is not biased against women. To feminists, this would necessarily be viewed as an improvement. While analysis of the First Amendment defense may still reflect traditional legal methods, at least a woman's point of view would have been considered.

A. "Asking the Woman Question"

To deconstruct the relationship between a successful First Amendment defense and women, I have chosen to ask the following "woman questions":

1) Does a successful First Amendment defense to sexual harassment liability serve any patriarchal interests?
2) What has been the effect on women of recent First Amendment proposals?

42. See, e.g., Michael P. McDonald, Unfree Speech, 18 HARV. J.L. & PUB. POL'Y 479, 485 (1995) ("Speech uttered that is not directed toward specific individuals should never be regulated as harassment."); Wayne L. Robbins, Jr., When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims, 47 BAYLOR L. REV. 789 (1995).

43. See supra note 11 and accompanying text.

44. Recall that one of the purposes of feminist legal methods is to identify and challenge bias in decisionmaking and to raise the consciousness of decisionmakers. See supra note 28 and accompanying text.
The first question examines the defense closely, attempting to expose the real effects of it on working women. The second question takes a broader look at the history of using the First Amendment to effectively scale back, if not curtail, women's rights.

From a feminist perspective, answers to the first question reveal that a successful First Amendment defense does serve patriarchal interests; it diminishes women's rights, essentially furthers unequal treatment between women and men, and effectively forces women, in certain circumstances, to leave the workplace without recourse.\(^\text{45}\) In addition, because the defense would effectively scale back sexual harassment recovery, it signals to women that their well-being, while once important,\(^\text{46}\) is now much less significant.

The potential First Amendment defense diminishes rights granted to women by the Civil Rights Act. The Act, as interpreted by caselaw, grants women the right to be free from sexual harassment in the workplace.\(^\text{47}\) Pursuant to current caselaw, if this right is violated, the sexually harassed woman may seek compensatory and punitive damages, as well as injunctive relief.\(^\text{48}\) A successful First Amendment defense would, however, enable a man's right to free speech to eclipse the rights of the sexually harassed woman, including the right to recover for harm caused by the harassment.\(^\text{49}\) In turn, this result cre-

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45. Although a First Amendment defense could be asserted by the employer/defendant on behalf of a female employee accused of sexually harassing a male colleague, most reported sexual harassment is directed by men toward women. Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 n.19 (1st Cir. 1988)("Most reported harassment is of women by men."); ELLEN J. WAGNER, SEXUAL HARASSMENT IN THE WORKPLACE 2 (1992). See also Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (1995)("Sexual harassment of women by men is the most common kind..."). Accordingly, my application is based on use of the defense against female plaintiffs. Discussion of this defense being used against male victims of sexual harassment is beyond the scope of this Article.

46. As Catharine MacKinnon put it: "The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender. They have been given a forum, legitimacy to speak, authority to make claims, and an avenue for possible relief. Before, what happened to them was all right. Now it is not." MACKINNON, FEMINISM UNMODIFIED, supra note 30, at 103-04.

47. See supra note 33.

48. See supra notes 36-37 and accompanying text.

49. Many women experience intense feelings of powerlessness, anger, and frustration as a result of being sexually harassed. Many also suffer from severe emotional and psychological problems, including depression, anxiety, irritability, loss of self-esteem, vulnerability, shame, guilt, and loss of sexual interest. See generally CATHARINE A. MACKINNON, ONLY WORDS (1993); Aileen V. Kent, Note, First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?, 23 HOFSTRA L. REV. 513, 514 (1994)(citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed
ates a working environment in which men and women are unjustifiably treated differently. Such disparate treatment caused by a successful First Amendment defense would completely undermine Title VII's prohibition against discrimination based upon gender.50

