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# Aristotle and the Dilemmas of Feminism

Andrew C. Spiropoulos, *Oklahoma City University School of Law*



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## ARTICLES

### ARISTOTLE AND THE DILEMMAS OF FEMINISM

ANDREW C. SPIROPOULOS\*

#### I. INTRODUCTION

One would have to be foolish, as well as inattentive, to deny or disparage the ascendance of feminist jurisprudence. Feminist theorists have critiqued the foundations of numerous bodies of legal doctrine and policy, including the treatment of rape<sup>1</sup> and the regulation of divorce, child custody, and property division.<sup>2</sup> Their critiques are radical in the precise meaning of the word; they go to the root of the political principles embodied both in traditional legal doctrines and the reforms that have attempted to improve on them.

These critiques have taken on increased importance as society has come to acknowledge that, since the modern feminist movement of the 1960's, the position of women in Ameri-

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\* Assistant Professor of Law, Oklahoma City University School of Law. B.A., Carleton College; M.A., J.D., University of Chicago. I would like to thank the Kerr Foundation for generously supporting the research that resulted in this essay.

1. *E.g.*, Susan Estrich, *Real Rape* (1987).

2. *E.g.*, Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991).

can society has not improved as much as we would have hoped and in significant ways has declined. This disappointment has occurred despite feminist efforts to enact reforms in areas such as divorce and employment law. Indeed, the expectations raised by these legislative successes have fueled the disappointment. Feminists have been forced to ask what went wrong.

Many feminists who have taken a hard look at the feminist reforms of the 1960's through 1980's have agreed that one of the most serious flaws of much of the resulting legislation was a slavish adherence to the principle of gender neutrality. Divorce reform presents the best example. Reformers, including many women, wished to improve the status of women by making divorce easier to obtain and by changing the rules regarding property division after divorce to require judges to presume that women were equal contributors to the household. The new rules were based on the idea that men and women were equal partners in the marriage and should be treated similarly.

In addition to divorce reforms, liberal feminist reformers<sup>3</sup> scoured family law in order to eliminate, either through constitutional challenge or legislative reform, gender-based family law statutes. This effort led to the demise of alimony statutes that awarded alimony only to women, child custody doctrines that specifically favored women, and statutes requiring men to supply women with the necessities of life. These changes were made in the name of gender equality.

We have discovered, however, that these divorce reforms were, from the perspective of the welfare of most women, ill-advised. Since the passage of these laws, more and more women have suffered through a divorce that impoverished them and their children, while their ex-husband's income increased. The elimination of rules favoring women in the divorce process has left women far more vulnerable in settlement negotiations than they were before reform, forcing many scholars to conclude that women have been forced to make unneeded concessions, further contributing to their declining standard of living. The

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3. In this essay, the term "liberal" refers to the jurisprudential position that laws should be based on formally neutral, clearly stated, relatively inflexible rules that apply to all citizens equally. In this context, a commitment to the rule of law, thus, is a liberal commitment.

symbolic benefits of living under a more gender-neutral regime have not made the suffering any easier to accept.

In confronting the failures of the liberal reforms, feminists disagree over what caused this failure and what principles should guide future reforms. These disagreements are not tactical; they are fundamental. Some feminists, for example, argue that one reason for the liberal failure was that many of the reforms, particularly in the family law arena, were rooted in a way of thinking that is particularly male. Men, because of a biologically determined or psychologically developed nature, seek to arrange society around hard, abstract rules that allow competition between individuals. If someone wins or loses, such as a man walking away from a marriage with most of the property, as long as the rules have been followed, society should not be concerned. Once divorce law was reformed to suit male nature, naturally, as it were, men began to increasingly prevail.

Feminists who agree that women's nature differs from men's believe that law should reflect, in the words of Carol Gilligan, women's "different voice."<sup>4</sup> Gilligan's work attempts to establish that women follow a morality of care, while men follow a morality of rights.<sup>5</sup> Women draw their nature from their essential connection to other human beings; hence, they are most concerned with the quality of that connection and seek to care—to nurture—others. Men, on the other hand, are by nature separate from other people; they seek to define a sphere of autonomy, or rights, that establishes sure boundaries for a life of competition and achievement.<sup>6</sup> It is this male mindset that underlay the disastrous liberal reforms; feminists should now concentrate their efforts on developing both a jurisprudence and a set of legal proposals that are based on the morality of care.

Another group of feminists, the anti-difference feminists, finds the Gilligan thesis at least unhelpful and at most danger-

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4. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

5. *Id.* at 17.

6. *Id.* at 16-23. It should be noted that even feminists who agree that this nature exists disagree over whether this nature is biologically or psychologically determined.

ous. They point to the similarity of the Gilligan nurturing woman to the stereotypical passive, disempowered homemaker so lionized by men. Even if some women may demonstrate some of the traits portrayed by Gilligan, these traits are the result of oppression, not blessed nature. It is a mistake, in other words, to celebrate women as nurturers and caretakers, as opposed to competitors and rulemakers. For while women are caring for and nurturing men, men are dominating and making rules for women.

