
4-15-1993

Images of Men in Feminist Legal Theory

Brian Bendig

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Jurisprudence Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), [Legal History Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Brian Bendig *Images of Men in Feminist Legal Theory*, 20 Pepp. L. Rev. Iss. 3 (1993)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol20/iss3/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Images of Men in Feminist Legal Theory

Brian Bendig*

I. INTRODUCTION

"Few discoveries are more irritating than those which expose the pedigree of ideas."

—Lord Acton

This essay displays the importance of images of men, male, and masculine in feminist legal theory. As a group, the feminist jurists discussed herein use such images in two different ways. In some texts, the images or depictions are deployed to help generate the plausibility and strength of the articles' main themes. In other texts, the images are actually formative of the main themes, even to the degree of comprising them. My term for these significant feminist data on men, male, and masculine is "andric imagery."

This essay is not a catalogue of references to men in feminist legal theory, nor does it elaborate on the prosaic idea that a gender-focused jurisprudence incorporates representations of the genders. Rather, the essay shows that andric imagery is an important resource in feminist legal theory by demonstrating the crucial roles played by such images in feminist jurisprudential texts. It displays the yield from a persistent focus on feminist jurists' images of what men are and what male and masculine mean. The paper discusses selections from the work of such theorists as Marie Ashe, Robin West, Catharine MacKinnon, Fran Olsen, Kenneth Karst, and Suzanna Sherry.

II. MARIE ASHE

As a major theme of her work, Marie Ashe argues that birth mothers have the greatest claim to decision-making authority in childbearing. This theme is built upon two andric images in her writings: (1) negative imag-

* Associate, Jenner & Block, Chicago, Illinois. J.D. cum laude, Harvard Law School (1992). I wish to thank Duncan Kennedy and Andrew Jacobs, who provided helpful and insightful comments on earlier versions of this paper.

ery of a male medico-legal discourse and (2) an image of men as bodies outside the possibility of sharing authority in childbearing. The discussion below features three articles by Ashe: *Law-Language of Maternity: Discourse Holding Nature in Contempt*,¹ *Conversation and Abortion: A Review of Abortion and Divorce in Western Law by Mary Ann Glendon*,² and *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*.³

A. *The Image of Male Medico-Legality*

Ashe's writings on maternity contain a crucial andric image. This image—a male medico-legal discourse that is distinct from women's knowledge and practices of maternity—is central to her argument that birth mothers have the greatest claim to authority regarding all aspects of reproduction.

Ashe views law and medicine as a discourse-practices complex. She sometimes melds and hyphenates them:

The "ordinary" medico-legal regulations of pregnancy and birthing (restricting time, place and manner of conducting pregnancy and of giving birth) are so pervasive that we often fail to recognize them as in fact regulations—particular cultural variants, perhaps, of a general and universal regulation of female sexuality and female personhood.⁴

She also refers to law and medicine as distinct, but functionally related. For example, she states: "[E]ven when law has recognized some limited freedom of choice and action for women, relating to the most intimate of bodily functions, it has circumscribed that choice by giving great weight to medical experts' participation in the reproductive decision of the pregnant woman."⁵

1. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988).

2. Marie Ashe, *Conversation and Abortion: A Review of Abortion and Divorce in Western Law by Mary Ann Glendon*, 82 NW. U. L. REV. 387 (1987).

3. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on Reproduction and the Law*, 13 NOVA L. REV. 355 (1989).

4. Ashe, *supra* note 3, at 371 (footnote omitted).

5. Ashe, *supra* note 1, at 542. The following quotations provide a further sample of Ashe's melding of "law" and "medicine" in a discourse-practices complex:

The pressures against birthing at home, in the sites where our mothers and grandmothers birthed, are enormous. Friends and family so take for granted the definitions of pregnancy and birthing articulated by medicine and enforced by law that they are unable to understand the choice of home-birth except as a kind of recklessness . . . [O]peration of law demonstrates the legal buttressing of the strictest forms of medical regulation. It precludes women's defining the degree to which we will treat our pregnancies and birthings as medical constructs.

The goal here is to demonstrate Ashe's ascription of maleness to the medico-legal discourse. First, her disassociation of the medico-legal discourse from women is discussed. Second, Ashe's conceptualization of the medico-legal discourse as male is displayed.

1. The Disjunction of Women and the Medico-Legal Discourse

According to Ashe, law and medicine are antithetical to the speech of women's bodies. For example, "the body language' characteristic of women's writing cannot easily be transposed into a public discourse in which the ostensibly neutral terminologies of science and medicine prevail."⁶ This also applies to law because, "[c]ommitted to categorization, law is intolerant of porous boundaries (placentas?)."⁷

The medico-legal discourse is harmful as well as alien. Medico-legal concepts and practices constitute deleterious authority: "In what are particularly shocking cases emphasizing the medical model of separability and the adversarial status of mother and fetus, courts have ordered the most violent technological intrusions into female bodies—Caesarian sections—in the name of fetal protection in contradiction of the mother's judgment against such surgery."⁸ Ashe explicitly locates this harm in the alien discourse: "These cases . . . perpetrate a violence to the personhoods of all women—mothers and non-mothers—by reliance on a discourse infinitely removed from and greatly at odds with the accounts that women might give of our own encounters with the potentialities and actualities of pregnancy and childbirth."⁹

Lastly, harm is specifically conjoined with the opposition of the external discourse and birthing women's self-accounts rooted in nature. Addressing women, she bemoans the fact that "[r]egulation and definition

Ashe, *supra* note 3, at 365. "The infusion of medical metaphor into law-language has been apparent in the law's treatment of many issues involving pregnancy and childbirth." Ashe, *supra* note 1, at 541.

6. Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1151 (1987).

7. Ashe, *supra* note 3, at 366. Any overlap between the discourses is fortuitous: "While [the medical] model may correspond to some primary experiences of pregnancy—most typically to experiences of undesired pregnancy or to the experiences of ambivalence which occur in the course of desired pregnancy—it by no means fully defines female experience." Ashe, *supra* note 1, at 540.

8. Ashe, *supra* note 1, at 542 (footnote omitted).

9. *Id.* at 543 (footnote omitted).

have always already assessed our work and our nature."¹⁰ In the area of surrogacy, "the uncertain constructs of man-made law" should not be substituted for birth mothers' knowledge based on "the seamless bonds of nature."¹¹ Harm results from medico-legal interference with a natural sphere that is beyond the language of law or medicine. Ashe defines this sphere as follows:

The identity of the mother and child is pre-verbal: the child will have no words for it, and the words of the mother will always be tentative, inadequate That fusion or identity can be said to constitute a prolonged embodiment of a kind of immediate, trans-verbal knowledge, an experience that is definitionally unspeakable for the reason that it lies outside of, or escapes from, the boundaries of language Writers have noted that women speaking of their maternity experiences are able to define and describe their negative experiences, but that they seem unable to elaborate or articulate fully what was "wonderful." The reason for this silence likely resides in the impossibility of expressing a pre-verbal, pre-cultural, natural, prenatal bond.¹²

2. The Maleness of the Medico-Legal Discourse

Beyond disassociating the discourse from women, Ashe identifies the medico-legal discourse with men. First, men are its originators and servitors. They are the agents of their discourse. Second, the discourse is the speech of men's bodies. Ashe actually gives it a male anatomy; she renders it "andromorphically." The discourse would seem to be the speech of the wrong bodies, according to Ashe.

Ashe continually associates men with the discourse. For example, they are the source of its harm: "It has seemed to me that the major attributes of legal discourse concerning women and mothers are these: it originates in men; it defines women with certainty; it attempts to mask the operations of power; it silences other discourse."¹³ The discourse does more than originate in men; it takes the form of scripture, with men as a technics-serving clergy:

10. Ashe, *supra* note 3, at 357.

11. Ashe, *supra* note 1, at 559.

12. Ashe, *supra* note 1, at 551 (footnote omitted). As another example:

If, for medicine, the female body is a machine, it is for all women (and perhaps for all people, in our deepest experience) the locus of nature, the site of powerful, undifferentiated or contradictory forces which underlie culture. As culture defines itself against nature, female self-naming entails a confrontation with the operation of nature through the female body.

Id. at 544 (footnote omitted).

13. Ashe, *supra* note 3, at 358 (footnote omitted). The origin of the male discourse is phrased differently in the following quotation: "The current public discourse regarding [menstruation, pregnancy, abortion, childbirth, lactation, and the suffering of rape] has been dominated by male perspectives and male definitions." Ashe, *supra* note 2, at 387.

There was a time when the shedding of women's blood—in childbirth, in menstruation, and, it may be, in abortion—was accompanied by elaborate ritual. Such ritual constructed and expressed the experience of the sacred generally attached to the open shedding of blood. The medicalization of abortion—like that of childbirth and pregnancy—has set women at a distance from the blood ceremonies of our bodies, placing us at the mercy of a technological priesthood that denies the sacred, detaching us from the physicality and the cultural implications of violence and bloodshed. We have become the victims, and not the agents, of bloodshed.¹⁴

Medicine and law have combined to legitimate a male-staffed regime that has usurped the rightful rule of the mother. Ashe traces women's loss of control over birthing to the invention of tools to be inserted into the vagina and the ascendancy of the inventor/users of those tools:

Historians generally locate the emergence of medical control over birth in the invention of the forceps and the ascendancy of forceps-users in the sixteenth century. That invention and usage marked a departure from female control of birth and a movement placing its control in the hands of male "medical experts."¹⁵

This regime is a coordinated, closed system—a discourse-practices complex that holds nature in contempt by denying and intruding upon it: "The practice has been defined as one emphasizing ever-increasing applications of machinery and technology to the female body. And medical theory—its discourse—has been defined as giving an account of the female body itself in mechanical terms."¹⁶

Having established and legitimated itself, medico-legality relies on the andric minions of medicalized birth to work its destructive power.¹⁷ Ashe uses male doctors to anecdotally represent sinister discursive imperatives. In strong contrast to the care and empathy of a midwife, a male doctor effects medicine's dehumanization of the maternal body,

14. Ashe, *supra* note 3, at 377.

15. Ashe, *supra* note 1, at 538 (footnote omitted).

16. *Id.*

17. Ashe feels that women can abjure victimhood and reclaim agency only by circumventing medico-legality, as is clear from her descriptions of her homebirthings:

Each birth was attended by a friend who had herself birthed at home. Each was without formal medical training. They extended care which I had never received in a hospital . . . Each of them was extremely intelligent, very well-informed, caring, and understanding of women's needs for dignity and respect. The births were unqualifiedly joyous occasions.

Ashe, *supra* note 3, at 365. "Encouraged by a plurality of female voices; kindness of hands that touched when I needed touching, that otherwise left me alone; understanding and courage communicated through eyes familiar with the extremities of birthing." *Id.* at 370.

referring to the flesh surrounding the birth canal as “a sterile area.”¹⁸ After an illegal home birth, Ashe describes an encounter with her male pediatrician: “The pediatrician came out to see [the newborn]. He looks great, he said. I don’t want to pry at all, he said, but I wonder who was with you during the birth? I know your husband was there. But was someone else with you? I gave him no names.”¹⁹

Ashe also identifies men with the medico-legal discourse through her “andromorphic” description of the discourse. Various components of the discourse are rendered as analogies from male-specific physicality. For example, she views medico-legality’s concept of the division between gestating mother and fetus as discursive borrowing from male reproductive biology: “The emphases on separability and discontinuity [in medico-legality] operate to obscure precisely those features of female reproduction which differentiate its process most clearly from that of the male reproductive experience.”²⁰

Medico-legality is also rendered as an abstraction from certain male bodies. For example, law is analogized to the penis of the rapist: “Law reaches every silent space. It invades the secrecy of women’s wombs. It breaks every silence, uttering itself. Law-language, juris-diction. It defines. It commands. It forces.”²¹

In one series of passages that links rape to the interaction between discourse and practice in medico-legality, Ashe describes the post-birth removal of her placenta by a doctor in a clinic:

I push his hand away. He is pressing something steel inside me. Please stop, I beg him. He doesn’t answer. He drives the steel object in more deeply. His face is covered like hers. Then he speaks: we have to do this. I beg him to stop.²²

She continues her description of this ordeal, repeating the doctor’s explanation of medical justification:

Someone is speaking. There is no woman here. There are no women in here. That one behind the mask is not like you. I hear horrible laughter. I push the mask away and I scream . . . And they stop. He pulls out his tools and drops them onto the counter. They clang . . . He slips the mask down . . . WE HAD TO DO IT, HE SAYS.²³

She concludes by giving the experience a resonant name: “[A] friend came by . . . I told her my story. He raped you, she said. I hated those

18. *Id.* at 360. Ashe describes her own powerlessness during a hospital birth under the command of a male forceps-user: “Damn it,’ he said, ‘she’s not pushing hard enough. Get me a forceps.’” *Id.*

19. *Id.* at 367.

20. Ashe, *supra* note 1, at 541.

21. Ashe, *supra* note 3, at 355.

22. *Id.* at 368.

23. *Id.* at 369 (emphasis added).

words. I did not want to hear them. Or to say them. But they were true. He raped me."²⁴

B. *The Image of Men as Nonauthoritative Bodies*

Unsurprisingly, Ashe argues that women's voices need to be heard in the public debate surrounding issues of maternity.²⁵ As is apparent from the discussion thus far, Ashe goes further, asserting the salutary primacy women should have in decision-making over childbearing. This brief section will demonstrate that Ashe also builds this claim to women's desirable trumping role in reproduction on a notion of bodily-based authority, which gathers considerable force from an andric image located in Ashe's writings on maternity: an image of men as bodies who do not have women's bodily-based authority.

1. The Authority of Women and the Body Image of Men

Ashe asserts that, ultimately, women should be the sole authorities over birthing, alone in private spheres: "I want a law that will let us be—women. That, recognizing the violence inherent in every regulation of female 'reproduction,' defines an area of non-regulation, within which we will make, each of us, our own 'mortal decisions.'"²⁶

For Ashe, women's authority within the issues of childbearing is centered on the knowledge derived from experiences rooted in their bodies. In other words, women have a body-derived phenomenology of authority. For example, birth mothers' body experiences are the trump in surrogacy disputes: "[T]he singular bodily contribution of 'gestation' and the effect of that gestation upon her personhood, establishes the absolute primacy of the birthing mother's claim to a continuous relationship with the child of her body."²⁷

24. *Id.* at 370.

25. On at least one issue, they need to be heard exclusively: "On the issue of abortion, I urge that, at this time in our history, it is essential that women speak—to ourselves and of ourselves—and that men should, for the time being, listen very carefully and say very little." Ashe, *supra* note 2, at 400-01.

26. Ashe, *supra* note 3, at 383.

27. Ashe, *supra* note 1, at 546-47. The following quotations show the body-locus of women's uttered truths in Ashe's writings:

The self-accounts of mothers and of all women—pregnant, birthing, aborting, suffering violations or growing in power—constitute utterances closer to the reality of women's experiences than does any formulation of law and medi-

Unstated, but glaringly obvious, is a concomitant image of men as lacking this knowledge and authority because no man has a maternal body.²⁸ Ashe considers some women to have more authority than others. For example, in surrogacy disputes, the birth mother should have primacy over the egg donor.²⁹ A logical corollary of her claim to a body-phenomenology of reproductive authority for women who achieve gestation is the notion that all men are merely bodies that do not develop this authority.³⁰

The claim here is that, despite her careful effort to locate the case for women's decision-making primacy in the female bodily experience of childbearing, Ashe also implicitly locates it in an andric image. Her texts portray men as male bodies that do not share authority over reproduction by locating the source of this authority in the maternal body. Her construct of authority as body-derived is neither logically nor representationally complete apart from this image. Her andric image is the mirror-reflective *doppelgänger* of her body-phenomenology of maternal authority.

The few passages in her work that generalize about male parenting echo this image. Thus, "after the act of 'sperm donation,' however accomplished, [men] experience neither the continuous bodily process constituting the development of a human child nor the bodily identity with that child."³¹ Also, men, unlike women, do not seem to relate to their bodies in important ways at all: "[O]ur public policy must move beyond its ordinary frame of reference to an understanding of the nature of the bodily experiences and related self-definitions that constitute, FOR WOMEN, our personhoods."³²

ciné. While our generalizations and extrapolations from those experiences may be in conflict, when we attend to one another we discover truths that, rising out of our natural and acculturated bodies, do not conflict.