Invoking a broader perspective on the relationship between First Amendment law and women, the second question, "what has been the effect on women of recent First Amendment proposals?," may be used to expose a pattern of using the (allegedly) neutral principles of the First Amendment to oppress women. Recent proposals in the name of the First Amendment have trivialized the rights and dignity of women. For example, women's reproductive rights defined in Roe v. Wade51 and Planned Parenthood v. Casey52 have, in some instances, been diluted by free speech rights of "right to life" protestors.53 And, as extensively documented by Catharine MacKinnon and Andrea Dworkin, to the extent that free speech protects pornography, it ignores and exacerbates women's painful reality of being made (by men) the ultimate sex object.54

Thus, for feminists, asking and answering "woman questions" reveals that a successful First Amendment defense to sexual harassment furthers patriarchal interests at the expense of women's rights and well-being. In addition, answers to "woman questions" show that recent First Amendment proposals perpetuate women's life experiences of oppression, rather than eradicating them. Accordingly, by using the "asking the woman question" method, feminists could argue that a successful First Amendment defense would represent the evils of traditional legal methods—preserving male power structures and neglecting a woman's point of view.

Organizations: Consequences of and Coping with Sexual Harassment, 42 J. Vocational Behav. 28, 28-35 (1993)). A successful First Amendment defense would effectively diminish recovery for these damages.

50. See supra note 33.
B. Feminist Practical Reasoning and Consciousness-Raising

Feminist practical reasoning and consciousness-raising could, if implemented, correct these evils underlying the potential First Amendment defense by forcing a court to consider the real effects of a successful defense: an increase in discrimination against women and in the suffering of women who are victims of sexual harassment. Both feminist practical reasoning and consciousness-raising methods attempt to provide the context in which a decisionmaker could evaluate, from a feminist perspective, the merits of his or her decisionmaking. Feminist practical reasoning would demand that the rights and life situations of all parties, including those of the employer, employee, and the sexually harassed woman, be considered. Consciousness-raising would then provide accurate depictions of the sexually harassed woman’s real-life experiences. By employing feminist practical reasoning and consciousness-raising in this way, a decisionmaker would be forced to consider the context in which a successful First Amendment defense would trump women’s interests. As a result, if a decisionmaker were to allow the defense, according to feminists, he or she would have to justify the defense in light of its negative effect on women.

Thus, feminist legal methods may fulfill their promise to expose and correct bias within traditional legal methods. Using feminist legal methods, feminists may argue that a successful First Amendment defense discriminates against women and is thus biased against women. Feminists may also use feminist legal methods to supply the missing woman’s point of view to counterbalance the bias inherent in a successful First Amendment defense.

There are, however, two conditions necessary for this successful implementation of feminist legal methods: 1) feminist legal methods must be able to distinguish bias against women, or “bad bias,” from bias that is advantageous to women, or “good bias”; 2) decisionmakers must actually employ feminist legal methods. But how is a decisionmaker to know when the bias is against women and when the bias favors women? And can feminists actually persuade decisionmakers to employ feminist legal methods? The next section, Part Three, uses the application set forth above to demonstrate that asking these questions about feminist legal methods exposes inherent weaknesses in the use of these methods.

IV. PART THREE: A CRITIQUE

In this Part, I argue that feminist legal methods fail to fulfill their promise because: 1) they cannot distinguish bias against women, or “bad bias,” from bias that is advantageous to women, or “good bias”; 55. See supra note 23 and accompanying text.
and 2) they cannot convince many decisionmakers to employ feminist legal methods. After making this argument, I identify and respond to possible objections by feminists to my critique.

1. Feminist Legal Methods Fail to Distinguish Bad Bias From Good Bias

One of the goals of feminist legal methods is to expose and eliminate bias against women. Feminists do not, however, want to expose or eliminate any bias that may be favorable to women. Because feminists want to purge only bad bias from decisionmaking, feminist legal methods must distinguish bias against women from bias that favors women. Feminist legal methods do not, however, distinguish bad bias from good bias.