Anti-difference feminists argue that the liberal reforms failed for the same reason that all reforms to this point have failed; men have power and women don't. Until the fundamental reality of oppression changes, women in this society will not be treated fairly. To the extent that Gilligan and her followers persuade people that women do conform to the historical stereotypes propagated by males, they make the task of fighting male power more, not less, difficult.

All feminists agree that this conflict over the nature of women is inseparable from conflict between the same feminists regarding how law should treat the roles women play in society. Difference feminists accept that women are nurturers by nature and thus choose to be mothers over other social functions. Indeed, difference feminists celebrate women's morality of care and often imply it is superior to man's morality. They criticize current law for undervaluing this nurturing and failing to protect women who make this choice. They want the legal regime to recognize women's contributions and explicitly protect their interests against the superior power held by men.

Anti-difference feminists urge women to resist the lure of Natural Mother. While they agree that the law does not sufficiently protect women, they are more concerned that the legal regime is structured to force women into the gendered roles men want them to accept. Anti-difference feminists argue that when difference feminists accept that women will fill these roles and just call for more legal protection, they are encouraging women to participate in their own oppression. Women will only break the chain of patriarchal dominance when the pillars of this society, such as the wage-labor system, the raising of children, and the management of households, are thoroughly

reformed to provide women more choice in the arrangement of their lives.

Lastly, feminists disagree on what should be the final lesson concerning the use of the principle of equality in reform. Some feminists (often difference feminists) vehemently resist legal reforms based on the principle of equality. They associate equality with gender neutrality or "male" rule equality. A tender concern for gender neutrality, they reason, is a remnant of a liberal, male legal paradigm that values concepts like formal equality and the rule of law over the actual lives of women. These feminists instead seek to devise reforms that assist women, without any concern over whether they are gender neutral in form or in impact. A continued obsession with gender neutrality expresses a pining for a perfectly equal world that does not exist and, in any event, cannot be produced by law.

Other feminists urge women to resist the desire to dispense with the principle of equality. A redefined vision of equality, they advise, is a powerful tool for obtaining the kinds of changes that will make a long term difference in women's lives. Rather than assuming that women will continue to play the roles they do now and that law is powerless to change them, feminists should offer a comprehensive vision of substantive equality to replace the liberal notion of rule equality. Law should play a powerful role in restructuring society so that women have the same choices as men. Abandoning equality will only ensure that women remain powerless and unequal.

Still other feminists, wanting both to employ the equality rhetoric we Americans find so congenial and to assist women when possible, argue that women should embrace a "pragmatic" stance. They contend that feminists should eschew the use of a consistent rhetoric and instead make the arguments which will best advance women's interests in the particular case. In other words, if equality works, argue equality; if difference works, argue difference.

This division among feminists is more than an awkward disagreement among friends. These deep philosophical conflicts discourage those who seek a true understanding of the plight of women in law and present serious practical impediments to productive cooperation for reform. I believe that these conflicts are unnecessarily severe. As feminists themselves have re-

marked, contemporary legal thought, including feminism, suffers from the harmful tendency to describe philosophical and legal problems in terms of rigid dichotomies. Women are naturally nurturing or they are not. Law can change people's nature, or it can't. A political regime and its laws are either based on rule equality or not.

For myself, and I surmise for many others, there is truth on both sides of the dichotomy. One can reasonably believe that women are more nurturing than men, but that, given a different social reality, this could change. Proceeding from this idea, one can believe that law can change people's natures, but believe that the power should and must be used sparingly. Must we accept that we are either philosophically incoherent or that coherence is not possible?

Aristotle can help feminists to resolve their conflicts, to come closer to an understanding of human nature, and to devise the best laws to help us live in accordance with that nature. As Linda R. Hirshman has written, Aristotle's thought is "the most ambitious work in the philosophical tradition addressing the critical question facing feminism . . . : the purpose and limits of equality."<sup>7</sup> Centuries before today's legal theorists began to struggle to define the nature of men and women and to think about the roles each play in society, Aristotle bequeathed us a way of thinking about nature, its expression in the political regime, and the role of law in politics that can help feminists transcend the conflicts that plague their discourse and prevent effective political action.