Ashe, *supra* note 3, at 382. Ashe contends that "[t]he task, then, of women-mothers and of women-non-mothers oppressed by law becomes that of speaking clearly of the experiences grounded in our own bodies." Ashe, *supra* note 1, at 544. Finally, Ashe posits that "[t]he gift of feminism to structuralism, already apparent in Kristeva's work, is the gift of voices asserting the truth-claims of female bodies." Ashe, *supra* note 6, at 1172.

28. This theme is rendered as a set of experiences in the following quotation: "There is a set of experiences that is unique to women because the female body is its site. That set includes menstruation, pregnancy, abortion, childbirth, lactation, and the suffering of rape." Ashe, *supra* note 2, at 387.

29. Ashe, *supra* note 1, at 547.

30. Ashe could be described as imaging non-birthing women as their bodies. This is consistent with her constructs of birthing women and men. *See id.*

31. Ashe, *supra* note 1, at 541.

32. *Id.* at 556 (emphasis added).

C. Conclusion

Ashe has based her account of authority in birthing on andric imagery. However, Ashe's main andric image—her elaborate construct of a male medico-legal discourse—is rich, unlike her second, derivative image of men as inhabiting bodies that do not develop reproductive authority. Still, the relationship between andric imagery and Ashe's theme of women's reproductive primacy is readily apparent in both parts of her argument. Her andric imagery is rich when she is on the attack, critiquing "male" knowledge, institutions, and practices. When directly valorizing birth mothers, her andric imagery is oblique, and almost silent.

Two problems attend Ashe's male discourse image. First, her ascription of maleness to medico-legality textually relies on a metaphorical opposition in which men are aligned with artificiality (discourse and its literal tools) and women with nature. This seems to define the non-woman human as out of "nature."

Second, to the extent that Ashe renders the discourse as analogous to certain elements of "maleness," her critique falls into what might be termed the anthropomorphic fallacy. Ashe's "andromorphism" is subject to the charge that is levelled at anthropomorphic constructs in general: they project unexamined assumptions of what is human into non-human spheres. The fallacy lies in basing a definition of something non-human on such unexplored assumptions. Ashe, for her part, has projected her own assumptions about the non-woman human onto the medico-legal discourse. These assumptions, moreover, are not explained or acknowledged. She merely asserts them without comment or qualification.

Briefly, there are several problems with the second image, her representation of men as inhabiting bodies that do not share authority over reproduction. First, her body-being construct is unverifiable, if not oversimplistic. Ashe does not trace the path from body to identity; her thesis is *ipse dixit*. Second, she commonalizes and stereotypes. Her thesis of birth mothers' authority follows from her sole grant of unassailable reproductive knowledge to all birth mothers.

Third, her privileging of birth mothers in the entire range of choosers surrounding human reproduction may rest on a selective, aureate vision of birth mothers. For example, the nonauthoritative-body image of men exists in contrast to Ashe's profoundly positive view of gestational motherhood. The following passage demonstrates her grandly affirmative view of the meaning of birth mothers:

Any abrupt or premature rupture of the connection to the maternal body must constitute for the child a non-gentle second bodily birth; an occasion of suffering; a particular wound. While the child experiencing that rupture may be offered, and may accept, alternative nurturance, comfort and sustenance, he will still have lost an irreplaceable relationship. There is a singular and indefensible deprivation involved in removing the child from occasions of infantile pleasure, in denying him the consolation he might later experience in remembrance of that pleasure.³³

One suspects that Ashe's views of birth mothers' identities and authority might also rest very heavily on extrapolation from her own experiences. In the words of Joan Williams: "[Ashe] has chosen to make the experiences of pregnancy and birthing central to her adult identity (not only has she experienced eight pregnancies, she also writes extensively about maternity)."³⁴

III. KENNETH KARST

Not everyone would call Kenneth Karst a "feminist theorist." Karst himself has disclaimed such status. For example, when setting out to inquire into the transformative constitutional possibilities of women's greater participation in American lawmaking, he wrote: "The inquiry . . . is not a search for a model constitution, for a society organized around the network of connection, . . . a project on that order is one for a feminist theorist."³⁵

It is clear, however, that some of Karst's pieces heavily feature the theme of examining and ending women's subordination. Further, these themes are grounded in andric images embedded in these texts. Karst, if not a full-fledged feminist jurist, is at least a legal theorist whose work, in part, confronts women's subordination and incorporates foundational andric images.³⁶

As is obvious from its title, andric imagery forms the thematics of his recent article, *The Pursuit of Manhood and the Desegregation of the Armed Forces*.³⁷ Karst's thesis is that certain military policies, such as the exclusion of women from combat, are the result of segregationist

33. *Id.* at 553 (citing J. KRISTEVA, *TALES OF LOVE* 235, 248-53 (L. Roudiez trans., 1987)).

34. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 322 n.122.

35. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480.

36. Karst's disclaimer implicates key questions present in contemporary feminism, such as (1) what is a feminist? and (2) who can be a feminist?

37. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499 (1991).

concerns furthered by "the pursuit of manhood."³⁸ A full analysis of *The Pursuit of Manhood and the Desegregation of the Armed Forces* is not included in this essay because its formative andric imagery is acknowledged—even trumpeted—as such.³⁹ The article is a *rara avis*, a jurisprudential text that explicitly recognizes its foundational andric imagery.

This section will concentrate on another of Karst's articles, *Woman's Constitution*.⁴⁰ The theme advanced in this article, that of a possible or plausible "woman's constitution," derives from a complex, ulterior, and general andric image. The foundational andric image in *Woman's Constitution* has to be collected from several places in the text before it becomes coherent and clear.

A. *Andric Imagery Supporting a "Woman's Constitution"*

Karst's main theme in *Woman's Constitution* is exploring an answer to the following general question: "What might be the consequences if our constitutional law itself were reconstructed to add a healthy measure of the morality and world view characteristic of our society's female half?"⁴¹ Karst's answer is that there would indeed be nontrivial consequences. This answer is undergirded by textual passages that constitute an elaboration of Karst's own honest admission at the outset that he "assumes that there are differences in the ways in which women and men tend to see the world."⁴²

Given his candid avowal of basic gender differences, it is unsurprising that a bifurcated scheme of gendered traits is present throughout Karst's discussion of the gender-based transformability of our constitutional ethos. However, Karst's focus is on women; much of his article is a Gilliganesque discussion of women's separate moral sphere.⁴³ His

38. *Id.* at 500.

39. See *id.* at 502-10, 523-45. Karst's article is a collection of characterizations of men, male, and masculinity. The main, shepherding image is of male group wall-building in the service of the anxieties brought on by "the pursuit of manhood." See, e.g., *id.* at 503-04. A few lines from Bertolt Brecht's satire of military masculinity, *A Man's a Man*, summarize this image:

The keynote now is relativity.
And left is right, and right is mostly wrong.
When he's a she, what will become of me?

40. Karst, *supra* note 35, at 447.

41. *Id.* at 449.

42. *Id.* at 480.

43. Karst terms Carol Gilligan's *In a Different Voice: Psychological Theory and*

Gilliganian image of women is a main structural element of *Woman's Constitution*. The purpose here is to briefly display the emphasis he also places on a disaggregated generalization of men, a structural element that is much less obvious from Karst's comments on his own text.

In *Woman's Constitution*, Karst's image of men is of their consciousness-bounded self-dealing. Men are portrayed as crucially oblivious, with an onanism rooted in male epistemics. For example, male-dominated legislatures are described as follows:

When a male-dominated legislature considers an issue that touches the interests of women—abortion, for example—it would be extraordinary if the legislators were to think consciously about the origins of their own personal definitions of woman, and to find the ability to exclude those definitions from the process of legislative decision-making. . . . The point is that a group of men, in deciding issues that define women's roles, cannot help being influenced by the traditional construct of woman.⁴⁴

This male obliviousness is explicitly paired with self-dealing:

Citizenship is a form of power, including the power to influence matters that are personal. The point can be illustrated by a short flight of fancy. Suppose that men—men as we know them, with their present political dominance and with their attitudes toward interpersonal relationships—were, by some miracle, transformed so that they, rather than women, were the ones who became pregnant and bore children. Can anyone doubt that "abortions on demand" would be the governing rule of law?⁴⁵

Male epistemology—chiefly the idea of autonomy—is implicated in closely-bounded consciousness. For example:

Women's Development an "especially valuable work" within the literature exploring women's "difference." *Id.* at 481 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)). Karst acknowledges that Gilligan's "interpretation has the ring of truth." *Id.*

44. Karst, *supra* note 35, at 468. Karst has offered this image in the judicial context as well, when discussing the pre-O'Connor Supreme Court:

[T]he constitutional sport of *Geduldig v. Aiello*, 417 U.S. 484 (1974), and last Term's even sillier statutory counterpart, *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), with their Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon, are good candidates for early retirement. These decisions are textbook examples of the effects of underrepresentation on "legislative" insensitivity. Imagine what the presence of even one woman Justice would have meant to the Court's conferences.

Kenneth L. Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 n.304 (1977).

He has also offered this image as applicable in general: "Women know that, in general, men tend to be blind to the realities of women's lives. Not just the lives of women of other racial or ethnic groups, but the daily lives of the women closest to them, are all but invisible to most men." Kenneth L. Karst, *Judging and Belonging*, 61 SO. CAL. L. REV. 1957, 1959 (1988).

45. Karst, *supra* note 35, at 472.

Many women appear to see individual autonomy as threatening not only their security in the web of relationships, but also their very sense of self. One who sees herself as continuous with the environment, including the human environment, may believe that she will have to give up her affiliations in order to be an autonomous person. Part of the problem is that a woman is apt to see autonomy in conflict with other goals that she values, such as compassion. Most fundamentally of all, she is apt to find the quest for autonomy illusory.⁴⁶

The following quotation divides the genders without qualification and indicates that women's self-definition precludes both narrow consciousness and naked self-dealing: "Men, finding identity in separation, tend to equate adulthood with autonomy and individual achievement; women, defining themselves as continuous with others, tend to equate maturity with responsibility and care."⁴⁷

B. Conclusion

This image of selfish, consciousness-bounded men, of a social category with an ethos different from that of women, is necessary to the very possibility of a "woman's constitution." It forms a key element of the notion that our constitutional regime would be affected by "add[ing] a healthy measure of the morality and world view characteristic of our society's female half."⁴⁸

Obviously, "society's female half" cannot be defined without reference to how the other half allegedly lives, either by implication or by explicit oppositional construct. Gilligan herself employs this "define against" method over and over.⁴⁹ Karst never acknowledges that his postulated male epistemics-ethos forms an image that helps make the current (male-created and male-dominated) constitutional regime appear categorically alien to a woman-inflected constitutional regime.

Karst's text gives no evidence that he realizes the necessity or the presence of a unified andric image that exists alongside his different

46. *Id.* at 479.

47. *Id.* at 483. This is another quotation that universalizes men and connects women with the metaphor of noncircumscribed being—the "web of connection": "No man has had a woman's experience, and most men, having found their identities in separation, will begin by fearing the web of connection. Women themselves may fear the consequences of seriously attempting to offer men new perspectives on something so close to the sense of self." *Id.* at 508.

48. *Id.* at 449. See *supra* note 41 and accompanying text.

49. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (especially Chapters Two and Three).

image of women, his "gynic" image. Karst, in the title of his article and on practically every page, posits a "woman's constitution," but he never directly avows his image of the current constitutional regime as male, or as "man's constitution." He never directly displays the structural underpinning of "man's constitution," a cohesive andric image. This image has to be pulled out of the text. Unlike Karst's image of women, the andric image does not form an obvious, acknowledged element of his argument, even though it serves the function of forming the basis of a constitutional regime's character.

IV. CATHARINE MACKINNON

This section will illustrate the thematic centrality of an unusual, repetitive andric generalization that appears in three articles by Catharine MacKinnon. This image of maleness is an association of male and men with the visual, with viewing and seeing. The visual or "ocular" andric image seems to be located close to the heart of MacKinnon's general ideas about pornography, epistemology, the state, power, and objectification. It may form all of the hard, lucid content of these general ideas. MacKinnon's ocular andric image is as striking as it is important, although the image may be most striking after demonstrating its thematic centrality in several articles.

The three articles which follow will be discussed individually, although there is more than a small amount of content, andric imagery, and thematic overlap between them. They are discussed individually so as to demonstrate the various, specific roles played by the image in each article. The articles are arranged in the following order: *Not A Moral Issue*,⁵⁰ *Pornography, Civil Rights and Speech*,⁵¹ and *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*.⁵²

A. *The Andric Image in the Meaning of Pornography: One*

In *Not A Moral Issue*,⁵⁰ MacKinnon concentrates on defining pornography. As an aspect of this task, she fleshes out the idea that pornography is crucially political. For example, obscenity law is reflective of male morals, "meaning the standpoint of male dominance," while the "feminist critique of pornography is [women's] politics . . . meaning the standpoint

50. Catherine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

51. Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

52. Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635 (1983).

53. MacKinnon, *supra* note 50.

of the subordination of women to men."⁵⁴ More generally, her "text as a whole is intended to communicate what [she] mean[s] by pornography."⁵⁵ The object here will be to delineate the repetitive andric generalization in this communication of meaning.

MacKinnon's essay is loosely structured. First, she delineates a critique of pornography.⁵⁶ She later concentrates on the dehumanization of women by pornography and then contrasts obscenity law with a feminist political attack on pornography.⁵⁷ These sections are highly interrelated. MacKinnon's first section communicates her theory of pornography and introduces her main thematics. The discussion will, therefore, concentrate on this section.⁵⁸

MacKinnon introduces the first section by asserting that "[p]ornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality."⁵⁹ Further, "pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female."⁶⁰

Knowing how pornography relates to or constitutes male supremacy and the contours between male and female, the reader also learns that the external relations and the internal space of pornography are rooted in a particular, peculiar image of men and male. Pornography, as a politically operative force and a conceptual category, is defined as conjoined with an ocular focus in male consciousness: "Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way."⁶¹

54. *Id.* at 322-23 (footnote omitted).

55. *Id.* at 321 n.1.

56. *Id.* at 325-29.

57. *Id.* at 329-45.

58. There are two other reasons for concentrating on this first section. First, because the discussion here focuses on the formative relation of the general andric image to a range of higher-order theoretical claims in several of MacKinnon's texts, it will help to bring out clearly the constancy of this relation to remain directed toward the conceptually gossamer sections of MacKinnon's texts. Second, as will be demonstrated in the discussion of all three articles, MacKinnon's general view of pornography and the underlying general andric image are intimately related to her view of the state, objectification, power, and epistemology.

59. *Id.* at 325.

60. *Id.* at 326 (footnote omitted).

61. *Id.* This ocular focus is featured in MacKinnon's elaboration of men's sexualized

The ocular andric image is significantly placed within MacKinnon's construct of pornographic, pervasively objectified sexual reality:

[Pornography is] the level of reality on which sex itself largely operates The aesthetic of pornography itself, the *way* it provides what those who consume it want, is itself the evidence. When . . . pornography tells all, all means what a distant detached observer would report about who did what to whom. This is the turn-on. Why does OBSERVING SEX objectively presented cause the MALE VIEWER to experience his own sexuality? Because his eroticism is, socially, a WATCHED THING.⁶²

Continuing to deploy the andric image, the next paragraph further outlines the association of objectification with sex by confirming a consequential epistemological slant on these relations:

If objectivity is the epistemological stance of which objectification is the social process, the way a PERCEPTUAL POSTURE is embodied as a social form of power, the most sexually potent depictions . . . *would* be the most objective blow-by-blow representations MEN HAVE SEX WITH THEIR IMAGE OF A WOMAN It is not that life and art imitate each other; in sexuality, they *are* each other.⁶³

Later sections of the article continue to use ocular imagery to describe maleness. For example, "male morality SEES that which maintains its

power over women: "In pornography, women desire dispossession and cruelty. MEN, permitted to put words (and other things) in women's mouths, CREATE SCENES in which women desperately want to be bound, battered, tortured, humiliated, and killed. Or, merely taken and used. This is erotic to the MALE point of VIEW." *Id.* (emphasis added). The ocular tincture of pornography and male is present in other works by MacKinnon. For example, "[P]ornographic meaning [is] that the woman is defined to be acted upon, a sexual object, a sexual thing—the VIEWING is an *act*, an act of MALE supremacy." CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 130 (1987) (emphasis added) [hereinafter MACKINNON, FEMINISM UNMODIFIED].