Although, as demonstrated in Part Two, “asking the woman question” about a successful First Amendment defense may reveal bias, it does not expose that bias as bad or good. “Asking the woman question” demands that the person asking the question “search” for bias within the potential First Amendment defense; it does not, however, lead to normative judgments about whether the bias, if found, is bad or good. Rather it is the answers, reflecting the personal bias of the person employing the method, that identify the bias as either bad or good. For example, when I asked the “woman questions” about a successful First Amendment defense, my answers did not flow from asking the “woman questions”; rather, they were dictated by the conclusions I ultimately wanted to draw, i.e., a successful defense reflects bad bias against women. There was nothing about “asking the woman question” that led me to that conclusion. “Asking the woman question” exposes bad bias only when the person answering the ques-

56. In fact, feminist legal methods would be ineffective if there were no “bad bias” to expose. See Bartlett, supra note 1, at 847 (“asking the woman question . . . has substantive consequences only if the law is not gender-neutral”) (emphasis added).

57. See Bartlett, supra note 1, at 847 (“The bias of the [asking the woman question] method is the bias toward uncovering a certain kind of bias. The bias disadvantages those who are otherwise benefited by law and legal methods whose gender implications are not revealed. If this is ‘bias,’ feminists must insist that it is ‘good’ (or ‘proper’) bias, not ‘bad.’”).

Patricia Cain has also addressed this point:

I take it that “bias” . . . can be both good and bad. To the extent a bias is a personal preference, something a person has affection for, it is something we want to acknowledge and celebrate about human personality. . . . On the other hand, to the extent a person’s bias constitutes bigotry, prejudice, or intolerance, we certainly do not want to celebrate it. Thus we might say that whereas we want judges who have affections for things, we do not want judges who are prejudiced. We want the good bias, but not the bad one.

tion knows what bad bias is and is motivated by personal or political reasons to find it. The method itself does not inform the decisionmaker how to distinguish bad bias from good bias. For feminists, the method makes sense because feminists want to find bad bias. But for decisionmakers who do not adopt a feminist perspective, the method is merely a set of questions, with the right answers ultimately revealed by feminists themselves, not by their methods.

Similar to “asking the woman question,” feminist practical reasoning does not designate certain biases as bad and others as good. It is only the feminist spin on contextual reasoning that identifies whether any bias within decisionmaking is bad or good. Lastly, consciousness-raising serves as a depository, accepting all kinds of women’s views and experiences concerning sexual harassment. There is no judgment placed on women’s experiences in terms of which experiences would be considered to reflect bad or good bias. Rather they are provided to the decisionmaker for comparison to his or her personal accounts of the sexually harassed woman’s life situation.

Even if the methods worked the way feminists claim they would, they are only effective if decisionmakers actually employ them. This brings me to the second weakness in feminist legal methods: there is nothing inherent in these methods that persuades many decisionmakers to employ them.

2. Feminist Legal Methods Lack Crucial Links Necessary to Convince Many Decisionmakers to Employ Them

Ultimately, feminists, believing that women matter, want the insights of feminist legal methods to affect legal decisionmaking. They hope that by using their methods as an example of how to expose and correct some of the bad bias against women inherent in traditional legal methods, decisionmakers will also be persuaded to apply feminist methods. But urging through example that decisionmakers apply feminist legal methods is simply not enough. It merely demands that decisionmakers believe that women matter and use the methods because feminists say so. This justification is not, however, always persuasive.

Feminists advocating the use of feminist legal methods correctly assume that women do matter; but most feminists erroneously conclude that because women matter, there should be a universal commitment by decisionmakers to eliminate bad bias against women, even at the expense of supplanting First Amendment values. Feminists cannot assume that the agents of law will care enough about the sexually harassed woman to make such a commitment, and feminist legal methods do not and cannot convince decisionmakers to do so either. No matter how horrific the experiences of sexual harassment, femi-
nists cannot assume that decisionmakers will care more about women than deeply embedded First Amendment values.\textsuperscript{58}

3. \textit{Anticipating Feminist Objections}

Feminists might object to this critique in three ways. They might argue that: 1) decisionmakers \textit{can} identify bad bias, 2) the emergence and use of feminist legal methods \textit{do make} decisionmakers become committed to eradicating bias against women, and 3) because feminist legal methods at least identify some bad bias against women, the decisionmakers already committed to eradicating bad bias \textit{will} employ the methods. Below, I respond to each argument respectively, and conclude that, in the end, they are unpersuasive.