In the first part of this essay, I will explore three important areas of conflict between feminists: the question of whether there is a female nature and, if so, what it may be; the extent to which present gender roles must be respected; and the impor-

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7. Linda R. Hirshman, *The Book of "A"*, 70 TEX. L. REV. 971 (1992). While, as I will make apparent, I disagree with Hirshman on how Aristotle can assist open-minded feminists in devising and implementing legal reforms that will help women—and the rest of society—in the long term, I must state my appreciation to her for introducing the wisdom of classical political philosophy into the debate over gendered laws. As she has so succinctly stated, feminists have a tendency, as do other legal critics, to believe that philosophical ideas that have been debated for hundreds of years "sprang full-armed from the forehead of Catharine MacKinnon" or Duncan Kennedy. *Id.* at 1005.

tance of the principle of equality in legal reform. I will demonstrate that prominent feminist theorists have argued that these issues present stark choices between right and wrong ways of accomplishing feminist reform. The implications of such a conclusion are unsettling; if reformers choose the wrong path, no matter how good their intentions, they will lead women into disaster. In the second part of the essay, I will demonstrate that a true confrontation with Aristotle's thought can teach us that many seemingly conflicting feminist critiques contain truth that cannot be ignored. Aristotle's works, I should add, do not contain an encyclopedia of truths. What Aristotle does instead is to teach us a way of thinking about human nature, politics, and law that takes into account the differing qualities of human beings and the practical difficulties of governing such different people. By understanding both the sameness and differences in humans' natures, Aristotle allows us to transcend the dichotomies plaguing feminism.

For example, Aristotle does not teach us either that human beings have no nature or that their nature is unchangeable and must guide all our political decisions. Rather, he argues that while human beings do possess a nature that a legislator must respect, these institutions are not, and cannot be, wholly determined by that nature. This is because nature is difficult to know in any detail, and because political institutions must conform to the characteristics of the particular people involved. In addition, one must remember that this nature is in part formed by legal institutions themselves. In short, we are both all created equal and different; the statesman must understand, as best as possible, the ways in which we are both.

Thus, while Aristotle, like difference theorists, believes that nature is important, he instructs us to resist adopting a rigid view of what it requires, and to remember that law can affect that nature. In seeming response to anti-difference feminists, Aristotle is also our finest teacher on the limits of politics. While anti-difference theorists may not like the apparent nature of women and the roles that nature supports, it is important to remember that these gender roles developed to fulfill a social purpose. These roles cannot be thoroughly discarded or ignored without serious and harmful consequences.

We must, Aristotle teaches us, always move cautiously when doctoring the soul of the regime. This doctoring must always be done with an eye toward the human good—the fulfillment of human nature—but with the knowledge that the correct decision is not made in the abstract, but rather is the best one that can be made under the circumstances. Principled, practical wisdom, not unprincipled pragmatism or abstract, unbending rules, is the heart of Aristotelian politics.

## II. THE FEMINIST DILEMMAS

### A. *The Problem*

It wasn't supposed to happen this way. Martha Fineman puts the case starkly: "[T]wo decades of the women's movement have not substantially improved the position of women and children."<sup>8</sup> Given the facts, one can hardly argue with her. One scholar has conveniently summarized some of the relevant facts:

Women and men face substantially different economic prospects over the course of their lives. The average full-time female worker earns only seventy-one percent of the wage earned by her male counterpart, and the average college-educated woman earns less than a typical man with only a high-school diploma. Among white married couples from ages twenty-five to sixty-four, three of four husbands earn more than their wives; in half these marriages the wife's wage is less than two thirds that of her husband. When both spouses are the same age and have the same education, the odds against a wife earning more than her husband are three to one.<sup>9</sup>

To put it concisely, in the words of social scientist Victor Fuchs, "the gap between women and men in economic well-being was no smaller in 1986 than in 1960."<sup>10</sup>

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8. FINEMAN, *supra* note 2, at 176.

9. Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1457-58 (1992).

10. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 3 (1988).

This existing economic gap between men and women becomes even more pronounced after divorce. The most noted study of the effects of the institution of no-fault divorce, Lenore J. Weitzman's *The Divorce Revolution*, concluded that among the California divorced men and women included in the study, men experienced a forty-two percent increase in their standard of living while women experienced a *seventy-three percent decrease* in their standard of living.<sup>11</sup> The rich get richer, indeed; more importantly, the already poor get even poorer.

The taste of this reality is especially bitter when one considers that these statistics describe a world that was to have been changed by the women's movement of the 1960's and 70's. Women were told both that they were equal, and that once legislatures removed laws treating men and women unequally and passed laws mandating the formal legal equality of the sexes, they would begin to advance. The problem was overt sexism in the law and legal equality was the solution. Women would take care of the rest.

In *The Illusion of Equality*, Martha Fineman has demonstrated how this promise was made in support of divorce reform, and why the laws mandating equal treatment of men and women in divorce failed to improve (and, indeed, hurt) the lives of women.<sup>12</sup> Fineman places the blame for this harm on the reformers' reliance on the principle of formal equality. The reformers sought formal equality, meaning that laws should treat men and women equally, rather than result equality, which would allow for laws that afford special treatment to one gender in order to equalize results.<sup>13</sup> Fineman argues that while formal equality carries great symbolic weight in our political discourse, reforms based on this idea, if women are not in fact equal, will harm women. In Fineman's words, "[i]n light of the different structural positions women and men occupy, it seems

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11. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 339 (1985).

12. FINEMAN, *supra* note 2, at 2 ("I criticize divorce reform efforts based on an equality model because they have had a detrimental impact on many women and children.").