62. MacKinnon, *supra* note 50, at 328. "Watched thing" does not necessarily extend the ocular image of consciousness and desire beyond men because one can interpret that sentence to mean only that male eroticism is activated by the ocular notion of "watching." MacKinnon seems to locate male erotic consciousness in a sort of deep voyeurism, one that permeates "male sexual thinking" with mental peeping.

63. *Id.* at 328-29 (emphasis added). MacKinnon obviously uses "image" in the visual sense. A passage containing many of the same ideas but somewhat different phraseology appears in *Feminism Unmodified*:

I'm claiming that ["the nonsituated, distanced standpoint"] is the MALE standpoint socially, and I'm going to try to say why. I will argue that the relationship between objectivity as the stance from which the world is known and the world that is apprehended in this way is the relationship of objectification. Objectivity is the epistemological stance of which objectification is the social process, of which MALE dominance is the politics, the acted-out social process. THAT IS, TO LOOK AT THE WORLD OBJECTIVELY is to objectify it. The act of control, of which what I have described is the epistemological level, is itself eroticized under male supremacy.

MACKINNON, FEMINISM UNMODIFIED, *supra* note 61, at 50 (emphasis added).

power as good.⁶⁴ Also, "obscenity is that sex that makes male sexuality LOOK bad."⁶⁵ Finally, "[p]ornography can invent women because it has the power to make its VISION into reality, which then passes, objectively, for truth."⁶⁶

The following final quotation intriguingly suggests the political import of the senses, and the reference to objectification (in light of the above discussion) probably indicates that MacKinnon ascribes special significance to visual sense perceptions: "No critique of dominance or subjection, certainly not of objectification, can be grounded in a vision of reality in which all sense perceptions are just sense perceptions."⁶⁷

B. *The Andric Image in the Meaning of Pornography: Two*

In *Pornography, Civil Rights and Speech*,⁶⁸ published the year after *Not A Moral Issue*, MacKinnon delivers a similar analysis of pornography that employs the same ocular andric imagery. In fact, she sometimes

64. MacKinnon, *supra* note 50, at 331 (emphasis added).

65. *Id.* at 334 (emphasis added).

66. *Id.* at 337 (emphasis added) (footnote omitted). While it appears that MacKinnon is fond of using words like "sees" or "views" to denote "thinks," "regards," "opines," "feels," etc., she consistently employs ocular terms to male perspectival existence and uses ocular terms in her depictions of the coordinated andric structure of sex-epistemology-power, etc.

67. *Id.* at 342. Interestingly, the only other feminist theorist who uses ocular andric imagery is Andrea Dworkin, whom MacKinnon credits at the beginning of *Not A Moral Issue* in the following way: "Many of the ideas in this essay were developed and refined in close collaboration with Andrea Dworkin. It is consequently difficult at times to distinguish the contribution of each of us to a body of work that . . . has been created together." *Id.* at 321 n.1.

The following quotations are a sample of ocular andric imagery in Dworkin's texts. She has associated the penis with the pornographer's camera: "The camera becomes part of the sexual action. The camera is not a substitute for the penis; rather it is if he had two." ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 42 (1981) [hereinafter DWORKIN, *PORNOGRAPHY*]. Another example explicates the viewer connection: "The camera is the penile presence, the viewer is the male who participates in the sexual action, which is not within the photograph but in the perception of it." *Id.* at 46. Dworkin has tied male sexual fear to the anxieties associated with the inability to see: "[In intercourse] his penis is gone—disappeared inside someone else, enveloped, smothered, in the muscled lining of the flesh that HE NEVER SEES . . . can he get out alive? seems a fundamental anxiety that fuels male sexual compulsiveness and the whole discipline of depth psychology." ANDREA DWORKIN, *INTERCOURSE* 64 (1986) (emphasis added) [hereinafter DWORKIN, *INTERCOURSE*].

68. MacKinnon, *supra* note 51, at 1.

uses the identical rhetorical format. For example: "Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be."⁶⁹

Much of *Pornography, Civil Rights and Speech* is a detailed, somewhat lawyerly explanation and defense of the anti-pornography ordinance written by MacKinnon and Andrea Dworkin.⁷⁰ Because this Article seeks to relate the ocular andric image to MacKinnon's general conceptual framework, the overarching ideas animating her political activity,⁷¹ this Article will again discuss only the manifestations of the image and her general conception of the meaning of pornography.

As in *Not A Moral Issue*, MacKinnon constructs a sexuality-epistemology-politics/power structure. This is introduced in both essays by a judicial anecdote which receives longer treatment in *Pornography, Civil Rights and Speech*.⁷²

[I discuss] pornography by connecting epistemology—which I understand to be about theories of knowing—with politics—which I will take to be about theories of power. For instance, when Justice Stewart said of obscenity, "I know it when I see it," that is even more interesting than it is usually taken to be, if viewed as a statement connecting epistemology—what he knows through his way of knowing, IN THIS CASE, SEEING—with the fact that his SEEING determines what obscenity is in terms of what he SEES IT TO BE, because of his position of power.⁷³

Within the confines of this sex-knowing-power structure, pornography looms large, and is itself related to a crucial ocular-object, male-serving reality that has defined the current perceptions of sexuality and gender:

The object world is constructed according to how it looks with respect to its possible uses. Pornography defines women by how we look according to how we can be sexually used. Pornography codes how to look at women, so you know what you can do with one when you see one. Gender is an assignment made visually, both originally and in everyday life. A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself. This is what the feminist concept "sex object" means. In this sense, sex in life is no less mediated than it is in art. One could say that men have sex with *their image* of a woman. It is not that life and art imitate each other; in this sexuality, they *are* each other.⁷⁴

69. *Id.* at 18. See MacKinnon, *supra* note 50, at 326.

70. MacKinnon, *supra* note 51, at 22-68.

71. See *supra* note 58.

72. For the version in *Not A Moral Issue*, see MacKinnon, *supra* note 50, at 325.

73. MacKinnon, *supra* note 51, at 3 (emphasis added) (footnotes omitted). The Stewart quotation comes from *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For an elaboration of the sex-knowing-power structure in *Pornography, Civil Rights and Speech* (which is very similar to that offered in *Not A Moral Issue*), see MacKinnon, *supra* note 51, at 17-20.

74. *Id.* at 19.

This passage is a description of what MacKinnon refers to later as the "pornographic view" of women.⁷⁵ The final three sentences, quoted earlier in their almost identical form from *Not A Moral Issue*,⁷⁶ are the graphic capstone to an exegesis of the centrality of males' ocular consciousness to sexuality and gender.

C. *The Andric Image, Gender, Law, and the State*

In *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*,⁷⁷ MacKinnon offers a general political theory continually featuring the ocular andric generalization. In fact, this essay most revealingly reflects MacKinnon's penchant for this image because she applies it most broadly to various general concepts. This Article will briefly illustrate this claim by reproducing the range of these concepts and their internal andric image.⁷⁸

MacKinnon's basic theme in this essay is best described as "toward a feminist jurisprudence as a means of developing a criticism of The State." As in the two essays discussed previously, she incorporates the ocular andric generalization into her main arguments in several ways.

First, she reproduces the connection between objectified reality/knowing and harmful ocularity: "At least since Plato's cave, visual metaphors for knowing have been central to Western theories of knowledge, the visual sense prioritized as a mode of verification. The relationship between visual appropriation and objectification is now only beginning to be explored."⁷⁹

Second, this crucial ocular image becomes gendered by the cumulative force of repetition. For example, "male dominance . . . is metaphysically nearly perfect. Its point of VIEW is the standard for point-of-viewlessness."⁸⁰ Also, keeping in mind MacKinnon's use of "image" in

75. *Id.* at 60.

76. *See supra* note 63 and accompanying text.

77. MacKinnon, *supra* note 52, at 635.

78. One could perform parallel analyses on similar works, including Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515 (1982) and CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). However, this Article's demonstration of her use of this andric image sufficiently indicates its repeated and versatile central usage in MacKinnon's writings.

79. MacKinnon, *supra* note 52, at 636 n.4.

80. *Id.* at 638-39 (emphasis added).

the sense of "visual" or "pictorial,"⁸¹ "the male point of VIEW is seen as fundamental to the male power to create the world in its own image, the image of its desires."⁸² In addition, "[c]riminal enforcement . . . punishes men for expressing the images of masculinity that mean their identity."⁸³

Third, and more significant, this critical ocular image becomes gendered very explicitly at the levels of the law and the state. In fact, MacKinnon seems to say that the ocular image helps create the gendered character of the law and the state. For example, "law sees and treats women the way men see and treat women."⁸⁴ Also, "the way the male point of view frames an experience is the way it is framed by state policy."⁸⁵ MacKinnon describes the gender of the state as follows: "Formally, the state is male in that objectivity is its norm. Objectivity is liberal legalism's conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality."⁸⁶

D. Conclusion

These articles demonstrate the importance and versatility of the peculiar andric image in MacKinnon's writings. This image embodies a set of representations of men and male as associated with seeing and viewing, with the ocular sense faculty. The image is featured in various texts as the main element of her description of a philosophy of law, the state,

81. See *supra* note 63.

82. MacKinnon, *supra* note 52, at 640 (emphasis added).

83. *Id.* at 643.

84. *Id.* at 644.

85. *Id.* This quote uses the visual metaphor of the painting/picture/photo frame. Andrea Dworkin has used this metaphor in the ocular andric image as well: "[Women] live in the male frame; pinned there." DWORKIN, INTERCOURSE, *supra* note 67, at 113. Dworkin may also be referring more generally to the "male gaze." Shelagh Young discusses the phenomenon of the social "gaze" in *Feminism and the Politics of Power: Whose Gaze is it Anyway?* in THE FEMALE GAZE (L. Gamman et al. eds., 1989).

86. MacKinnon, *supra* note 52, at 644-45. A further quotation from this article provides another example of her ocular genderization of the state (keep in mind the clear association of "see" and "view" in the previously cited quotation, and notice the use of "blind"):

[T]he state will appear most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied.

Id. at 658. Elsewhere, MacKinnon has distilled the image into an ultimately general account of its centrality to male supremacy: "Feminism has revealed nature and society to be mirrors of each other; the male gender looking at itself looking at itself." MacKinnon, *supra* note 51, at 16.

pornography, etc., as well as the relationships between these notions.

Her overall coordinated theory seems somewhat abstract and lacking in intelligible content. The andric image, however, is quite clear and focused. This disjunction is probably because, in these texts, MacKinnon's specific characterization of men and male has to perform too much grand-level conceptual work.⁸⁷ A highly-focused, specialized image of men and male is repeated numerous times as she moves through a matrix of relations between very general and sketchy ideas.

Other problems are implicated with MacKinnon's use of the ocular andric image. Her ocular image is an example of the figure of speech known as metonymy. Metonymy is the term for the replacement of the denotative name of something by "a different name that relates to a quality, attribute or characteristic of a thing."⁸⁸ Thus, MacKinnon has replaced "man" or "male human" with an image of them as not much more than the visual faculty, a physical attribute or characteristic. Furthermore, she uses that metonymic structure to outline the high-level political-philosophical content of some of her jurisprudential texts.

This reduction of males to a sense faculty presents three problems. First, MacKinnon's method of presenting her notion of ocular male involvement in world-construction—the method of repetitive incantation of the metonymic image—remains unconvincing because MacKinnon offers nothing else. The reader must simply accept its veracity. Second, the reduction of males to a single sense faculty seems less likely to implicate them in male supremacy than a construct that would implicate all of their faculties in a selfish enterprise of power maintenance. Third, MacKinnon's metonymic construct is faulty because she starts her reduction using only half of the species. Throughout the relevant portions of these texts, she operates as though only males are so describable.⁸⁹ It is

87. MacKinnon's work is full of important andric imagery; however, this Article discusses only one image. Recall also that this Article is concerned only with her use of a particular andric image to inform her general theoretical claims in several articles.

88. CELESTE CONDIT, *DECODING ABORTION RHETORIC* 227 (1990).

89. Two other rhetorical concepts may assist in explaining the andric image used by MacKinnon in these texts. These concepts may grant more lucidity to MacKinnon's major thematic ideas discussed previously.

First, the concept of "framing" provides assistance. Framing, according to Celeste Condit, embodies the "use of ambiguity and multiple interlocking themes to construct a simple, singular square that limits and controls the meaning of some significant object or event." *Id.* at 226. This Article does not ascribe this motive to MacKinnon, nor does it assert that she incorporates a technical understanding of rhetoric into her jurisprudence; however, MacKinnon's ocular image remains intimately connected with her

literally as if only men have eyes.

V. SUZANNA SHERRY

The discussion here of crucial andric imagery in Suzanna Sherry's work centers on her 1986 article, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*.⁹⁰ Sherry's article provides a detailed assertion of connections between a nascent feminine jurisprudence and classical republican theory. She claims to use these asserted connections or similarities to predict major changes in contemporary American law and jurisprudence.

As a preface to the demonstration of the formative role of andric generalizations in that text, a brief discussion of another article that Sherry published earlier in 1986 is warranted. This article, *The Gender of Judges*,⁹¹ provides a good starting point for an examination of the andric imagery in *Civic Virtue and the Feminine Voice in Constitutional Adjudication*.⁹² First, it candidly presents a commitment to a definite, differential characterization of the genders as the basis of her jurisprudential views.⁹³ Second, it also predicts gender-derived transformations in American law. Third, it is a partial, brief summary of *Civic Virtue*.

In *The Gender of Judges*, Sherry begins by arguing three ways in which female judges differ significantly from male judges. She asserts that "[w]omen judges make a unique contribution to the legal system by their presence, their participation, and their perspective."⁹⁴ She discounts the

vague, major ideas through framing. This renders the formative axis between her andric image and her major themes *bi-directional*. The entire purpose of the argument in the main text is to show how the image forms whatever clear content there is in her interlocking (because of the image) and vast abstractions.

The second helpful concept is "presence." Condit defines presence as "the ability of rhetoric to give more force to particular symbols, acts, agents, etc., or to make them more salient simply by repetition." *Id.* at 228. The term is derived from C. Perelman and L. Olbrechts-Tyteca, *THE NEW RHETORIC*. The argument in the main text demonstrates the sheer repetitive volume of the ocular andric image. This establishes that the salience of the principal ideas may be a function of the image's presence in the Perelman/Olbrechts-Tyteca sense. That is, because the image *is* the hard content of the major concepts, their presence is a function of the image's presence.

90. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

91. Suzanna Sherry, *The Gender of Judges*, 4 LAW AND INEQ. J. 159 (1986).

92. See Sherry, *supra* note 90, at 543.

93. In this sense, it resembles Kenneth Karst's *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499 (1991). See *supra* notes 37-39 and accompanying text (discussing *The Pursuit of Manhood and the Desegregation of the Armed Forces*).

94. Sherry, *supra* note 91, at 159.

future influence of the first two factors because they "may decrease in significance as discrimination wanes."⁹⁵ However, the feminine judicial perspective will survive because it is not a function of temporary female judicial rarity.⁹⁶

Sherry devotes most of her article to discussing this viable feminine perspective. Her view of the current existence and future presence of the feminine perspective within judging and law is explicitly based on andric generalizations. She adopts the view that men regard themselves as independent and autonomous and that they use noncontextuality and abstraction in resolving interpersonal disputes.⁹⁷ Further, her research indicates that women have a self-conception that emphasizes connection and, thus, resolve disputes by emphasizing context and not abstract rules.⁹⁸

This Gilliganian picture is the basis for Sherry's subsequent discussion in *Civic Virtue* and her conclusions about the future of a new and feminine perspective in law.⁹⁹ Having stated the above gender associations, Sherry proceeds to a broad, gender-based description of American politics and law.¹⁰⁰ She describes our current regime as wedded to abstraction and oblivious to context.¹⁰¹ According to Sherry, American political theory has abstracted us into rights-bearers.¹⁰² This penchant for abstraction requires a values-agnostic, "pluralist political structure" because our rights-based political system cannot express "official preference for specific values."¹⁰³

However, a "feminine society . . . makes decisions based on what is

95. *Id.*

96. *Id.* Sherry defines the feminine perspective as follows:

By the "feminine perspective," I do not mean the political agenda associated with feminism, but rather a distinctly feminine way of looking at the world. A feminist perspective is an ideology that encompasses the belief that men and women should have equal roles in society, but does not necessarily reach other aspects of the social or political structure. A feminine perspective, on the other hand, encompasses all aspects of society, whether or not they affect men and women differently.