The first objection feminists may have is that decisionmakers \textit{can} easily identify bad bias, especially when using feminist legal methods. Bad bias exists when women are excluded, made to feel inferior, subjected to male hierarchy, generally treated unfairly as compared to other groups, or, collectively, to borrow from Catharine MacKinnon, when women are hurt.\textsuperscript{59} However, in the same way that feminist legal methods cannot distinguish bad bias from good bias, feminist legal methods cannot accurately determine whether certain legal decisions actually hurt women.

In addition, feminists may argue that decisionmakers \textit{can} identify bad bias within a potential First Amendment defense by simply referring to general feminist opinions on whether the defense reflects bad bias against or good bias for women. Unfortunately, for such decisionmakers, there are conflicting feminist opinions on this issue. Nadine Strossen, for example, represents the view that favoring First Amendment values over sexual harassment liability is good bias because restrictions on workplace sexual harassment are paternalistic, reminiscent of protective legislation, and undermine gender equality.\textsuperscript{60} Yet other feminists argue the opposite: favoring the First Amendment over women is bad bias because it favors ideas over peo-

\textsuperscript{58} Andrea Dworkin makes a similar point:

\begin{quote}
The accounts of rape, wife beating, forced childbearing, medical butchering, sex-motivated murder, forced prostitution, physical mutilation, sadistic psychological abuse, and the other commonplaces of female experience... should leave the heart seared, the mind in anguish, the conscience in upheaval. \textit{But they do not.} No matter how often these stories are told, with whatever clarity or eloquence, bitterness or sorrow, they might as well have been whispered in wind or written in sand: they disappear, as if they were nothing.
\end{quote}


\textsuperscript{59} \textit{See generally} MACKNINN, FEMINISM UNMODIFIED, supra note 30.

Because of these divisions within legal feminism, it may be impossible for feminist legal methods, even with mechanisms attempting to distinguish bad bias from good bias, to ever clearly divide bad bias from good bias.

A second objection by feminists may be that the emergence of feminist legal methods may in fact convince decisionmakers to employ feminist legal methods. Katharine Bartlett explains that: "[r]easoning from context [as feminist legal methods do] can change perceptions about the world, which may then further expand the contexts within which such reasoning seems appropriate, which in turn may lead to still further changes in perceptions." Bartlett's reasoning is too optimistic. Reasoning through context, or exposing and/or telling stories about bias, may, at most, make a decisionmaker sympathetic to, and perhaps empathetic with, women's plight. But, unless a decisionmaker is already committed to feminist goals in law, narratives about bias do not automatically move, persuade, or compel decisionmakers to eradicate bad bias against women. This is true for anyone in a powerful position with decisionmaking authority. A

61. MacKinnon, Feminism Unmodified, supra note 30, at 103 (emphasizing the harm to women from sexual harassment, implicitly arguing that people matter more than speech, and concluding that a conflict exists "between those who value speech in the abstract more than value people in the concrete"); Keith R. Fentonmiller, Verbal Sexual Harassment as Equality Depriving Conduct, 27 U. Mich. J.L. Rev. 565 (1994); Scales, supra note 14, at 18-19; Kent, supra note 49.

For an overview of tension within feminism surrounding the potential First Amendment defense, compare Strauss, supra note 41 (cautioning feminists about minimizing the value of free speech and arguing that if sexist speech is not directed at a particular woman and is not discriminatory, then it should be protected by the First Amendment) and Amicus Brief of Feminists for Free Expression, Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994) (arguing against prohibiting pornography in the workplace because of the risk that it may foster stereotypes of women as fragile, vulnerable, and asexual) with MacKinnon, supra note 30; Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Sangree, supra note 34; and Kent, supra note 49.