13. *Id.* at 20-21.

obvious that to impose sameness of treatment, particularly within the context of family laws, simply perpetuates inequality."<sup>14</sup>

The divorce reformers sought to implement their vision of formal or rule equality by eliminating the gender-based rules that judges used to protect women under the old family law regime. For example, courts formerly applied a "tender years" presumption that awarded custody of young children to their mother as long as she was a fit parent. Also, under the old regime, men were required to support their wives, but not vice versa. Operating under this understanding, judges in earlier times often found a way to award the wife the marital home, even if it meant that the wife took more than half the marital assets.

The new reforms changed all this. In property division, for example, the new laws required that men and women be treated as equals. In order to establish this formal equality, the new laws were based on the vision of marriage as an economic partnership in which men and women made an equal contribution and, thus, were entitled to equal benefits upon dissolution of the partnership. Many of the state laws established an equal-division presumption that required judges to justify why they were departing from the equal-division rule. Judges were often instructed that the primary principle that should guide distribution of the property was the contribution of the spouse to the economic unit, not the need of one of the spouses. Because each party had an equal obligation to support themselves and the children after the divorce, the awarding of alimony, apart from temporary awards for the "rehabilitation" of a un- or underemployed spouse, was sharply curtailed. In custody matters, the "tender years" doctrine was abolished, and each parent was considered, as an initial matter, equally qualified to receive custody.

Fineman argues that the results of these reforms have contributed to the impoverishment of women. The emphasis on equal division and contribution has prevented judges from making the unequal divisions of property that often allowed a mother and her children to remain in the family home after divorce.

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14. *Id.* at 35.

The near-elimination of alimony has allowed men to walk away from marriages with greater earning capacities and no obligation to the wife who may have helped him build that earning capacity. Finally, the custody rules, while not significantly affecting who gets the children, have given men the credible threat of a custody fight, depriving women of bargaining power in settlement negotiations.

In sum, Fineman contends that women would have been better off without these reforms. The disaster of divorce reform, Fineman argues, serves as an indictment of the whole project of liberal reform. We should not underestimate the import of this conclusion. What Fineman and, as we shall see, many other feminists are saying is that the purported foundation of the Western political and legal tradition, the derivation and equal application of neutral, objective rules, is responsible for the subordination of women in American society. The acceptance of this claim would require us either to defend the subordination of women as at least a provisional good or to support the abandonment of the rule of law as a guiding principle.

Before making this momentous decision, we should reflect on the exact failings of our use of the rule of law in the context of the position of women. One cannot deny the reality of the economic inequality of women. One can, however, disagree over whether a commitment to the rule of law *inherently* entails the acceptance of subordination of women because of the very nature of a morality of neutral, objective rules, or whether other reasons, such as the sheer exercise of power by men over women, can help explain why our implementation of the rule of law has not yet helped to sufficiently alleviate the disabilities suffered by women. Feminists have profoundly reflected on these questions but have reached unnecessarily polarizing conclusions.

### *B. Woman's Nature?*

One ready answer to the question of why the liberal vision of a neutral, objective rule of law has failed to help women is that it is a male notion, designed by and for males. In order to conclude that the rule of law is gendered, it is necessary to know what one actually means by "male" and "female." In other

words, one must be able to identify the "male" and "female" natures.

For many feminists, Carol Gilligan's *In A Different Voice* supplied the theory for these natures.<sup>15</sup> Gilligan, a developmental psychologist, sought to prove that the existing theories of moral development were gendered, meaning that male psychologists had postulated a course of development that was based on the development patterns of males, not females. These male psychologists classified an individual as a mature adult when that person developed a sense of justice, a belief in equality and fairness, a dedication to rules, and a sense of autonomy from others that is frequently reflected in a concern for competitive achievement and desire for defined individual rights.<sup>16</sup>

Given these assumptions, after studying the development of men and women, these psychologists often concluded that women suffered developmental disabilities. As Gilligan aptly states, "In the life cycle, as in the Garden of Eden, the woman has been the deviant."<sup>17</sup> Women did not develop, or at least not as quickly, a sense of autonomy or separateness. They instead continued to insist that they were responsible for others and refused to judge others' actions by unbending, objective rules. They instead insisted on judging a person's action only in the context of that person's situation.<sup>18</sup> In Gilligan's words, "[t]he psychology of women that has consistently been described as distinctive in its greater orientation toward relationships and interdependence implies a more contextual mode of judgment and a different moral understanding."<sup>19</sup>

This different morality, a morality of care rather than of rights, Gilligan argues, is not deviant; women "bring to the life cycle a different point of view and order human experience in terms of different priorities."<sup>20</sup> Women's voice is vital to the health of society because, more than men, they recognize "the

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15. GILLIGAN, *supra* note 4.

16. *Id.* at 7-9; *see also id.* at 23 ("[T]he developmental litany intones the celebration of separation, autonomy, individuation, and natural rights.").

17. *Id.* at 6.

18. *Id.* at 21-23.

19. *Id.* at 22.