Id. at 160.

97. *Id.* at 163.

98. *Id.*

99. See Sherry, *supra* note 90, at 584-87.

100. *Id.* at 545-47.

101. *Id.*

102. *Id.*

103. *Id.*

right under the circumstances, not on who has rights in the abstract."¹⁰⁴ Abandoning the abstract, rights-bearer picture of the human requires a society "to decide what is right."¹⁰⁵ A feminine society will express official preference for specific, competing values: "a feminine society is a virtuous society in the sense that it cannot be pluralist."¹⁰⁶

Sherry affirms the sweeping, transformative implications of this strictly gender-based picture. She asks, "[What] happens when a contextual, virtue-based woman meets the abstract, rights-based male world? She changes the shape of that world. In almost every discipline, women are integrating their feminine perspective into a previously male world view."¹⁰⁷

Law is one of the disciplines that is subject to transformation by "[t]he feminine emphasis on connection and contextuality."¹⁰⁸ For example, women judges employ a non-political, feminine model of self and society that does not fit into the traditional framework of conservative or liberal.¹⁰⁹ Also, the very tone of *The Law* and its previously coercive operations will be known anew:

Because women are more naturally connected to others, they are more likely to be governed by true empathy: paternalism grounded not on power, but on the sort of equation of self and other that causes a driver to fling her arm across the passenger seat when she comes to a sudden stop. Increasing the likelihood of proper motivation decreases the likelihood of abuse.¹¹⁰

A. *Andric Imagery in the Service of a Transformative Civic Virtue-Feminine Voice Connection*

Based on the above, Sherry clearly seems to regard the concepts of masculine and feminine as denoting different visions of both the self and the world. In turn, this construct of distinct visions leads her to a brief and general predictive picture. This gender split reappears in the much longer and more complex *Civic Virtue*.¹¹¹

In fact, Sherry claims that these different gendered visions are the basis of her thesis in *Civic Virtue*: the increased presence of women in law is related to a possible paradigm shift toward neo-republicanism.

104. *Id.* at 164.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 165.

109. *Id.* at 165-66. Sherry asserts that Justice O'Connor is a good example of this model. *Id.*

110. *Id.* at 169.

111. Sherry, *supra* note 90, at 543.

This Article proposes that the specific image of the makers and users of Sherry's modern, liberal paradigm as males who have excluded women from law is much more important to the plausibility and strength of her thesis. This is because she muddles away the general gender dichotomy in *Civic Virtue*, leaving only the particular image of exclusionary men as the textual basis of her thesis.¹¹²

In *Civic Virtue*, Sherry links gender to general political theories.¹¹³ She asserts that "the masculine vision parallels pluralist liberal theory, [while] the feminine vision is more closely aligned with classical republican theory, represented in its various forms by Aristotle, Machiavelli, and Jefferson."¹¹⁴ Thus, women's entry into the legal profession in large numbers indicates that a "paradigm shift in moral, political, and constitutional theory" might result from the advent of a distinctly feminine jurisprudence tied to the classical republican revival.¹¹⁵

Thus, a distinctively feminine jurisprudence would help the resuscitation of republicanism:

This article suggests . . . that modern liberalism is a characteristically masculine response to the failure of Jeffersonian republicanism. Because the masculine perspective has been the dominant—and virtually the sole—influence on the legal and political structure, that structure is bound to reflect a more masculine or liberal emphasis on liberalism over community. A feminine jurisprudence, instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society.¹¹⁶

Her argument proceeds through four stages, of which the first two are background. These first two stages feature only the type of self-acknowledged, dichotomizing gender-based imagery contained in *The Gender of Judges* and are not discussed below. In *Civic Virtue*, she first applies an historical introduction to the basic distinctions between liberal theory and a classical, Aristotelian, virtue-oriented political paradigm.¹¹⁷ Second, she maps the American transition from a classical perspective to a

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 544. The feminine-republican link operates on the level of using oppositions of the "men are autonomous, women are connected" type to assert the masculinity of our regime's current grounding and the femininity of classical republican theory. For example, Sherry states: "The classical paradigm's theme of connection provides a stark contrast to the autonomous theme of the modern view." *Id.* at 547.

117. See Sherry, *supra* note 90, at 543-62 (covering the first two stages).

liberal, Lockean, individualist paradigm.¹¹⁸

The next two stages deal with the present and future. By way of defining in detail the current state of dominant affairs, she describes the modern setting of conservative, liberal, and radical jurisprudence.¹¹⁹ Lastly, the article explores the contours of "the basic feminine alternative" to modern jurisprudence,¹²⁰ with a final focus on Justice O'Connor's opinions as a test case of that alternative.¹²¹

Sherry's thesis of a "feminine alternative"¹²² to the "modern [masculine or liberal] paradigm"¹²³ is crucially dependent on andric imagery in a way she does not acknowledge. Her theme is textually dependent on her characterization of men as excluders of women. This image operates on a level far removed from a simple and general dichotomization of men as abstract and autonomous and women as contextual and connected. This dependence is present in the last two stages of her argument.

Stated differently, this Article will not argue that Sherry's thematics are fueled by her avowed, general, and basic differentiation of the genders along Gilliganian lines. The above discussion of *The Gender of Judges* served such a function.¹²⁴ Rather, her positing of a feminine jurisprudence is rooted in highly particular imagery of men as gender excluders. This image produces the viability of the last two subparts of her argument.

These latter portions of *Civic Virtue* do not assert the bifurcation of consciousness or moral sensibility by gender. Therefore, Sherry does not root this text's posited feminine jurisprudence in general, gender-based world-views. Instead, Sherry roots the feminine jurisprudence in the coherent image of the exclusionary male makers and users of the modern paradigm. The argument below tracks this presentation of what the unavowed andric imagery has to accomplish in the text.

1. Feminine Revival of the Classical Paradigm

As stated above, in *Civic Virtue*, Sherry explores the possibility of a feminine/neo-republican alternative to the male, modern paradigm.¹²⁵ She first advances this idea generally and then analyzes a number of Jus-

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 593-616.

122. *Id.* at 543-62.

123. *Id.*

124. See *supra* notes 91-110 and accompanying text.

125. See Sherry, *supra* note 90, at 543.

tice O'Connor's 1981-1986 Supreme Court opinions as a test case.¹²⁶ The text itself demonstrates that her hypothesis cannot be supported by general level gendered imagery of the "men are abstract; women are contextual" variety.¹²⁷

There are numerous textual clues indicating that Sherry does not believe men and women have different moral and cognitive frameworks. First, she undercuts her own claim at the outset that, paraphrasing Virginia Woolf, a woman's jurisprudence is always feminine.¹²⁸ The following quotation seems to problematize the possibility of the creation of such a jurisprudence through the entry of women into law: "Astute readers might ask why this article itself contains an abundance of references to [abstract] paradigms and structures . . . [however,] women's fluency in the masculine voice" reflects their success in education.¹²⁹ More fundamental change would seem to be required. Second, Sherry qualifies her assertion of the bifurcation of the genders so often that the dichotomy collapses.

Sherry states that "women in fact MAY have a unique perspective, a world-view that differs in significant respects from that of men."¹³⁰ Further, she notes that "women's moral development and concept of self MAY differ from those of men."¹³¹ Also, basic "difference[s] between men and women MAY influence the manner in which they think about, write about, and practice their disciplines."¹³² Sherry states: "It has long been recognized that women MAY make unique contributions to specific areas of law."¹³³ Finally, she writes that "women's views on the law in general MAY provide insights and approaches that are less natural to, and therefore less available to, male lawyers and judges."¹³⁴

Third, her introductory adumbration of the feminine paradigm mixes the genders up into a soup that cannot be strained: "[T]he feminine perspective strongly resembles the classical paradigm while the masculine perspective strongly resembles the modern paradigm. Although all of us HAVE some mix of the two paradigms in our own world-view . . . the

126. *Id.* at 593-616.

127. *Id.*

128. *Id.* at 543.

129. *Id.* at 569 n.123.

130. *Id.* at 580 (emphasis added).

131. *Id.* (emphasis added).

132. *Id.* at 581 (emphasis added).

133. *Id.* at 581 n.169 (emphasis added).

134. *Id.* (emphasis added).

classical perspective MAY be more dominant in women."¹³⁵ If we all internally possess the two political paradigms, then there is no reason to gender-identify either paradigm.¹³⁶

Even if one accepts that genderization of the paradigms exists because "the classical perspective may be more dominant in women," then more difficulty develops.¹³⁷ Sherry insists that her construct is non-political, arguing that the "feminine perspective . . . encompasses aspects of personality and relationship to the world that have nothing to do with one's political preferences."¹³⁸ This notion presents two insuperable problems. First, what could Sherry possibly mean? One suspects she might mean "purely" psychological phenomena, but the reader must guess. She distinguishes "feminist perspective" by maintaining that "feminists have a particular political agenda."¹³⁹ However, her main overarching point in both *Civic Virtue* and *The Gender of Judges* is that the feminine perspective does constitute a fully elaborated public alternative to the modern autonomy and individualism paradigm.

This implicates a second problem with Sherry's dichotomization of the genders. If the "feminine perspective" is non-political, one must ask if the same is true of the "masculine perspective."¹⁴⁰ In other words, is her brief characterization of the relationship between "feminine" and "feminist" a guide to her characterization of the relationship between "masculine" and an undefined conceptual entity that could be labelled "sexist"

135. *Id.* at 579 (emphasis added). Sherry later contradicts this notion that we all possess elements of both paradigms. In discussing Kenneth Karst's article *Women's Constitution*, she writes: "Karst is correct to disclaim the ability of a male to explore a feminine paradigm." *Id.* at 583 n.172 (citing Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984)).

136. Briefly, points one through three would seem to undermine the basis for Sherry's notion that Justice O'Connor's work on the Supreme Court indicates the nascent feminine paradigm. Sherry, however, does engage in an extended discussion of individual opinions to argue for "feminine aspects of [O'Connor's] jurisprudence." Sherry, *supra* note 90, at 592. *See id.* at 592-616.

Two additional criticisms vitiate her data. She states the first herself: "This data cannot be quantified or proven scientifically and is thus open to criticism that it is possible to find indications of a feminine perspective in the writings of *any* Justice." *Id.* at 592 n.212. Her further assertion that "I doubt whether an analysis of any other Justice's work would yield a [similar] pattern" is not verified. *Id.* Second, each opinion she discusses either features male signatories, reference to communitarianism or other gender-ambiguous conceptual categories, or references to gender-ambiguous human characteristics such as "compassion." *See id.* at 593-613.

137. *Id.* at 579.

138. *Id.* at 583 (footnote omitted).

139. *Id.* This language suggests that Sherry views feminist programmatic as smaller in scope ("particular political agenda") than the feminine perspective. *See supra* note 96.

140. *See supra* text accompanying note 138.

or "masculinist" or "patriarchal?" The reader might wonder if such a distinction is intelligible at all, given Sherry's attempt to distinguish "feminine" from "feminist" and her retreat from a solid gender division at the level of general world-views.¹⁴¹

2. "The Jurisprudence of the Modern Paradigm"¹⁴²

The section of *Civic Virtue* discussing "the jurisprudence of the modern paradigm" and passages characterizing "the modern paradigm" elsewhere in the article contain the clear gender imagery necessary to rescue Sherry's posited feminine jurisprudence from the contradictions, disclaimers, and qualifications that seem to have rendered it improbable on her own textual terms.¹⁴³ Because Sherry muddles and denies the "men are abstract, women are contextual" dichotomy that ostensibly fuels her thesis, some other type of gender imagery must be present to render a supercessionary or rising *feminine* jurisprudence plausible.¹⁴⁴

This imagery is contained in her discussion of what she claims is the modern paradigm in American law. Sherry commonalizes contemporary conservative, liberal, and radical jurisprudence by claiming that "[i]ndividual autonomy serves as the underlying paradigm" for each.¹⁴⁵ She claims that this tripartite division of modern legal thought is characterized by an atomistic view of the self in society.¹⁴⁶ Also, she claims that this view of the self undergirds dominant modern American legal consciousness.¹⁴⁷

As stated above, Sherry's critical gender imagery characterizes the makers and users of the modern paradigm as exclusionary males. There

141. Sherry, *supra* note 90, at 582-84. Even if one rejects the claim that Sherry voids, disclaims, or muddles the basic Gilliganian dichotomy, the second stage of the argument survives. The second stage identifies an unacknowledged andric image that produces a phenomenological basis for a feminine jurisprudence. The Gilliganian image (which is incoherently and contradictorily presented in *Civic Virtue*) is basically an argument drawn from *psychology*. The unacknowledged andric image, described in detail below, sets in motion an *historical* basis for feminine jurisprudential singularity. In sum, the image identified below may not be sufficient to rescue Sherry's posit of a feminine jurisprudence, but it at least provides some alternative grounding.

142. *Id.* at 563.

143. *Id.* at 563-74.

144. *Id.* at 587.

145. *Id.* at 562.

146. *Id.* at 544-45.

147. *Id.*

are numerous passages in *Civic Virtue* that add a male monopolization dimension to her notion that gendered jurisprudential paradigms supersede each other. For example: “[B]ecause women have been excluded from shaping our legal structure in general, that structure reflects a distorted view of the tension between autonomy and connection and between the individual and society.”¹⁴⁸

Her text also images modern jurists as male and actively exclusionary. At times the exclusion is intellectual. Her example of the conservative portion of the modern paradigm is Robert Nozick,¹⁴⁹ who “denies entirely the validity of any doctrine that recognizes connection or community as a separate and valuable principle.”¹⁵⁰ He excludes women by implication because their perspective is discordant. According to Sherry, the liberal jurisprudence of John Rawls and Ronald Dworkin likewise does not admit of a non-individualist ethic: “Rawls, like Dworkin, builds his entire jurisprudence around an individualist conception of human nature.”¹⁵¹

It appears that liberal jurisprudence is completely outside the feminine ethos, according to Sherry:

In addition to a decidedly individualist bias, liberal jurisprudence exhibits two other traits characteristic of the modern paradigm: liberalism epitomizes an abstract, rule-based theory, and liberalism is a highly pluralistic philosophy. In a world of self-interested individuals, abstract rules or principles are a necessary alternative to such contextual moral notions as virtue.¹⁵²

Although it is the result of “closer examination,” even radical jurisprudence “embodies the individualist paradigm.”¹⁵³ Emphasizing Mark Tushnet, Duncan Kennedy, and Roberto Unger, Sherry asserts that critical legal thought is part of the autonomy-individualist-abstraction school.¹⁵⁴

Of course, this exclusion at the rarified level of philosophy and paradigm is muddled by her subsequent disclaimers of any certainty regarding the existence of a feminine perspective and her related acknowledgment of each person’s possession of that perspective.¹⁵⁵ The image, however, remains strictly andric. The intellectual excluders are all male

148. *Id.* at 582. See, e.g., *id.* at 544, 584, 591, and 592 (stating, for example, that “the Constitution . . . is a quintessentially masculine document”).

149. *Id.* at 562 n.88.

150. *Id.* at 563.

151. *Id.* at 565 (footnote omitted).

152. *Id.* at 567.

153. *Id.* at 569.

154. *Id.* at 569-74.

155. See *supra* notes 117-125 and accompanying text.

and this assignment of gender is paired with a coherent image of exclusion.