62. Bartlett, supra note 1, at 863 (emphasis added).

63. Jennifer Nedelsky and Carol Smart have argued the same point. See Carol Smart, Feminism and the Power of the Law 72 (1989) ("[W]e cannot simply rely on experience as if it were a concrete reality which merely needs to be exposed thereby circumventing the problems and difficulties of intellectual work."); Nedelsky, supra note 13, at 1300 ("showing how a policy will clearly harm women will not change the minds of those who simply do not care about women's... well being... ."). See also Dworkin, supra note 58, at 20-21 (Regardless of how often women tell their stories of oppression, they will not be recognized by men who do not believe women are significant beings).

64. For example, consider an associate in a law firm who, upon discovering she is pregnant with twins, requests from a female partner twice the allotted pregnancy leave. The associate begins her argument with personal experience stories concerning childbirth and taking care of an infant. The associate then reminds the partner how difficult it was when she (the partner) was taking care of her new-
decisionmaker may be moved by listening to real-life experiences of a sexually harassed woman. But given the competing First Amendment values, a decisionmaker may not, absent a preexisting and overwhelming commitment to feminist goals, be persuaded to employ feminist legal methods.

Even if a decisionmaker has a preexisting commitment to feminist goals, this still may not be enough to convince that decisionmaker to employ feminist legal methods. If decisionmakers are truly committed to feminist concerns and to addressing those concerns with feminist legal methods, they may reject the methods, somewhat ironically, as representing male ways of thinking.

Feminist legal methods represent the "maleness" of traditional legal methods in two ways. First, they exclude "other" points of view. Feminism rejects exclusivity as male, and insists that there is no one feminist theory. Yet some feminists advocate using only feminist methods, or, being even more "exclusive," feminists like Catharine MacKinnon advocate the use of only one feminist method, consciousness-raising. Further, "asking the woman question" and consciousness-raising include only a woman's point of view as repre-
sentative of truth, and exclude all other interested parties’ views. Specifically, the “woman question,” by not asking other questions, excludes the views of others, such as the poor, handicapped, racial minorities, and homosexuals, except to the extent that members of those classes are also women. My point is not that “woman questions” should include these viewpoints, but rather that “asking the woman question” embodies the male exclusiveness of traditional legal methods.

Second, feminist legal methods represent the maleness of traditional legal methods because the methods are grounded in hierarchical thinking. Feminists attack hierarchical thinking as male,69 yet “asking the woman question” elevates women’s issues over those affecting poverty, disability, racism, homophobia, and other public interest matters. Also, feminist practical reasoning, by displacing objectivity and abstraction (methods associated with male thinking) with contextual thinking (methods associated with female thinking),70 elevates women’s ways of thinking over men’s ways of thinking.

Lastly, consciousness-raising privileges experiences of women as “truth” over other groups.71 Because of their inherent exclusionary and hierarchical nature, feminist legal methods operate at cross-purposes with feminist principles of inclusion (over exclusion) and cooperation (over hierarchy). Thus a decisionmaker committed to true feminist values may choose not to employ feminist methods because feminist reasoning reveals them as too “male.”

V. PART FOUR: SUGGESTIONS FOR IMPROVING FEMINIST STRATEGIES IN LAW

Feminists using the law to improve women’s lives have many goals, one of which (for some) is to preserve injunctive relief against, and monetary recovery for, sexual harassment in the workplace. However, in order to achieve this goal, feminists must persuade decisionmakers to disallow the First Amendment as a defense to sexual harassment liability.

An underlying question explored throughout this Article is whether feminist legal methods effectively persuade decisionmakers.