20. *Id.*

continuing importance of attachment in the human life cycle."<sup>21</sup> It is not the fault of women that they do not act according to the theories; it is the theories that are flawed. Human beings mature not when they think like males, but when they understand the importance of both modes of thought. Gilligan concludes:

To understand how the tension between responsibilities and rights sustains the dialectic of human development is to see the integrity of two disparate modes of experience that are in the end connected. While an ethic of justice proceeds from the premise of equality—that everyone should be treated the same—an ethic of care rests on the premise of nonviolence—that no one should be hurt. In the representation of maturity, both perspectives converge . . . . This dialogue between fairness and care not only provides a better understanding of relations between the sexes but also gives rise to a more comprehensive portrayal of adult work and family relationships.<sup>22</sup>

It does not take an Aristotle to see the implications of Gilligan's work for jurisprudence. The resemblance of Gilligan's description of the male morality of rights or ethic of justice to the traditional defense of the ideal of the rule of law is uncanny. The natural conclusion is that liberal jurisprudence is "essentially and irretrievably masculine."<sup>23</sup> Robin West has forcefully made these connections. The rule of law is not based on and does not value the connections between human beings; rather, "its official value is autonomy."<sup>24</sup> Thus, "[t]he values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law."<sup>25</sup>

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21. *Id.* at 23.

22. *Id.* at 174.

23. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

24. *Id.* at 58.

25. *Id.*

Unlike Gilligan, who is concerned with psychological development, West unhesitatingly rests her analysis of women's nature on biology. She argues that women, unlike men, are essentially connected to other human beings through the material, or biological, experiences of pregnancy, heterosexual penetration, menstruation, and breast feeding, as well as the existential connections described by Gilligan.<sup>26</sup> This connectedness "entails a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's."<sup>27</sup> Men, in contrast, are unconnected from other human beings and thus see themselves as autonomous individuals who must be protected from potential aggressors.<sup>28</sup>

This experience of separation is, according to difference feminists, the underlying basis for the rule of law. This experience is captured in Hobbes's state of nature; life is nasty, solitary, brutish, and short because the world is full of equal beings who are in no way connected to you and often wish to take what you have. In order to live a decent life, one must establish rules to govern the competition, protect individual rights, and prevent aggression. Women, on the other hand, see people as

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26. *Id.* at 3.

27. *Id.* at 15. West quite rightly brings to our attention the conflict between feminists, like Carol Gilligan, whom West calls cultural feminists, and feminists, like Catharine MacKinnon, whom she calls radical feminists. The cultural feminists subjectively experience women's connectedness as a great strength and a key to a good life. The radical feminists experience this connection as the key to women's oppression and thus the source of their misery. *Id.* at 28-29. West confronts the tensions I discuss in this essay and argues, *pace* Duncan Kennedy, that they arise from a "fundamental contradiction" in women's lives, meaning that both the cultural and radical feminists tell a truth about women's lives. Women both embrace an ethic of care and wish to free themselves from this intrusive intimacy, thus attracting many feminists to liberal autonomy and individual rights. Women must attempt to struggle with this contradiction and give jurisprudential attention to both perspectives. *Id.* at 55. I offer Aristotle's resolution of this contradiction: these disparate experiences must be understood in light of a common human nature modified by experience and one's personal attributes. What is important for this portion of the essay, however, is that West, as sensitive as she is to the differences among feminists, never seriously addresses the views of the many feminists who deny that women possess a separate, connected nature of any consequence for politics or law. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 n.2 (1989).

28. West, *supra* note 23, at 27.

inherently unequal and needing care, much as an infant needs the care of her mother. They value a society based on responsibility for others and an ethic of care for the weaker among us.<sup>29</sup>

West argues that the rule of law is at best indifferent and at worst hostile to women's values. The results of this dismissal of woman's nature are chilling. West writes:

The material consequence of this theoretical undervaluation of women's values in the material world is that women are economically *impoverished*. The value women place on intimacy reflects our existential and material circumstance; women will act on that value whether it is compensated or not . . . . [T]he Rule of Law is *not* a coherent reaction to the existential dilemma that follows from the material state of being connected to others, and the values and dangers attendant to that condition. It neither recognizes nor values intimacy, and neither recognizes nor protects against separation.<sup>30</sup>

Difference feminists urge fellow feminists to develop a new jurisprudence founded on connection to others that takes women's lives seriously. The rule of law—in truth, patriarchy—must go. This project will not succeed, though, until feminists recognize the truth of women's nature and “attack the burdens of pregnancy and its attendant differences, rather than deny the uniqueness of pregnancy.”<sup>31</sup> Feminist jurisprudence must understand and give life to women's voice.

Anti-difference feminists have little patience for this account of woman's nature. Joan Williams, for example, refuses to abandon liberal feminism's commitment to gender neutrality and sharply questions the difference feminists' description of woman's nature. Williams states her thesis bluntly:

I reject Gilligan's core claim that women are focused on relationships while men are not. To the extent this claim pinpoints actual gender differences, I argue it merely reflects the oppressive realities of the current gender

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29. *Id.* at 27-28.