Sherry asserts that men traditionally have kept women down and out.¹⁵⁶ Note, for example, how theory and practice are linked in the following passage: "It is not so surprising that even a radical movement excludes the feminine paradigm. Past radical groups have treated women little better than their liberal or conservative counterparts."¹⁵⁷

This claim may actually save her gendered jurisprudence from the criticism that she has commingled and disclaimed her earlier assertions about men and women to such an extent that it is impossible, on her own terms, to speak of anything as jurisprudentially gendered. First, her image of the current paradigm is andric in that she populates it entirely with exclusionary males. Second, because women do not share with men this history of American juristic pre-eminence (because of male exclusionary practices), women have a unique experiential source for their perspective.

Sherry does offer a phenomenological basis for her model, but it is textually secondary to her general dichotomization of the genders and her association of "masculine" with "modern" and "feminine" with "classical republican."¹⁵⁸ For example, women's knowledge and discourse is deeply affected by "the masculine voice."¹⁵⁹ Also, "the modern paradigm [may be] an inevitable result of male domination of the public sphere."¹⁶⁰ Furthermore, "because women have been excluded from shaping our legal structure in general, that structure reflects . . . distort[ion]."¹⁶¹

B. Conclusion

Sherry's stated and general differentiation of the genders provides little support for her construction of a neo-republican, feminine jurisprudence. Her argument rests more solidly on a notion of gendered jurisprudential

156. Sherry, *supra* note 90, at 581 ("Women have been excluded from the mainstream of legal authority and legal change.").

157. *Id.* at 578 n.163. Sherry goes on to cite the following groups as examples of radicals' sexist behavior: 1960s civil rights groups, Students for a Democratic Society, Columbia student protesters in the late 1960s, and CLS itself.

158. *Id.* at 579.

159. *Id.* at 569-70 n.123.

160. *Id.* at 579.

161. *Id.* at 582.

consciousness that is traced from a specific characterization of males as gender excluders.¹⁶² The possibility of a feminine jurisprudence, as well as its ability to update the classical paradigm because of basic resemblance, has a phenomenological basis grounded in female exclusion by males.

This interpretation indicates that Sherry was not in complete control of the actual foundational andric imagery in this text. Her text, then, exemplifies the production of a supportable feminist jurisprudential thesis through secondary, minor andric imagery that assumes a crucial role because equivocation and contradiction detract from the author's main, ostensible characterization of the genders.

VI. ROBIN WEST

This section of the essay demonstrates the critical role played by andric images in Robin West's feminist jurisprudential writing. Three articles¹⁶³ will be analyzed individually.

In *Feminism, Critical Social Theory and Law*,¹⁶⁴ West outlines and supports "the lack of enthusiasm among at least some feminist legal theorists for the great transformative ideas of Michel Foucault, Roberto Unger, poststructuralists, postmodernists and other critical social theorists that have so energized critical legal thought."¹⁶⁵ For West, this disenchantment results from problems with the critical social theorists' ideas regarding the nature of four items: power, knowledge, the self, and morality.¹⁶⁶ Her treatment of critical theory and these four items in this text is consistently rooted in andric imagery.

Two of West's articles develop feminist law-as-literature themes containing pejorative andric images that construct those themes. In *The Feminine Silence: A Response to Professor Koffler*,¹⁶⁷ West develops the thesis that the title character in Melville's *Billy Budd: Sailor* is an embodiment of "feminine" by strictly denigrating "masculine." As her theme in *Economic Man and Literary Woman: One Contrast*,¹⁶⁸ she valorizes

162. These males have been primarily Mandarins, but some have been of the *hoi polloi*.

163. Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59; Robin West, *The Feminine Silence: A Response to Professor Koffler*, 1 CARDOZO STUDIES IN L. AND LITERATURE 15 (1989); and Robin West, *Economic Man and Literary Woman: One Contrast*, 34 MERCER L. REV. 867 (1988).

164. Robin West, *Feminism Critical Social Theory and Law*, 1989 U. OF CHI. LEGAL F. 59.

165. *Id.*

166. *Id.*

167. Robin West, *The Feminine Silence: A Reponse to Professor Koffler*, 1 CARDOZO STUDIES IN L. AND LITERATURE 15 (1989).

168. Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L.

"literary woman" over "economic man" by drawing a severe contrast between genders that strictly denigrates men.¹⁶⁹

A. *Andric Images Underlying West's View of Critical Social Theory*

1. Power

In this section of *Feminism, Critical Social Theory and Law*, West discusses the implications for feminist thought of what she terms a basic tenet (emphasizing Foucault) of critical social theory: the productivity of power. "Following Foucault's mandate, critical legal scholars collectively have taught all of us to think of the productivity rather than the negativity of legal power."¹⁷⁰ However, West urges caution upon feminist legal theorists:

It may be . . . that a profoundly negative, censorial, patriarchal power lies behind the positing and creative forms of modern social and legal power which are the subject of critical legal and social analysis. If so, we should hardly expect male critical legal or social theorists to see this, or to adjust their theory accordingly.¹⁷¹

With this statement, West has sketched a connection between the substance of critical theory and the gender of most of its originators and adherents.¹⁷² She also connects them here with patriarchy. The argument below is that her problematization of the critics' notion of power is actually grounded in several concrete generalizations about males, whether they be critical theorists or not.

West formulates her Cassandran admonition about power as follows: "I want to urge, even plead, that we turn down the Foucaultian invitation to

REV. 867 (1988).

169. *Id.* at 868-73.

170. West, *supra* note 164, at 60.

171. *Id.* at 61.

172. West gives other clues that she views critical social theory as male. For example, addressing feminists, she states that one of the problems with critical social theory is that "critical philosophical vision . . . , like the enlightenment vision it seeks to replace, has not been of our making." *Id.* at 97. She has made the identification elsewhere:

The Hobbesian story of the state of nature (and the critical story of alienation as well) is a synthesis of umpteen thousands of personal, subjective, everyday male experiences. *Images* are generated from that synthesis, and those images, sometimes articulate, sometimes not, of what it means to be a human being then become the starting point of legal theory.

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 64 (1988).

think of power in primarily positive terms. My reason is very simple: Women's experiences of patriarchal power, told and retold in feminist texts, are profoundly unlike anything imagined in Foucault's philosophies.¹⁷³ West says that women experience patriarchal control as violent, not as "discursive productivity." As long as this condition persists, the urge to discuss power as positive "is of little use to feminism."¹⁷⁴

Her focus, however, turns out to be on men. Most of the points made by West in elaboration of her caveat feature a crucial, cumulative andric generalization of men as oblivious. Her first point is that feminist comprehension of patriarchy requires investigation of "its utterly non-discursive and silencing violence."¹⁷⁵ She feels this to be the case "[p]articularly if we want to understand it from women's point of view [If so,] we must not focus obsessively on its talkative, pontificating and no doubt internally contradictory blabber."¹⁷⁶ Laying aside West's association of men with patriarchy, the last passage images men as outside the sphere of pressing understanding, that is, the "women's point of view."

This notion—"they just don't get it"—is both real and important, as the reader quickly discovers. West's second criticism of the Foucaultian understanding of power makes male obliviousness critical and clear:

[F]eminist legal theorists should keep our focus on patriarchal violence, rather than patriarchal constructs . . . it is extremely difficult, as feminists inside and outside of law know, to communicate to men, including critical legal scholars, the defining role that sexual violence and the fears of sexual violence play in women and girls' lives.¹⁷⁷

Third, West maintains that male blindness is implicated in the rationalization of critical theorists' refusal to see patriarchal violence:

[C]ritical legal scholars increasingly resort to a decidedly hip philosophical justification for their selective blindness. If the central insights of social theory hold for patriarchal power as they seem to hold for legal power, they argue, then to understand law, we should be examining what it has invented rather than what it has destroyed Social theory, in short, has become yet another excuse for

173. West, *supra* note 164, at 61.

174. *Id.* at 61-62.

175. *Id.* at 62.

176. *Id.* (footnote omitted).

177. *Id.* at 62-63. She immediately continues by toying with another generalization, by way of an explanation for this non-comprehension:

The reason for this, I suspect, is to some degree self-interest. To be blunt, it is almost impossible *not* to blind oneself to the violence in the world of which you are an indirect if not direct beneficiary, and most men do indeed benefit, at least in the short run, from the sexual violence from which many women fear or suffer.

Id. at 63 (footnote omitted).

men to blind themselves to the violence of patriarchy, the destructivity of misogyny and the absolute moral imperative for positive legal intervention on behalf of women.¹⁷⁸

2. Knowledge

In this section of her text, West addresses the "central Foucaultian insight" that humans discursively create the objects of their knowledge, rather than discover them.¹⁷⁹ She claims that social theory's thesis of discursive epistemology is problematic because women's knowledge has been the product of silence: "Much of our feminist work both in and outside of law is beginning to show that silence is and has been to modern women's lives what Foucault has argued that knowledge and discourse are and have been to modern men's."¹⁸⁰

West's demonstration of the centrality of silence to women's lives is accompanied by constant and highly interrelated andric imagery. Modern women's silence turns out to have a strictly male etiology: coordinated andric generalizations are incorporated into the reasons for the production of that silence. Moreover, these reasons are West's only elaboration of the concept of "modern women's silence."

First, "modern women's silence" is the product of violence rendered as male. Citing recent psychological work, West maintains that this silence is a woman's "way of knowing," developed during an abusive childhood.¹⁸¹ In addition, silence as a way of knowing "leads to passivity in the face of violence in adult life as well."¹⁸² West clearly regards the face of at least adult violence as male, as is clear from the anecdotal illustration she uses to demonstrate the silence-passivity-violence interrelation: "[T]rying to explain why she stayed with a batterer for ten years, one woman . . . recalled her own voicelessness: 'You know, I used to only hear HIS words, and HIS words kept coming out of my mouth. HE had me thinking that I didn't know anything.'"¹⁸³

Second, modern women's silence is the product of the "more subtle

178. *Id.* at 63.

179. *Id.* at 65.

180. *Id.* at 66.

181. *Id.* at 68-69 (citing MARY FIELD BELENKEY ET AL., *WOMEN'S WAYS OF KNOWING* (1986)).

182. *Id.* at 69.

183. *Id.* (emphasis added). The original quotation appears in BELENKY, ET AL., *supra* note 181, at 30.

coercion of an elaborate, alien, and hostile dialogue."¹⁸⁴ This "dialogue" turns out to be male, in that men are "speakers" who can avail themselves of their talky epistemology. West asserts that "contemporary and relatively privileged women law students . . . opt for or are pushed toward silence in . . . classrooms, and in significantly greater numbers than are men."¹⁸⁵ She uses the testimony of a woman Yale law student as an illustration:

I felt unable to keep up with the class and terrified of being exposed to the rest of the class as unable to match them I was very, very quiet, very reserved I basically felt inadequate in all classroom settings, unable to make comments or to project myself into the conversation, often unable to think as quickly as I thought others did The recklessness, the casual . . . stance that others seemed to achieve—I just couldn't.¹⁸⁶

Third, modern women's silence is a product of adult males' monopoly on entitlement. For West, "[t]he massive production of 'unentitled silence' regarding female sexual violation stands in marked contrast to the near-manic production of a 'discourse' on male sexual pleasure so carefully documented by Foucault."¹⁸⁷ This production differential can be traced to men's monopoly of the sense of entitlement. For example, using a bit of text by Florence Rush, West argues that it is women and children who are unentitled:

Why is it that children who have been molested, sexually abused, or even raped rarely or never tell? They never tell for the same reason that anyone who has been helplessly shamed and humiliated, and who is without protection or validation of personal integrity, prefers silence. Like the woman who has been raped, the violated child may not be believed . . . , her injury may be minimized . . . , and she may even be held accountable for the crime.¹⁸⁸

Fourth, modern women's silence is abetted by superior male time, facilities, and energy. Men are imaged as possessed of the means to discourse: "Women are silent because we do not have the time, the atomistic self-possession, the luxury or the rooms of our own in which to speak."¹⁸⁹ Men are free of certain distractions and debilitations, while for women "[t]here are too many dishes . . . , too much laundry, too many children, too many cares, too many problems. Without more help—a great deal of help—there is just too much of this non-lingual, de-

184. West, *supra* note 164, at 69.

185. *Id.*

186. *Id.* at 69-70. The testimony originally appeared in Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1333 (1988).

187. West, *supra* note 164, at 70.

188. *Id.* (quoting Florence Rush, *Foreword*, in *I NEVER TOLD ANYONE* 13 (Bass & Thornton eds., 1983)).

189. *Id.*

manding domestic world for women" to overcome.¹⁹⁰

West's fifth and final reason for the production of modern women's silence—it is the self-reproducing effect of women's silence—might seem to be only indirectly related to male situatedness or causation. However, the opposite is true: "Masculine discourse dominates the conversational space, thus generating male social constructs that in turn further women's silence."¹⁹¹ More particularly, women's self-reproduced silence exists as a product of patriarchal violence (identified with men and their discourse in the following text):

[S]o long as women and children remain overwhelmingly silent in the name of overpowering violence, if we want to understand the contours of our oppression, we will have to come to grips with our forced, coerced or collaborative silence, and not (only) with their developed and contradictory and oppressive discursive practices. And when we understand women's silence, we will have a better understanding not only of patriarchy, but of men's discourse, of men's discursive practices and of masculine subjectivity as well.¹⁹²

As causative of women's silence, patriarchal violence and discursive epistemology are also closely allied with male sexuality. West states:

While we discourse endlessly on the *pleasure* of sex so central to masculine sexuality—whether to condemn it, censor it, praise it, analyze it, understand it, rechannel it, repress it or simply indulge it—we still speak almost not at all of the violence of sex so central to childhood and femininity.¹⁹³

Discourse and patriarchy are implicated as the root causes of silence:

Surely we need to understand not only the speaking (male) sexuality and its possessor, the subjective (male) self created by all our discourse on sexuality, but also the silence of the objective (female) being, also "created" by both the sexualized discourse and the patriarchal power behind it. We need, in other words, to understand the modern societal inclination to keep [women and children] silent.¹⁹⁴

3. The Self

West emphasizes that both critical social theorists and feminist theorists have exposed the "liberal self" as a construct. She claims these theorists do differ: critical theorists maintain that the liberal self is a social construct, "defined and produced by a liberal-cultural understand-

190. *Id.* at 71.

191. *Id.* at 72.

192. *Id.* at 78.

193. *Id.* at 74.

194. *Id.* at 75.

ing,¹⁹⁵ while feminists stress that it “is a gendered construct, both bound and produced by masculine, patriarchal and, to some degree, misogynist experience.”¹⁹⁶

West concentrates on what she claims is a deeper difference between critical social theory and feminism on the subject of the self. She discerns a tension between “feminist interpretations of women’s experiences,” and “the social theorist’s claim that not just the *particular* liberal self, but virtually *every* possible description of the nature of the self, is a social construct.”¹⁹⁷ As she states: “Now the question I want to pose is whether this universal claim—that *any* description of a concrete, given, natural, precultural self is delusional . . . is an accurate account of women’s inner lives. It may, of course, be true of men but not of women.”¹⁹⁸

West’s answer is that the universal claim is not true of women. She claims to base her answer on the developing body of women’s self-accounts and feminist research into female interiority. However, West’s discernment of the deep difference between the critics and the feminists is just as dependent on her own view of the masculine self.

For example, her discussion of the limits of the universal claim contains her own important conclusion that the male self is opposite to the female self. Specifically, West views the male self as constructed and the female self as natural, a split that echoes her discussion elsewhere in *Feminism, Critical Social Theory and Law* of natural female morality and non-natural, discursive male morality.¹⁹⁹ The constructedness of the male self is one of the reasons the critical theorists insist on the universality of the constructed self.²⁰⁰ West most commonly speaks of the constructed male self by implication, when discoursing on the non-constructed female self:

[W]e should be extremely wary of the postmodern, poststructuralist and social-theoretic claim that this non-discursive, woman-bonded, creative, erotic, and quietly rebellious self within is but another product of a political, patriarchal, liberal and societal discourse. We should instead seek to protect and nurture and give voice to that most tentative, intuitive, unschooled and above all else undisciplined female self that lies within.²⁰¹

195. *Id.* at 86.