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69. See, e.g., West, supra note 1.
70. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).
71. As Judith Grant put it: “it is unclear why the experiences of ‘women’ would count more heavily than those of any group as being ‘true’ measures of reality.” JUDITH GRANT, FUNDAMENTAL FEMINISM 43 (1993). See also Owen M. Fiss, The Law Regained, 74 CORNELL L. REV. 245, 253 (1989) (“No persuasive argument has ever been offered to explain why consciousness-raising is the only method for discovering the truth . . . .”).
As demonstrated above, feminist legal methods may not be a sound mode of argument because the methods do not distinguish bad bias from good bias. In addition, feminist legal methods may not convince many decisionmakers to employ them. Thus, and as more thoroughly discussed below, feminists should not rely on the belief that they must ground their arguments, or part of their arguments, in feminist legal methods. Instead, feminists should employ reasoning that resonates with the decisionmakers. In this way, feminist arguments would be grounded in terms familiar and understandable to decisionmakers, and thus be more persuasive.

1. Feminists Should Abandon the Belief that Feminist Goals in Law Must Be Obtained Exclusively Through Feminist Methods

Although feminists aim to fulfill feminist goals in law, it does not follow that feminist strategies must flow from feminist methods. At the time feminists first pronounced their critiques of law, it made sense to emphasize feminist methods as symbolic of and as a means to enunciate feminist goals. This rationale is now less important. Feminists have clearly set forth their critique of the law. Thus, feminists can, when appropriate, move away from feminist legal methods and achieve feminist goals without always using feminist methods.

I am cognizant of the argument that to abandon feminist legal methods and use traditional reasoning is to validate the evils flowing therefrom.72 This argument must, however, be evaluated in light of the reality that feminists who rely solely on feminist legal methods do so at the risk of utterly failing to persuade certain decisionmakers.

2. Feminists Should Employ Reasoning that Resonates with Decisionmakers

Feminists should develop arguments against the First Amendment defense based on First Amendment and sexual harassment reasoning and precedent amenable to the Supreme Court as it is currently composed. Because the Court has not explicitly decided whether the regulation of sexual harassment should be scrutinized as conduct, content-based regulation, or content-neutral regulation,73 feminists have many viable theories of permissible regulation upon which to base their arguments. Sarah Burns has already begun work in this area by suggesting alternative theories upon which to regulate speech underlying sexual harassment claims. For example, Burns argues that verbal, visual, or symbolic conduct serving as the basis for hostile environment claims is workplace conduct rather than speech thus

72. See supra note 5 and accompanying text.
73. See supra note 11.
eliminating First Amendment inquiry altogether. Alternatively, Burns and others argue that even if the regulation of speech underlying sexual harassment is content-based (thereby implicating the First Amendment), then the infringement on sexually hostile workplace speech is constitutional because eliminating employment discrimination should be a compelling governmental interest.

Feminists may also base arguments against a potential First Amendment defense to sexual harassment liability on the First Amendment precedent of content-neutral speech regulation. One theory underlying permissible content-neutral regulation that may be explored by feminists is the secondary-effects doctrine. Pursuant to this doctrine, as explained by the Supreme Court in City of Renton v. Playtime Theatres, Inc., speech like pornography in adult theatres may be regulated if the regulation is targeted at the secondary effects of pornography, i.e., its harmful effects, and not at the content of the speech. Similarly, relying on the precedent of City of Renton, regulation of sexually harassing speech may be permissible if the regulation targets the secondary effects of such speech—the emotional and psychological harm it causes women.