30. *Id.* at 58-59.

31. *Id.* at 24.

system. Beyond that, Gilligan's claim is inaccurate and serves to perpetuate our traditional blindness to the ways in which men are nurturing and women are competitive and power-seeking.<sup>32</sup>

Williams contends that the picture of women painted by feminists like Gilligan and West is the picture not of women's nature, but a picture of the kind of people men have forced women to become. In Williams's words, "Gilligan is talking about metaphors, not actual people."<sup>33</sup> Men have forged an ideology of "domesticity" and have convinced women to adopt this view of themselves and accept their place in the economic system run by and for the benefit of men. Biology has little to do with women being nurturers. Men can be nurturers too; they just don't have to be.

Williams explains that difference feminism is an "updated version of the Victorian ideology of domesticity," in which women were considered inferior to men but were praised as more moral because they were more nurturing and dedicated to the needs of others.<sup>34</sup> This ideology was devised as a cover for the gender-wage labor system that enriches men at the expense of women and children. This system is premised on what Williams calls an "ideal worker." This worker can work full time and has no child care responsibilities.<sup>35</sup> Men are raised to believe that they will fill the role of ideal worker, while women are raised to believe that they will take care of the children.<sup>36</sup> The women are thus excluded from the economic system and become impoverished. It is this system, not the law's failure to recognize women's special nature, that causes the misery of women. Indeed, argue the anti-difference feminists, the difference feminists' defense of domesticity exacerbates the oppression of this system by celebrating "a woman's culture that encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."<sup>37</sup> Courts have even

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32. Williams, *supra* note 27, at 802.

33. *Id.* at 840.

34. *Id.* at 800.

35. *Id.* at 801.

36. *Id.* at 823.

37. *Id.* at 801.

relied upon the kind of description of woman's nature offered by different feminists to reject a claim of sex discrimination in employment because women did not really want the jobs at issue.<sup>38</sup>

In sum, Gilligan's nature is a new and dangerous offshoot of the seductive ideology of domesticity and must be fought. "To break free of traditional gender ideology," Williams concludes, "we need at the simplest level to see how men nurture people and relationships and women are competitive and powerful."<sup>39</sup> Shaking off this ideology, these feminists argue, is a precondition for successfully accomplishing the real work of feminism, the reconstituting of the current social structure.

So then, out of the need to explain why liberal reforms and the rule of law have not affected the subordination of women, feminists provide different answers to the question of whether the nature of women makes the achievement of both a rule of law and the ending of patriarchy possible. Difference feminists argue that the natures of the rule of law and of women are in perpetual conflict. The rule of law simply does not, and cannot, value what women do. Anti-difference feminists argue that no such nature exists; women do what they do only because that is what men allow them to do. The question is men's power, not women's biology.

### C. *What About Sex Roles?*

These polarized positions regarding women's nature cannot be separated from feminists' divergent positions regarding the treatment of sex roles. The difference feminists accept that, because of their nature, women will seek to be nurturers. West does not mince words:

The value women place on intimacy reflects our existential and material circumstance; women will act on that value whether it is compensated or not. But it is not. Nurturant, intimate labor is neither valued by liberal legalism nor compensated by the market economy. It is

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38. Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd.*, 839 F.2d 302 (7th Cir. 1988).

39. Williams, *supra* note 27, at 841.

not compensated in the home and it is not compensated in the workplace—wherever intimacy is, there is no compensation.<sup>40</sup>

Thus, difference feminists are concerned about ensuring that women who act on their natures are fairly compensated. Fineman, for example, is not interested in grand theories about women's eventual equality; she believes in "the desirability of basing law on what is concrete rather than on what is abstract."<sup>41</sup> She bases her legal conclusions on what will help actual women in the here and now.

This orientation leads her to lament the demise of the gender-based rules of the past because these rules helped women in real cases. It is no consolation that the cause of abstract equality was advanced by looking at women as equal partners in a marriage; it would have been better if courts, recognizing many women's real dependency, continued to award more than half of the marital estate to the woman. Similarly, no one concerned about the actual fate of women can be pleased to see the move from the tender years doctrine to joint custody. This shift has put women, who, by and large, are the primary caretakers of children, at a far greater risk of losing custody.

Fineman is not sympathetic to the notion of using law as a tool to effect social change. Liberal feminists, she claims, "centered on changing role expectations within marriage and on the notion of shared domestic responsibilities between spouses."<sup>42</sup> Their goal was "to break down the gender stereotypes historically associated with the division of labor in the family."<sup>43</sup> Some of these feminists may have even believed that the older rules did not help and may have actually hurt women because they reinforced "the notion that biology is destiny" and made "an individual woman's decision to relinquish custody to her husband more difficult."<sup>44</sup>

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40. West, *supra* note 23, at 58-59.