196. *Id.*

197. *Id.*

198. *Id.*

199. See *infra* notes 209-29 and accompanying text.

200. The other reason is the “truth” of the female self: “What of *this* self?—this woman-bonded, creative, playfully erotic, loving, unspeakable and negative female self? . . . The social theorist is concerned with discursive truths, and the truth of this female self is by definition that which is unspeakable.” West, *supra* note 164, at 95-96.

201. *Id.* at 96.

The following passage would indicate that among the gendered selves, the male self is constructed because it, and only it, lies within discourse:

[F]eminists should not conclude from [the] discursive exclusion of the female self that we have discovered yet another socially constructed and ultimately nonexistent self which should be banished from all thought, dreams and histories. WE SHOULD CONCLUDE THAT WE HAVE DISCOVERED THE LOGICAL LIMITS OF THE DISCURSIVE OBJECT OF SOCIAL THEORETIC UNDERSTANDING.²⁰²

West also directly images the male self as constructed. For example, “[w]omen’s folk lore, consciousness-raising sessions and conversations are replete with recountings of the sheer time and energy expended in the never-ending and enormous female task of maintaining the male’s masculine sense of self.”²⁰³ Such direct imagery is vastly exceeded by indirect imagery, however. West obliquely images the male self in all but the last formulation already displayed. This practice continues in other formulations, such as the “uncultured, natural, loving, female self,”²⁰⁴ and that self’s non-constructed, extant, natural meaning: “It is that self who can show us how to create a safe world without killing the spontaneous, the physical, the natural, the unpredictable and the pleasurable.”²⁰⁵

4. Morality

Emphasizing Roberto Unger, West holds that the formulation “power and its distributions exhaust the moral universe” is one of critical social theory’s main tenets.²⁰⁶ Specifically, “[t]he critic’s utopia . . . is a world in which the power to break free of the false necessity created by institutional and imaginative constructs is as widely distributed as possible.”²⁰⁷ Freedom requires weakening the script that has written (and maintains) these hierarchizing constructs. Further, Unger “urges the ‘denaturalization’ of society, which is synonymous with the emancipation of society from social roles girded by false claims of necessity.”²⁰⁸

West identifies three problems with this Ungerian notion that, as she

202. *Id.* (emphasis added).

203. *Id.* at 88.

204. *Id.* at 95.

205. *Id.* at 96.

206. *Id.* at 78.

207. *Id.* at 78-79.

208. *Id.* (citation omitted).

puts it, "the end of hierarchy is . . . the necessary root of morality."²⁰⁹ This three-part argument features a crucial andric image in which men are likened to non-nature. To advance her critique, West runs a dichotomy in which women are identified with nature or natural processes (chiefly birthing), and men with non-nature or non-natural processes (chiefly discourse).

In the first part of her argument, West claims that oppression is an avoidable "consequence of inequality and hierarchy."²¹⁰ Her case in point is the relationship of mother and infant: "The physically unequal mother *in all cultures* typically breast feeds and protects, rather than bullies or browbeats, the vulnerable infant and child. The powerful mother nurtures so as to give life and create growth in the weak. She does not impose so as to inscribe her will."²¹¹ This observation debunks critical social theory's views of power and morality:

If feminists are right to theorize and women are right to experience a respectful, nurturant, caring response that aims to promote rather than dominate the interest and well-being of the weaker "other" as one possible product of hierarchical relations, then the Ungerian descriptive claim that a dominating, positing and delimiting power is the only product of hierarchy, and the moral claim that the destruction of hierarchy is the only intelligible political goal, are simply wrong.²¹²

Finally, the example of the mother-infant relationship shows that ameliorating all hierarchical relationships requires only the infusion of care and not "false claims of equality, objectivity or a distanced and alienated respect, nor with levers by which the hierarchy can be smashed."²¹³

These claims are grounded in an identification of women with nature and men with artificiality. The identification of women with nature is basic and unremarkable. Mothers' nurturant response to hierarchical advantage constitutes a "physical fact[] of life."²¹⁴ Women may be right "to trust [their] nurturant response within the natural inequality of the mother-infant relationship."²¹⁵ Breast feeding forms part of the possible grounding of a moral theory that rejects "Enlightenment ideals of rationality and objectivity" as well as "post-enlightenment glorification of power."²¹⁶

Further, West associates men with discourse, and images discourse as

209. *Id.* at 80.

210. *Id.*

211. *Id.*

212. *Id.* at 81.

213. *Id.*

214. *Id.* at 80.

215. *Id.* at 81.

216. *Id.* at 80-81.

antithetical to nature.²¹⁷ Unger, West wrote, portrays "a world in which 'nature' is there to be denigrated, conquered, transcended and exploited, and it is a world in which passion creates not the basis of moral life, but hierarchical ties to be broken."²¹⁸ By "nature," West seemingly meant the non-discursive and passionate basis of primarily female existence because the next sentence counsels distrust of claims "that definitionally exclude the emotional and subjective root of many women's, and more than a few men's, aspirational and moral lives."²¹⁹

West continues to rely on gender as she criticizes the critical social theorist's claim that all is discourse, that human ideals exist only in our "uttered imaginings."²²⁰ To West, the truth of such a view is belied by the fact that "[f]or many women, moral inclinations are neither reflected nor embodied in our modern discursive practices—any of them."²²¹ Women's moral lives, West believes, are "rooted in our earliest, pre-verbal experiences of being loved and nurtured."²²² Furthermore, this women's reality is a "natural experience."²²³

West's genderization of the distinct realms of non-verbal and verbal, as well as her opposition of verbal and natural, is apparent in the following passage:

We might conclude that moral ideals and moral inclinations derive from the quiet love of the mother, rather than from the discursive guidance of the father. We might conclude that the root of moral life and experience is profoundly non- and pre-verbal We will not do so if we acquiesce to the Ungerian insistence that we focus our idealistic and historical gaze on the verbal spheres of our "denaturalized" existence.²²⁴

West's third and final reason for criticizing Ungerian morality starkly illustrates her association of women and their interests with nature and men with non-nature. This association is prefaced with an admonition. According to West, "[f]eminists and feminist legal theorists . . . should also be extremely wary of the profound devaluation of nature, the denial of the significance of the natural realm and the disregard and contempt for natural constraints and natural truths that play such a prominent role

217. *Id.*

218. *Id.* at 81.

219. *Id.*

220. *Id.*

221. *Id.* at 82.

222. *Id.*

223. *Id.*

224. *Id.*

in Unger's critique of traditional morality."²²⁵

This devaluation of nature was troublesome to West, in part because "it characterizes the history of patriarchal culture, at least from the Renaissance to the present."²²⁶ The woman-nature connection is coordinated with the iniquitous past and the hope for the future: "The oppression of women and the exploitation of nature have been constant companions in the story of patriarchy; by correlation, as numerous feminists have insisted, respect for nature and respect for women must play convergent roles in the story of our mutual liberation."²²⁷

The connection between women and nature, however, is more than a function of patriarchal history. Rather, it is at the heart of West's definition of women. West insisted that feminist legal theorists should "remember, remain true to, and draw upon, the naturalism and quietness that have always been central to what has been and is still most admirable about women's moral lives."²²⁸

West does introduce a partial qualification of her dichotomous rendering of men and women:

There is surely no way to know with any certainty whether women have a privileged access to a way of life that is more nurturant, more connected, more natural, more loving and thereby more moral than the principled lives which both men and women presently pursue in the public sphere . . . [b]ut it does seem that whether by reason of sociological role, psychological upbringing or biology, women are *closer* to such a life: If it is but a memory, then for women it is a more vivid memory; if it is a utopian dream, then for women it is a dream we have never fully denied and from which we routinely draw sustenance and guidance.²²⁹

However, even taken by itself, the qualification is only a recognition of uncertainty. It also seems to conflict with nearly all of her statements about men, women, nature, and non-nature in this section of *Feminism, Critical Social Theory and Law*. Contrary to the spirit of her closure in this section, West advises against women self-censoring because of "a Nietzschean power ideology now fashionable among critical legal scholars."²³⁰ "[It] not only threatens to silence once again what is most distinctive in [women's] voice, but is also steeped, far more than the liberal theory against which it defines itself, in a covert and overt contempt for women, feminism, nature, the natural realm and the feminine."²³¹

225. *Id.*

226. *Id.* at 83.

227. *Id.* (footnote omitted).

228. *Id.* West also speaks of "remembrances of a feminine and feminist closeness to nature." *Id.* at 97.

229. *Id.*

230. *Id.* at 84.

231. *Id.* For a group of passages in which West explicitly identifies critical theory

5. Conclusion

This text contains an incredibly myriad and complex use of gendered and andric imagery. In *Feminism, Critical Social Theory and Law*, Robin West uses a very large number of generalized statements about men, male and masculine in her various arguments.

West not only peppers this text with generalizations about men; this section demonstrates that her themes and claims are based on them. This demonstration has been done by closely reading the themes and claims and by presenting the supporting andric imagery. However, as a general cap to this incremental textual analysis of *Feminism, Critical Social Theory and Law*, it is valid to say that this quantity of andric imagery has to constitute more than jettisonable window-dressing.

Even so, West's andric imagery is unacknowledged. Although her use of generalizations about men in her various arguments is obvious, West never acknowledges either a critical or multifarious role played by her conceptions of men, male, and masculine.

It may be possible to boil down West's myriad andric imagery in *Feminism, Critical Social Theory and Law* into two general types. The first type, which is very prominent in her discussion of power and knowledge, can be summarized as follows: men do not understand what women are and act on women in destructive ways. Because of their ignorance and their monopoly of certain essential aspects of life, they have a destructive effect on women. More concretely, because the male critical theorists do not know women, they do not recognize that power is not just productive; because males have monopolized knowledge and have defined it as discourse, they have turned women's knowledge into silence.

West's second general andric image in this text is much more closely aligned with a picture of what men actually *are* to her. In her discussions of the self and morality, she images men as constructed or non-natural. Because men are at least less natural than women, those among them who have developed critical social theory have (1) promulgated a discursive, gendered idea of the human self that is not true of women and (2) perpetuated the notion that hierarchy is unnatural, immoral, coercive, and otherwise negative.

with "male," see *supra* notes 170-71 and accompanying text.

B. Andric Imagery in The Feminine Silence

The moral nature was seldom out of keeping with the physical make.

—Melville, *Billy Budd: Sailor*

In *The Feminine Silence: A Response to Professor Koffler*, West counters Judith Koffler's claim that "femininity is banished" from *Billy Budd: Sailor* (a story without female characters),²³² except that Melville invested the title character with "erotic femininity."²³³ West claims that Billy Budd is feminine in three other respects. First, "Billy embodies feminine virtue," in that "Billy is a peacemaker . . . inspir[ing] men toward peace . . . not through force, but through beauty, grace, and love."²³⁴ Second, "Billy's silence is feminine . . . [t]hat silence is profoundly, tragically, feminine."²³⁵ Third, he is "through and through a victim, and that victimization is profoundly feminine."²³⁶

West's claims are strongly rooted in pejorative andric imagery. Her explanations of these claims illustrate that West's interpretation of *Billy Budd* rests on the following simple dichotomy: negativity is rendered as masculine, positivity as feminine. West identifies "the feminine" in a short novel featuring only male characters by assigning valorous femininity to the most sympathetic of them. She identifies "the masculine" as negative by both directly characterizing it as such and assigning it to other, less sympathetic principle characters.

1. The Feminine Victim and the Masculine Victimizer

Addressing her last claim first, West states that Billy Budd is a valorous and innocent feminine victim. She emphasizes that, like women, Billy is attacked by and, in response, kills someone "with whom he lives in relatively close quarters."²³⁷ Billy is first victimized by Claggart, the attacking, abusive ship's master-at-arms. He is then victimized by Captain Vere, who presides over the court-martial that condemns Billy to death for killing Claggart: "Like Billy, abused women and children who kill their abusers kill in self-defense, and like Billy Budd, they are for that reason legally as well as morally innocent. As with Billy, to convict them

232. Judith Koffler, *Billy Budd: The Feminine Presence*, 1 *CARDOZO STUDIES IN L. AND LITERATURE* 1 (1989).

233. West, *supra* note 167, at 16.

234. *Id.* at 17.

235. *Id.*

236. *Id.*

237. *Id.*

is legally wrong as well as morally criminal."²³⁸

As a complement to her characterization of Billy, West masculinizes his victimizers. Claggart is comparatively unimportant; he is mentioned only in passing to complete the domestic violence analogy.²³⁹ Vere is much more prominent and significant. For example, West's strict and negativizing masculinization of this character inflects her condemnation of Billy's punishment:

Maybe a female Vere would honor the feminine, as well as hear it. Maybe, to be precise, Billy's case *would have come out the other way*. And maybe, if it had, the result would have been more just. That is: it might be *because Vere banishes the feminine voice that the masculine Vere commits such a grave injustice*.²⁴⁰

She wonders whether Billy "was done in . . . by the smallness of Vere's stunted, de-feminized spirit."²⁴¹

The pronounced masculinity of West's Vere serves to condemn not only the result in Billy's court-martial, but also law in general. She claims uncertainty as to whether a female Vere—or one who did not "banish[] the feminine voice"²⁴²—would have made a difference.²⁴³ However, she is certain

that women's presence and women's voice in the law, in government, in the military, and in military law will make a difference—a real difference—to *Billy Budd*, to the outcome of cases, to the quality of justice, to the administration of the Articles of War, to the interpretation of statutes and constitutions, and to the meaning of the Rule of Law.²⁴⁴

She is also rather certain that a female or feminine Vere would have been more merciful, as the following rhetorical question makes clear: "Would a female Vere suggest to female officers that they must vanquish the feminine, silence the feminine voice, and subordinate female compassion, kindness, and maternal care to masculine, paternal, and patriarchal duty?"²⁴⁵

238. *Id.* at 18.

239. *Id.* at 17.

240. *Id.* at 16.

241. *Id.* at 18.

242. *Id.* at 16.

243. *Id.* at 15-16.

244. *Id.* at 16 (footnote omitted).

245. *Id.* at 15. This quotation also nicely encapsulates West's affirmation of feminine and concomitant denigration of masculine.

2. Feminine Silence and Feminine Virtue

West "comment[s] much more briefly on Billy's feminine silence and feminine virtue."²⁴⁶ She notes that Billy remains silent as his world crashes down on him and that Melville introduces the character by emphasizing his peacemaking skills. West melds her feminine-ascribing treatment of these together because "Billy's womanly virtue and even more womanly silence is interesting. [This is because his] womanly silence renders his womanly virtue *totally* mysterious."²⁴⁷

In discussing Billy's feminine silence and feminine peacemaking, West focuses on the connection between women's silence and their nonoperative virtue of peacemaking:

If women's moral voice is truly different—more loving, more caring, more peaceful, than men's—as Prof. Gilligan and many others now argue—then perhaps, if only it could be heard, that voice would make a difference. Perhaps our conflict-ridden history is itself, in part, a function of women's silence. If women's morality is really different, and if women are truly silent, then it is time for women to break that silence.²⁴⁸

Her discussion of this connection between feminine silence and feminine virtue is dependent on a strict dichotomization of masculine and feminine that denigrates the former and valorizes the latter. Her gender dichotomization here is as crucial and strong as in her discussion of Billy as a feminine victim.

It is clear from *The Feminine Silence* that West does not find "womanly virtue" to be "totally mysterious." She is actually certain that "women's morality is really different" and better. She characterizes women and men without qualification. For example, "[w]e [women] reject the claimed necessity of a violent root of human association."²⁴⁹ Elsewhere, she maintains that "[i]n the interest of accuracy, women's moral voice seems to be distinctively tied to the moral value of empathy."²⁵⁰ Her attitude toward the morality difference is clear from her gender dichotomization of Billy and Vere: "[Billy's] feminine virtue, his morality, and his talent for waging peace all stand in stark contrast to Vere's prin-

246. *Id.* at 18.

247. *Id.*

248. *Id.* (citation omitted).

249. *Id.* at 19.