Lastly, feminists may argue, as have other commentators and scholars, that regulation of sexual harassment is permissible under the captive audience doctrine. Pursuant to this doctrine, the govern-

74. See Burns, supra note 34, at 413.
75. See Burns, supra note 34, at 415; Fentonmiller, supra note 61; Sangree, supra note 34, at 531; Kent, supra note 49, at 532-35 (arguing by implication that the harmful effects of sexual harassment on women denies women equal employment opportunity, and that preventing discrimination in the workplace is a compelling governmental interest).
76. Recall that the court in Wisconsin v. Mitchell unanimously hinted in dicta that prohibiting sexual speech at work is permissible content-neutral regulation under the First Amendment. See supra note 11.
78. See MacKinnon, Feminism Unmodified, supra note 30, at 103; MacKinnon, supra note 49. For further discussion exploring the harmful effects of sexual harassment against women, see Jane L. Dolkart, Hostile Environment Harassment: Equality, Objectivity and the Shaping of Legal Standards, 43 Emory L.J. 151 (1994).
79. See, e.g., J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 422; Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813 (1991); Karner, supra note 41 at 678-91; Cathleen Marie Mogan, Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating it Too, 6 Notre Dame J. L. Ethics & Pub. Pol'y 543, 573 (1992); Strauss, supra note 41, at 49 (Although setting forth circumstances in which sexist speech in the workplace should be protected, she also argues that "sexist speech [in the workplace] can be regulated . . . if the offended listener constitutes a captive audience.")
ment may proscribe speech directed at a captive audience.\textsuperscript{80} Feminists may argue that female employees at work are a captive audience,\textsuperscript{81} and thus regulation of sexually harassing speech aimed at them is permissible.

Because any one of the above arguments may, without the use of feminist legal methods, persuade the current Court to deny a First Amendment defense to sexual harassment, it would be foolish not to employ them as either supplemental to or alternatives to feminist legal methods.

\section*{VI. CONCLUSION}

Feminist methods in law are crucial to the success of feminist goals in law. However, the feminist goal of defeating a First Amendment defense to sexual harassment liability will remain unattainable if methods used by feminists are not persuasive enough to compel a decision favoring the status quo of sexual harassment liability. This Article has argued that feminist legal methods alone are not enough to persuade decisionmakers to care about the impact on women of a successful First Amendment defense to sexual harassment.

"Asking the woman question" demands application of legal rules that do not perpetuate women's subordination.\textsuperscript{82} Feminist practical reasoning insists that decisionmakers no longer mask political and social considerations.\textsuperscript{83} Consciousness-raising informs the law if it has "gotten it wrong" concerning women's experiences.\textsuperscript{84} It is empowering for feminists to describe feminist legal methods this way. But, as feminists are well aware, reality is what is important. This Article seeks to discover what real results feminist legal methods can achieve. For feminists, feminist legal methods represent their agenda, and that is perhaps persuasive enough to keep feminists working together toward common goals.\textsuperscript{85} But for nonfeminists, the audience to which feminists should be speaking, feminist legal methods and their symbolic

\textsuperscript{82} See supra note 16 and accompanying text.
\textsuperscript{83} See supra notes 24-26 and accompanying text.
\textsuperscript{84} See generally supra notes 23-24 and accompanying text.
\textsuperscript{85} William N. Eskridge makes a similar point: "Many narrative scholars emphasize that the consciousness-raising feminist methodology serves as the inspiration for their scholarship." William N. Eskridge, Jr., Gaylegal Narratives, 46 STAN. L. REV. 607, 608-09 n.5 (1994) (using Kathryn Abrams and Toni Massaro as examples to support his statement).
significance are not talismanic. Decisionmakers will more likely be persuaded by reasoning that is familiar to them than by narratives filled with emotive content, but lacking universal and convincing appeal.

Although this Article urges continued evaluation of feminist legal methods in relation to their capacity to fulfill feminist goals, it also attempts to provide recommendations for improving feminist strategies in law. Feminists ought to invoke a variety of methods in an effort to obtain their goals. This approach means using feminist legal methods where appropriate—with decisionmakers who have a preexisting commitment to feminist goals in law. It does not mean, however, relying exclusively on feminist legal methods. Clearly, feminist legal methods can show that the law treats women as if they “don’t matter,” but they cannot demonstrate that women “should matter.” Given this weakness, feminists must look beyond feminist legal methods for strategies to fulfill feminist goals in law.