41. FINEMAN, *supra* note 2, at 7.

42. *Id.* at 24.

43. *Id.*

44. *Id.* at 26.

These reformers forgot that "while law can be used to highlight the social and political conditions it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change."<sup>45</sup> While the reformers saw the dismantling of stereotypes and the establishment of equality as their ideal, this ideal did not in most instances accord with reality. As a result, most women were hurt. It would have been better to take women as they are and help them.<sup>46</sup> Fineman concludes that "we as a society should value and reward nurturing children, sacrifices made for others, and the future that is represented by the children who have been lost to equality."<sup>47</sup>

Other feminists, particularly anti-difference feminists like Williams, maintain that social reconstruction of gender roles is the only effective way to help women. Williams is especially concerned, as are Fineman and West, with the impoverishment of women. As I have discussed, Williams does not attribute this impoverishment primarily to the undervaluing of "woman's work"; the feminization of poverty will not be ended if we value nurturing more. The source of women's economic subordination is the wage-labor structure or the ideal worker system. This structure forces women to choose between neglecting the child care responsibilities that have been assigned to them and that they know men will not assume or economic subordination.<sup>48</sup> This child care burden accounts, it has been found, for about half of the wage gap between men and women.<sup>49</sup> The rise of institutions such as the "mommy track" shows the weight of this responsibility on women who choose to work.<sup>50</sup>

Working in tandem with this structural disability, today's social conditions have made women even more vulnerable to the threat of economic privation than in the past. Phenomena such as increased divorce, the necessity of two-earner households, and increasing numbers of unwed mothers and absentee fathers have made it more likely that women's competitive

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45. *Id.* at 11.

46. *Id.*

47. *Id.*

48. Williams, *supra* note 27, at 824.

49. *Id.* at 825.

50. *Id.* at 828.

disadvantage in the market will result in poverty for women and their children.<sup>51</sup>

What is to be done? First, Williams argues, one must remember that if a woman chooses domestic responsibilities over economic security, it is not because *her* nature has compelled her to do so; it is, rather, the nature of the *choice* that has led her to her decision. To say, as do difference feminists, that women choose to nurture, while men do not, indicates a gross failure to understand the nature of the choice presented:

In order for the wife's "choice" to be equivalent to her husband's, she would first have to be in a position to ask herself whether or not she would choose to be an ideal worker if her husband would choose to stay home with the children. Second, she would have to pose the question in a context where powerful social norms told her he was peculiarly suited to raising children. When we speak of women's "choices" to subordinate their careers, we are so blinded by gender prescriptions that we can forget that the husband's decision to be an ideal worker rests upon the assumption that his wife will choose not to be in order to allow him that privilege . . . . Women know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will.<sup>52</sup>

It is imperative, then, to change the wage-labor structure to give women more choice than that between the ideal worker life pattern or economic deprivation.

Williams hopes the massive entry of women into the workforce will produce a "paradigm shift" in work patterns that will include new options such as flexible schedules, parental leave, and short work weeks. These options will allow women the opportunity for greater participation in the market and will give men the opportunity and incentive to spend more time at home.<sup>53</sup> This real reform, as opposed to making the prison of domesticity more comfortable, is the only way to alleviate fe-

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51. *Id.* at 824-26.

52. *Id.* at 831.

53. *Id.* at 835.

male poverty and should constitute the center of the feminist agenda.<sup>54</sup>

We thus again see that given the same problems to address, particularly the impoverishment of women, feminists, because of their apparently irreconcilable premises, come to conclusions they find terribly conflicting. Their rhetoric tends to exclude their own allies, weakening their ability to propose practical political change. One side tells the other that they are sponsoring laws that are based on an ideal, equal, sexless woman that does not exist and never will. Consequently, not only are women left suffering without any assistance, but the new laws are making them worse off by removing gendered protections that once ameliorated their condition. The other side responds that your gendered laws and, worse yet, your rhetoric, only entrenches the system that has caused the suffering that upsets you. Your excessive concern with legal changes that will only marginally help women is akin to fiddling while Rome burns. Is there a principled way to choose one of these apparently polar opposites? Must we choose?

#### *D. Whither Equality?*

The dilemma of choice has become all the more painful because feminists cannot agree on the ideal they are striving to achieve. Indeed, the questions regarding the existence and content of women's nature, as well the correct focus of legislation regarding sex roles, are folded into the question of whether feminists should strive for equality and, if so, what kind. Many of the same divisions we have already examined, and much of

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54. One could even argue, as Williams does not, that one part of a program to reconstruct sex roles would be to reform family law and other rules to dissuade women from becoming nurturers and giving life to the stereotypes that are at the heart of the current social structure. See Regan, *supra* note 9, at 1484 ("[G]iven the backdrop of the existing gender system, divorce law that treats economic transfers and custody as a 'reward' for concentrating on household tasks may reinforce the message that domesticity is a viable alternate career for women.") Katharine Bartlett and Carol Stack make such an argument against a primary caretaker custody standard and for joint custody. Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986). Fineman implies that this point of view motivated at least some of the liberal feminists who supported divorce reform. FINEMAN, *supra* notes 41-47 and accompanying text.

the same divisive rhetoric, accompany feminist discussions of equality. Some feminists, feeling the pull of both sides of the divide, have attempted to forge a third way. This third way, however, is not the way of principled choice; it is the abandonment of the possibility of principled choice.