250. West, *supra* note 168, at 867 n.2. Many other examples from her writings could be offered. Here is a single sample: "[W]omen do not struggle toward connection with others, against which turn out to be insurmountable obstacles. Intimacy is not something which women fight to be capable of. We just do it. It is ridiculously easy. It is also, I suspect, qualitatively beyond the pale of male effort." West, *supra* note 167, at 40.

ciplined morality, his masculine virtue, and his talent for waging a just war."²⁵¹

West is also confident that women are silent and need to speak their different and better morality. They are possessed of the "feminine ethic," which "pushes women . . . to see [their] idealized selves as peacemakers."²⁵² Because he keeps silent, the feminine "Billy—again like innumerable women—fails as a peace-wager."²⁵³ West feels that "[t]he bottom line for women is just this. Women must break this silence."²⁵⁴ This imperative arises from male disability; men in general, as well as "the men in *Billy Budd* . . . cannot love one another."²⁵⁵ It is up to women to end this situation: "But if we are to be more effective than was Billy in showing these men how to love one another—and if we are to avoid getting hanged in the process—then, unlike Billy, we must break our silence."²⁵⁶

3. Conclusion

West's identification of a feminine character in *Billy Budd*—as well as her related claims about women and men—rests on an uncompromising association of masculine with negativity. Billy is a feminine victim, a victim of masculine cruelty and stuntedness. Billy is also a symbol of women's silent virtue (which, if expressed and heard, would counteract male disability). The association of masculine with negativity, deficiency, and inferiority in this text is uncompromising.

The main problem with *The Feminine Silence*, however, is not West's facile gender dichotomizing, the misandric mantra that springs off the page. Instead, it is that her article may provide an example of the limits of feminist literary criticism. As an interpretation of *Billy Budd*, West's text is perhaps a very clear example of the limiting imposition of simple gender imagery on a complicated literary work. To the extent that West wants a reappraisal of *Billy Budd*, her imposition works a reductive distortion in which the reader is asked to substitute West's gender certainties for a short but complex novel.

251. *Supra* note 167, at 17.

252. *Id.* at 19.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 19-20.

C. *Andric Imagery in Economic Man and Literary Woman*

In *Economic Man and Literary Woman: One Contrast*,²⁵⁷ West contrasts characteristics of “economic man” that have been developed in economic legal analysis with characteristics of “literary person” or “literary woman” that have been developed in literary legal analysis. Her contrast is based on a set of her own generalizing gender oppositions that—as in *The Feminine Silence*—are rife with disparaging andric imagery. However, *Economic Man and Literary Woman* features a somewhat different set of oppositions.

1. The Distinct Genders of the Economic and Literary Humans

This set of oppositions is expressed in the two main stages of the article: her definitional contrast between economic man and literary woman, and the latter’s distinct moral promise.

The basic definitional contrast is simple. According to West, the claims on behalf of economic man—that (1) we know what is best for ourselves and invariably seek it, and (2) we are “incapable of empathic knowledge regarding the subjective well-being of others”²⁵⁸—are belied by the lack of self-knowledge and self-motivation, as well as the empathic strength of literary woman.²⁵⁹ She is defined as this lack and this strength. Her moral promise rests on her empathy, on the community-building and intersubjective understanding of which she is capable.²⁶⁰ Thus, literary woman “stands in sharp contrast to her closest interdisciplinary cousin, economic man.”²⁶¹

This article’s primary attraction was not the possibility that West associates men with rational maximizing and women with intersubjectivity. Instead, this section will explore her contrast between the visions called *economic man* and *literary woman*. In other words, the critique will operate on the level of West’s assignment of gender to two general human images, one of which (she claims) arises out of law and economics and the other out of law and literature.²⁶²

The definitional contrast between economic man and literary woman begins in the article’s introduction. West states that it is, “of course,” standard to refer to the “abstract character who has emerged from the

257. West, *supra* note 168.

258. *Id.* at 869.

259. *Id.* at 868-73.

260. *Id.* at 873-78.

261. *Id.* at 868.

262. *Id.* at 867.

economic analysis of law" as "economic man."²⁶³ Also, "in the interest of rough justice and somewhat in the interest of accuracy," the person "emerg[ing] from literary legal analysis" can be referred to as "literary woman."²⁶⁴

The first step in West's definitional contrast—the assignment of gender to these two general visions of "human being"—clearly is not inevitable.²⁶⁵ First, gendering the law and economics vision may only reflect one's view of that school of thought. The image of humans as rational maximizers of their own utility is claimed to be virtually universal by proponents of law and economics.²⁶⁶ This basic aspect is reflected in a quotation from Richard Posner that West cites as she launches into her description of economic man: "[Law and economics assumes] that people are rational maximizers of their satisfactions Is it plausible to suppose that people are rational only or mainly when they are transacting in markets?"²⁶⁷ Second, West herself acknowledges that her image of the human vision emerging from law and literature may not be the most representative of that school of thought.²⁶⁸

West's genderization of these visions provides the framework for her contrast of them. Rendered as an opposite of "literary woman," "economic man" is constructed out of derogatory andrisc imagery.²⁶⁹

First, economic man's prime attribute, his "Herculean rationality," is a conceit.²⁷⁰ West characterizes economic man's claim as: "[h]e knows his

263. *Id.* One might dispute the "standardness" of this genderization.

264. *Id.* "Rough justice" is explained as the inclusion of men in terms referring to women. *Id.* at 867 n.2. Somewhat contradictorily, this same footnote states that "accuracy" means that "women's moral voice seems to be distinctively tied to the moral value of empathy" and the "literary method of narrative" discussed in the article. *Id.* West's text actually dichotomizes the genders, belying any such "rough justice."

265. *See id.* at 867.

266. *See, e.g.,* GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

267. West, *supra* note 168, at 868 n.2. (citing RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 1-2 (1981)).

268. *Id.* at 867-68. West states that

I am not suggesting, and do not believe, that the comparative vision of literary woman that contrasts with economic man and which I will describe in this essay is the only, or even the most, representative vision of humanity and human nature that has emerged from the law and literature movement.

Id.

269. *See id.* at 868-81.

270. *See id.* at 868.

own subjective rationality and pursues it relentlessly.²⁷¹ This false claim is exploded by the obviousness of our failures of self-knowledge.²⁷² Herculean rationality is antipodal to literary woman's complexity: "[s]he does not know herself . . . [and] is sufficiently complex so that as a character, she is worth portraying, and as a reader, she is worthy of dialogue; she is educable."²⁷³

Second, this phony vision is potentially destructive. West states that, in addition to the risk of losing "the literary vision of our humanity,"²⁷⁴ it is possible for us to become "the person posited as economic man."²⁷⁵ This would mean that we would be nonempathic; we would be "hardened to others," and "unable to listen to, understand, or respond sympathetically to the subjective anguish of others."²⁷⁶ The reader does not escape the gender-identification of the economic human: West warns against "the egotistic danger of economic man."²⁷⁷

In marked contrast, literary woman's prime attribute is not a conceit. Her "empathic ability is truly Herculean."²⁷⁸ The literary woman is amazingly capable: "She has a virtually infinite ability to understand the subjective being of the other, even where such empathic knowledge is most difficult: of the person with the different racial heritage, the different family history, the different intelligence, or the different ambitions, goals, happiness, and sorrow."²⁷⁹ West's two examples of this literary type are Toni Morrison²⁸⁰ and Patricia Williams.²⁸¹

West's contrast of genders by employing strictly derogatory andric imagery is also prominent in the second main portion of *Economic Man and Literary Woman*, where West concentrates on the moral promise of literary woman. This moral promise is exemplified by her "empathic competence, which is not shared by economic man."²⁸² According to West, "the literary woman achieves the empathic bridge in the hard case,

271. *Id.*

272. *Id.* West states that "[a]lthough economic man is perfectly rational with respect to knowledge of his own subjective well-being, he is at the same time utterly incapable of empathetic knowledge regarding the subjective well-being of others." *Id.* at 869.

273. *Id.* at 871.

274. West points out that the law and literature movement is "an important and even vital interdisciplinary and critical perspective on law." *Id.* at 879.

275. *Id.* at 874.

276. *Id.* at 875.

277. *Id.*

278. *Id.* at 872.

279. *Id.* (footnote omitted).

280. *Id.* at 872 n.21 (citing TONI MORRISON, *BELOVED*).

281. *Id.* (citing Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. L.R.-C.L.L. REV. 401 (1987)).

282. *Id.* at 872.

the means by which she gains access to the other's subjective life, [through] metaphor and narrative."²⁸³ Additionally, literary woman represents hope:

[U]nlike economic man, she is . . . someone we can unabashedly claim that we should become. She represents not just our cultural heritage, but more importantly (and relatedly) she represents our potential for moral growth. She is the possibility within all of us for understanding, for empathy, for sympathy, and most simply, for love.²⁸⁴

Sometimes West is gender-neutral in her description of the literary type. For example, she writes, "We can fulfill the empathic promise of the literary *person* rather than the egotistic danger of economic man."²⁸⁵ However, the economic type is never rendered in gender-neutral terms and the literary person is often gender identified. West begins the paper by claiming that "women's moral voice seems to be distinctively tied to the moral value of empathy . . . and the literary method of narrative."²⁸⁶

West's discussion of literary woman's moral promise features an andric image of incapacity.²⁸⁷ She claims that empathy is often hard to achieve, particularly "when the experience with which we are trying to empathize is one that we have never experienced ourselves, and even one that we could never experience ourselves."²⁸⁸ Her only "examples" of such empathic or intersubjective disability to mention gender complement her view of women's unique moral voice and male disability. For example, "[I]t is very difficult for a white man to empathically grasp the magnitude or nature of the pain of being the only woman or black on a law faculty."²⁸⁹

283. *Id.* at 873-74.

284. *Id.* at 878 (footnote omitted).

285. *Id.* at 875 (emphasis added).

286. *Id.* at 867 n.2 (citing Suzanna Sherry, *Civic Virtue and The Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)).

287. *See id.* at 873-77.

288. *Id.* at 873 (footnote omitted).

289. *Id.* As another example:

The adamant refusal of the "white male heavies" in the critical legal studies movement (as elsewhere) to come to grips with this deceptively simple point is the reason, plain and simple, that so many women, people of color, gays, lesbians, and other "different" and differently oppressed groups are enraged by the internal dynamics of the movement.

Id. at 873 n.23.

2. Conclusion

The andric images in this text are strictly derogatory. However, the purpose here has been to demonstrate West's gender contrast and its centrality to her claims about the relative merits of the "economic" and "literary" versions of the human being. Her ascription of gender to the differing visions of "human being" that she claims exist in the economic and literary schools of legal thought is complemented by a strict dichotomy of gender traits. This dichotomy, furthermore, is the clear grounding of her contrast between the visions of "human being" she discerns in the two schools. Gendering these visions is not inevitable, but West's handling of the differences between them as well as the moral promise of the literary species is clearly heavily dependent on the lens of gender, from the use of pronouns to substantive pictures of gendered traits.

VII. FRANCES OLSEN

This essay's discussion of critical andric imagery in Fran Olsen's work is focused on a single article, *Statutory Rape: A Feminist Critique of Rights Analysis*.²⁹⁰ This article is unique among her published pieces because it is the only article containing crucial andric imagery.²⁹¹

In *Statutory Rape*, Olsen claims to add to the debate over rights analysis and sexuality²⁹² out of two motivations:

This Article . . . uses statutory rape laws to examine rights analysis and the critique of rights in a concrete context and to evaluate the relevance of both to women's struggles. I have chosen this example for two reasons: first, statutory rape laws raise in a rich context issues of equal protection, paternalistic protection, sexuality, and privacy; second, the Supreme Court upheld a gender-based statutory rape provision three years ago in *Michael M. v. Superior Court*,²⁹³ a de-

290. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

291. Apart from this article, Olsen does not place much emphasis on generalizing assertions about men. Olsen does, however, indulge in occasional blanket assertions about men in her other writings. For example:

For men, the family is a realm in which they can expose their "weaknesses," in which they may embrace without shame the values traditionally associated with women. By relating with women in families, men try to reclaim wholeness. Second, the family is a realm in which men can be bosses. In their families men can express competitive values and other values traditionally considered masculine. Men may be compensated in the family for their failures in the marketplace. The home is a haven for men.

Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1565 (1983).

292. Olsen, *supra* note 290, at 390.

293. 450 U.S. 464 (1981).

cision that has generated a good deal of scholarly comment.²⁹⁴

Olsen's various conclusions about rights analysis and sexuality are grounded in an image of male heterosexuality as pervasively predatory and coercive.²⁹⁵ In fact, this pejorative, sexualized androcentric image is crucially present in her discussion of both rights and statutory rape laws, as well as the result in *Michael M. v. Superior Court*.²⁹⁶ In other words, far from being merely one of the issues raised by statutory rape laws, Olsen's text makes it clear that sexuality (of the straight male variety) is *the issue*.²⁹⁷

Olsen's text also makes it clear why her characterization of male sexuality—and not a position on the battleground of rights—forms the basis for her discussion of statutory rape laws:

Some of the proposed changes in statutory rape laws are better than others. It is even possible that most feminists would agree on the best change. But this agreement would not be reached by discovering the "real" meaning of women's rights or by logically deducing the "true implications" of gender equality. Rather, it would rest upon sociological calculations and political and moral commitments. An abstract commitment to women's rights does not help us decide concrete cases.²⁹⁸

The argument in the next section supports the idea that the desire for feminist agreement rests upon seeking feminist acceptance of the "sociological calculation" that male heterosexuality is unqualifiedly negative.²⁹⁹ This pejorative image of male heterosexuality is the foundation of Olsen's thesis.

A. *The Pejorative Image of Male Heterosexuality*

In *Statutory Rape*, Olsen is mostly critical of rights analysis.³⁰⁰ She begins her critique on the most general level, pointing to past demonstrations of the contradictions and indeterminacy of rights theories.³⁰¹ Rights thinking also has a negative impact on thinking about sexuality:

[T]hinking in terms of rights encourages a partial and inadequate analysis of sexu-

294. Olsen, *supra* note 290, at 390 (footnote omitted).

295. *See id.* at 390-401.

296. *See id.* at 390-429.

297. *See id.* at 429-32.

298. *Id.* at 412.

299. *See infra* notes 300-334 and accompanying text.

300. *See Olsen, supra* note 290, at 390-401.

301. *Id.* at 387-89 (footnotes omitted).

ality . . . it conceptualizes the problem of sexuality as a question of where social controls should end and sexual freedom should begin The important issue, however, is not where to draw such a line, but the substance and meaning that we give to sexuality.³⁰²

Olsen, however, has many good things to say about rights. For example, “[t]he claim that women have rights . . . [as a description] expresses a set of established social practices that are fairly decent for women.”³⁰³ Such a claim also “is a way for a woman to make a claim about herself and her role in the world.”³⁰⁴ “[R]ights for women . . . may be necessary and should be supported.”³⁰⁵

In contrast, her detailed treatment of rights, sexuality, and statutory rape law features a single, condemnatory view of male heterosexuality as predatory.³⁰⁶ Her examination of rights analysis in the context of statutory rape laws—a regulation of sexual conduct—is constantly and structurally related to her characterization of the meaning and practices of male heterosexuals.³⁰⁷

This definite and constant image of male heterosexuality as coercive and aggressive fuels the thematics of the piece.³⁰⁸ Whether Olsen is discussing various formulations of basic rights that women might assert,³⁰⁹ the general historical and current feminist take on statutory rape laws,³¹⁰ a number of posited rape law devices for improving women’s lot,³¹¹ the result in *Michael M.*,³¹² or a new feminist jurisprudence cen-

302. *Id.* at 389.

303. *Id.* at 390-91.

304. *Id.* at 391.

305. *Id.* at 394.

306. This Article makes no claim regarding Olsen’s statements about male heterosexuality, other than that they are important and structurally supportive of her article’s main themes.

307. Olsen never uses the word “heterosexual.” Her typical formulations do not break down “male sexual” into homosexual or heterosexual types. However, because she is only concerned with male sexual practices regarding women, it is logical to assume she means only male heterosexuality.

308. Olsen offers only “occasional moments of escape:”

Friends have argued to me that men are often confused about when women are or are not receptive to them and that what I characterize as men’s efforts to force community upon women is at least a step away from alienated isolation. To the contrary, I would suggest that the expectation of access to women by men is part and parcel of our alienated existence None of what I say is intended to deny, however, the occasional moments of escape from alienation that individuals experience as a glimpse of new possibilities. Such moments do occur (even between men and women) and they can be wonderful.

Olsen, *supra* note 290, at 394 n.23.

309. *Id.* at 390-401.

310. *Id.* at 401-06.

311. *Id.* at 406-13.

tered on sexual thinking and practice,³¹³ she employs this picture of current male heterosexuality.³¹⁴ This Article discusses each position, demonstrating the versatile thematic centrality of Olsen's pejorative image of male heterosexual practices.

1. Rights and the Critique of Rights

Olsen's discussion of rights and the critique of rights, as both apply to women's sexual situation, makes crucial use of an image of illegitimate and aggressive male sexual conduct. The image supports her claim that rights and the critique of rights are valid and problematic for feminism, depending on context.³¹⁵ For example, in discussing women's right to autonomy, Olsen valorizes rights using such an image: "Men force community upon women when they make sexual advances to coworkers and subordinates or pester women strangers with unwelcomed conversations. A rapist may believe he is seeking community with his victim, especially if she is his wife or social friend."³¹⁶ Further, the image is crucial: "[t]he women's 'rights' that we should support are an expression of the social practice of allowing women to resist forced community."³¹⁷

2. Feminism and Statutory Rape Laws, Generally

Olsen's general discussion of feminism and statutory rape laws also features the pejorative image of male heterosexuality. In this section, she purports only to adumbrate the various positions taken by feminists past and present on statutory rape laws, chiefly (1) nineteenth-century feminists' general support for such laws out of protective motives and (2) her statement of the two contemporary feminist criticisms of such laws: "that they restrict women and that they reinforce sexist stereo-

312. *Id.* at 413-29.

313. *Id.* at 429-32.

314. To use a concept from rhetoric, her combinatory use of the word "male," forms of the word "sexual," and forms of the word "aggression" (as well as analogous terminology in various combinations), can be called the use of a "commonplace." A "commonplace" is a "classical rhetorical term for a set-piece of discourse repeatable in a variety of situations." Condit, *supra* note 88, at 227. See also *supra* note 89 for Condit's basic definition of "presence," another helpful rhetoric concept.

315. Olsen, *supra* note 290, at 388.

316. *Id.* at 393.

317. *Id.*

types.³¹⁸

According to Olsen, nineteenth-century feminists conceived of male sexuality as actually and not stereotypically aggressive.³¹⁹ Also, this “nineteenth century concern with oppressive male initiative was replaced in the mid-twentieth century by concern with state repression of sexuality.”³²⁰

Her own sympathies turn out to be with the ancients, not the moderns. Resonating with her earlier discussion of forced community and presaging her discussion of *Michael M.*, Olsen rejects the more recent concern with stereotype-weakening and state repression, and echoes the nineteenth-century protectionists:

It can be argued that the [statutory rape] statutes legitimate the pervasive reality of male sexual aggression by attempting to police a border between “good” shared sex and “bad” coercive sex. In fact, there is no clear distinction; the exploitative content of so much sexuality in our society pervades all of its forms.³²¹

3. Addressing Feminist Concerns Regarding Statutory Rape Laws

The pejorative, repetitive image is used in the next section of the article, where Olsen discusses a number of devices that might address contemporary feminist concerns that statutory rape laws limit women sexually and reinforce stereotypes.³²² First, there are two ways in which such laws could be changed to “free young women from state-enforced sexual constraint”: (1) such laws could be abolished, or (2) such women could be given the decision whether or not to prosecute.³²³

The first option is addressed with the image of destructively aggressive male heterosexuality. Olsen rejects abolition on the explicit and single ground that it would expose young women to the systemic private oppression faced by adult women.³²⁴ This oppression is the result of structural societal conditions and private aggressive action: “Adult women occupy a position of pervasive economic and social subordination to men. Adult women are seduced, pressured, coerced, and even forced into unwanted sexual relations, for which they have no legal recourse.”³²⁵

Olsen’s list of possible avenues to reduce the damaging stereotype of

318. *Id.* at 402.

319. *Id.* at 403-04.

320. *Id.* at 404.

321. *Id.* at 402 n.71.

322. *Id.* at 404-06.

323. *Id.* at 406-10.

324. *Id.* at 406-07.

325. *Id.* (footnote omitted). Olsen’s use of the passive voice in the second sentence does not disguise the actors.

helpless victimhood implicit in statutory rape laws likewise includes the image of destructive, aggressive male heterosexuality in crucial ways. For example, abolition is again problematic because it would "allow[] more young women to be victimized by male aggression."³²⁶

The second avenue is more effective enforcement of current statutory rape laws.³²⁷ This avenue is interesting because Olsen—for the first time in the article—directly refers to male sexual aggression as a "stereotype."³²⁸ However, the following adjacent paragraphs—her whole discussion of this avenue—illustrate her actual view that male sexual aggression is importantly real, and not a false but common ascription:

If it were possible to enforce or revise statutory rape laws so that they actually prevented men from victimizing women, the stereotypes might become so false that they would lose their power. This approach implies significant risks, however. Legal reform may be insufficient to prevent victimization; laws alone seldom change behavior. Moreover, in our present society, it may be impossible to empower women without stigmatizing them.

In a sense, this second approach is the converse of [abolition]. [Abolition] would undermine the stereotype of men as aggressors and women as victims but allow the reality; the second would support the stereotype but undermine the reality.³²⁹

These passages construe aggressive male heterosexuality as real and law-immune. As to the second paragraph, it is clear that Olsen believes that sexual stereotype and sexual reality occupy separate spheres. The reality of men as aggressors would be allowed by abolition and would be undermined by effective enforcement or reform. The stereotype would be affected in the opposite way. The first paragraph both places victimizing male sexuality in an at least intermediate causal position and denies that enforcement or reform could stop male aggression ("laws alone seldom change behavior").

The third avenue would reduce stigma to underage women by extending the protection of statutory rape laws to underage males.³³⁰ Olsen problemizes this approach by pointing out that "it obscures the issue of social power."³³¹ This issue resolves itself into current sexual practices, with male sexuality imaged as non-repressed and perhaps non-repress-

326. *Id.* at 410.

327. *Id.*

328. *Id.*

329. *Id.* (footnotes omitted).

330. *Id.*

331. *Id.* at 411.

ible:

Extending age-of-consent laws to males may effect merely a cosmetic change, without altering images or practices under the law. Moreover, it leaves untouched the repressive aspects of statutory rape laws. In our present society, these repressive aspects hurt females more than males. Extension of the legal rule to males might not bring extension of these repressive aspects.³³²

"Practices under the law" probably implies male sexual aggression, given her objection to a fourth and final avenue, one that would "decriminalize most sex between teen-agers but extend protection to minors of both sexes against exploitation by an older person."³³³ Olsen's criticism of such a regime starkly and exclusively rests on her image of male heterosexuality: "Unfortunately, such a law would not address the problem of male sexual aggression that characterizes society at large. Underage males are likely to relate to underage females in illegitimate ways, just as their older counterparts relate to adult women in illegitimate ways."³³⁴

4. *Michael M. v. Superior Court*³³⁵

The image of pervasive, destructive, aggressive male heterosexuality accompanies Olsen's treatment of *Michael M.* In that case, the U.S. Supreme Court narrowly rejected an equal protection challenge to a California law criminalizing sex with underage females, but not underage males. Here, this Article will demonstrate how Olsen's theme of "pervasive male sexual aggression" or "coercive male initiative" is present in her criticism of each Supreme Court opinion in the case, as well as her treatment of the reaction of feminist scholars to the case.

Olsen condemns the *Michael M.* case, "including the plurality, concurring, and dissenting opinions," because it functions to "mask and legitimate conditions of social existence that are hurtful and damaging to women."³³⁶ In each discussion of the underlying opinions, she reintroduces the image of hurtful and damaging male sexual aggression. Thus, she asserts that Justice Rehnquist's plurality opinion failed to address reasons behind use of statutory rape laws by underage women: "to protect themselves from male sexual aggression."³³⁷ In Olsen's view, the plurality's tacit acceptance of the underage woman's joint responsibility was nonsensical because the laws exist "to protect females from male

332. *Id.*

333. *Id.*

334. *Id.* at 412. Notice how "illegitimate" is rendered as the likely basis of at least underage males' relations with women.

335. 450 U.S. 464 (1981).

336. Olsen, *supra* note 290, at 427.

337. *Id.* at 414.

sexual aggression.³³⁸

Justices Stewart and Blackmun each filed concurrences. Stewart founded his resistance to Michael M.'s equal protection argument on the fact that the statutory rape law in question did allow underage women to be prosecuted for aiding and abetting their underage sexual activity.³³⁹ Olsen criticizes this as follows: "by treating the intercourse as a joint wrongful act . . . [this] approach would discourage or disable women from using statutory rape laws to protect themselves against aggressive males."³⁴⁰ She maintains that Blackmun expressed qualms about the prosecution of Michael M. because of his dim view of the victim in the case. His opinion "endorsed the double standard of sexual morality, under which men may aggress against one class of females, but must leave the 'higher' class chaste."³⁴¹

Justices Brennan (joined by White and Marshall) and Stevens each filed dissenting opinions, maintaining that the statute discriminated against men. Olsen rejects the dissenters' prescription for curing the facial discrimination of the statute by prosecuting underage women. If such a regime existed, "[a] woman would find it more difficult to use statutory rape laws as a shield against male aggression, even aggression by men who are above the age of consent."³⁴² She views the dissenting opinions as flawed, in that they tacitly include a positive view of current male heterosexual practices:

The dissenters assume that the problem of sex discrimination can be solved with tools and resources readily at our disposal, that sexual intercourse in our society is an equal and joint act, and that no major or fundamental changes in our present sexual arrangements are necessary. All of these assumptions are unjustified and apologetic.³⁴³

The pejorative image of male heterosexuality also figures prominently in Olsen's discussion of feminist reaction to *Michael M.* Much of this portion of her article is a summary of Wendy Williams' discussion of the case.³⁴⁴ Williams is represented as an example of the "liberal-legalist

338. *Id.*

339. 450 U.S. at 477 (Stewart, J., concurring).

340. Olsen, *supra* note 290, at 415.

341. *Id.*

342. *Id.* at 420.

343. *Id.*

344. See Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. L. REP. 175 (1982).

view of *Michael M.*³⁴⁵ Williams “acknowledges that men are frequently sexual aggressors,” but nonetheless fails to “endorse laws addressing this problem.”³⁴⁶ Ultimately, she fails to recognize “the cultural phenomenon of coercive male initiative.”³⁴⁷

These failures may be the result of Williams’ liberal-legalist aversion to gritty reality.³⁴⁸ Olsen writes: “[Williams] assumes that to oppose male sexual aggression we must refuse to acknowledge its existence.”³⁴⁹ Olsen also feels that Williams’ quibbling over the damaging aspects of protectionist legislation is likewise a failure of clear sight: “I believe that we should acknowledge the present reality of pervasive male sexual aggression in our society and devise ways to change it rather than deny it as an ‘outmoded stereotype.’”³⁵⁰

Olsen also claims that *Michael M.* “has had a bad effect on feminist political analysis.”³⁵¹ This bad effect is chiefly the obscuration of male sexual aggression. For example, Olsen points out that some feminists share the dissenters’ view that “prosecuting young women will deter them from becoming pregnant.”³⁵² These feminists “do not consider whether giving females more power to resist male aggression would reduce the incidence of unwanted pregnancy.”³⁵³ The Court’s “liberal-legalist” method also ensnares feminists into accepting “a mystification of sexual intercourse,” a false belief that heterosexual sex is an “equal interaction.”³⁵⁴

Olsen ends this section by resting her critique of the *Michael M.* decision on her image of male heterosexuality:

The decision in *Michael M.* did not have to mystify sexual intercourse or legitimate the status quo. The case could have been an occasion to examine conditions of sexuality in a society of gender hierarchy. Male sexual aggression could have been exposed as oppressive and illegitimate. Michael’s coercive male initiative could have been generalized and delegitimated.³⁵⁵

The Court did not evince acceptance of Olsen’s view of pervasive, preda-

345. Olsen, *supra* note 290, at 423.

346. *Id.*

347. *Id.* at 425 n.184.

348. For a direct attack on the abstractions of liberal feminist legal theory using a self-acknowledgedly foundational, extremely pejorative image of male sexuality, see Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 93-108 (1987).

349. Olsen, *supra* note 290, at 423-24.

350. *Id.* at 424.

351. *Id.* at 425.

352. *Id.*

353. *Id.*

354. *Id.* at 426.

355. *Id.* at 428.

tory, and aggressive male heterosexual practice. It did not show awareness that "sex is usually to some extent imposed on females by males."³⁵⁶

5. Male Heterosexuality and the New Feminist Jurisprudence

The article concludes with a proposal for a new direction in feminist jurisprudence that will turn the focus away from squabbling over rights to a "call for a reconstruction of sexuality altogether."³⁵⁷ In this section, Olsen includes her image of male heterosexuality in a summary of her position on rights analysis of statutory rape laws:

Feminist rights analysis generally pretends that there are no differences between men and women and attempts to advance women by giving them the rights men have. The related attitude toward sexuality pretends that males are not sexually aggressive and attempts to advance women by allowing them to participate in sex as men do. Rights analysis is *modified*—though not basically changed—by feminist arguments for special treatment. The sexual analogue to special treatment recognizes males as aggressive but acts as though merely expanding social control, without changing the nature of social control, will provide a real answer.³⁵⁸

Feminists, Olsen claims, need to go beyond rights analysis ("liberal legalism").³⁵⁹ This would end the practice of pretending that males are not aggressive and it might change the nature of social control by empowering women to use social control mechanisms to provide the real answer to pervasive male sexual aggression. Feminists should focus efforts on the reconstruction of sexuality, which is currently "a system defined by and for men and designed in such a way that women are silenced, terrorized, or both."³⁶⁰

B. Conclusion

In *Statutory Rape: A Feminist Critique of Rights Analysis*, Fran Olsen uses a repetitive and pejorative image of male heterosexuality as the "sociological calculation"³⁶¹ that might lead to feminist agreement on statutory rape law reforms. The sociological focus is mandated by, *inter alia*, debilitating feminist division over legal rights analysis. If femi-

356. *Id.*

357. *Id.* at 430.

358. *Id.* at 429.

359. *Id.* at 430.

360. *Id.* at 431.

361. See *supra* note 298 and accompanying text.

nists could simply see the reality of male sexual predation, the circular distractions of abstract rights arguments might be shunted aside. Real progress might be made.

The objects in the lengthy analysis of her text were to (1) point out the constant repetition of that image in her article, and, more importantly, (2) to demonstrate the image's use in advancing her arguments. The image is invariably negative and derogatory. One can experience it as a wholesale condemnation of male heterosexuality. That, however, is beside the point. This lengthy analysis of *Statutory Rape* shows how a particular picture of male sexual practices fueled a feminist's discussion of laws and rights.

VIII. CONCLUSION

This essay was prompted by two recognitions. First, there is no systematic treatment of how feminist legal theorists depict men in their writings. In fact, no systematic study exists of how these theorists image women. They have criticized each other's conceptions of women, but such commentary has always been part of the debates within feminist jurisprudence. No one had attempted to stand back and look at the representations of men or women across a range of feminist legal theorists.

This was and is a serious deficiency. This essay displays the important role played by at least one category of such images in feminist jurisprudential writing. It shows that these images are central to thematic construction and presentation in feminist jurisprudence. Images of men mandated attention because those depictions have been unaddressed, even as part of feminist legal theory's internal debates.

Second, andric images in feminist jurisprudence also required attention because of the quality of this imagery. One is struck by the sheer volume of facile and derogatory definitions and characterizations of men, male, and masculine, etc., in feminist jurisprudence. Men are rarely differentiated at all. One is also struck by the indirectness and obtuseness of much of this imagery. Men are—perhaps of necessity at this time—largely an inference (interference?) in feminist legal thought. Women receive the energies directed at completeness and clarity; men, male, or masculine provide a murky backdrop.

However, this phenomenon of ancillary characterization is important to examine because women—in part through feminist legal theory—have entered the previously all-male realm of gender definition and distortion. Rather than merely providing the possibility of a salutary balance, perhaps this phenomenon has further cluttered the confusion and heightened the crudity of political discourse.