Many feminists, most often difference feminists, are skeptical about equality as a principle of reform. As I have discussed, if women do have a nature that differs from that of men, laws that attempt to treat men and women as equal will result in unequal results, most often to the detriment of women. The danger women face from laws based on equality is great, and this potential is far too often realized because, given the respect in this society for equality rhetoric, such arguments "are too easily appropriated and utilized for antifeminist measures."<sup>55</sup> So-called "fathers' rights" advocates, for example, were able to use equality rhetoric to pass statutes providing for joint custody. Fineman advocates that feminists "abdicate equality" because "women and children will fare better under legal rules which reference their material and emotional circumstances, not grand theoretical abstractions."<sup>56</sup> Women should turn away from ideals that don't work for women and seek solutions that do.

Other feminists, however, insist that women must not concede the principle of equality to their opponents. What feminists must do instead is redefine equality to suit their purposes. Equality need not mean rule equality based on equal treatment of each sex. Feminists can instead argue for an equality that is not based on biological equality, but is instead founded on an equality between human beings.

Christine Littleton, for example, argues that equality should be redefined as an "equality of acceptance."<sup>57</sup> This equality is not one of equal rules applying to women and men. Littleton, instead, asks us to accept that, for whatever reason, men and women are different and play different roles in society. They, however, should not be treated differently because of these

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55. FINEMAN, *supra* note 2, at 190.

56. *Id.* at 11.

57. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-85 (1987).

roles.<sup>58</sup> For example, while one can accept that society asks women to be mothers, while asking men to be soldiers, it is inexcusable that society values and rewards soldiering more than mothering.<sup>59</sup> In other words, if we want to call something "women's work," it ought to pay and be given the same respect as "man's work."

If one accepts such a concept of equality, it follows that society, through the law, must ensure that differences in gender do not result in unequal resources, status, opportunities, and power because gender differences ought not to result in differences in people's lives.<sup>60</sup> Difference is not the concern: we are all different. It is what results from difference that matters. We should resolve, as a matter of policy, that some differences, such as gender, will not result in an unequal distribution of social goods.<sup>61</sup> As Milton Regan puts it, "the principle of equality can be used to challenge the propriety of facially neutral rules, as those rules may not allocate goods in a way that assures men and women comparable well-being in their chosen ways of life."<sup>62</sup> By redefining equality, feminists can still call for the reconstruction of society while speaking in the language of the Declaration of Independence.

An increasing number of feminists, finding the polarization I have described unpalatable, have counseled against seeking any theoretical resolution of these dilemmas. They argue that the very attempt to craft coherent answers to questions such as whether women have a nature is a project forced upon feminists by men and should be abandoned. Margaret Jane Radin, for example, calls these dichotomies the "double bind" and says they are created by male oppression.<sup>63</sup> She gives the example

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58. *Id.* at 1297 ("[T]he function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one.").

59. *Id.* at 1329-30.

60. Regan, *supra* note 9, at 1489.

61. *Id.* at 1490.

62. *Id.* at 1491.

63. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

of the dilemma regarding laws protecting pregnant women from adverse employment decisions due to their pregnancy. These laws are often criticized for departing from the principle of equality because they afford women "special treatment" in the workplace. If feminists do not support these laws, women will lose their jobs. If they do support the laws, they are both taunted as hypocrites for preaching equality while asking for special favors and, more importantly, possibly reinforcing stereotypes of women as the "weaker sex."<sup>64</sup> This kind of dilemma is the "double bind."

The double bind, as we have seen, pervades the issues engaging feminists. Radin argues that these dilemmas are caused by our patriarchal conception of gender. Gender is defined in such a way so that if women seek equality they have their difference thrown in their face, but if they seek to be treated differently, they are told that they must be treated equally. In short, women lose either way.

An example of this oppression is the treatment of the question of the nature of women. Conventional thinking forces women to choose the morality of care or the morality of rights. Women must pick what they believe to be true; are we nurturers or not? This framing of the problem is a product of patriarchy. Men first construct a dichotomy between rights, based on rationality, and care, based on emotion, and then find:

the rational pole to be dominant, suitable for the market and the public world, and the emotional pole to be subordinate, suitable for the family and the private world . . . . To exalt the ethic of care leaves the polarities intact. It just reverses their signs. As others have pointed out, a group that seeks liberation from a dominating system of thought should be very suspicious of adopting its categories.<sup>65</sup>

Radin argues that we should be able to choose both the advantages of the ethic of justice and the ethic of care because if women accept the constrained choice, they "are forced to

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64. *Id.* at 1701.

65. *Id.* at 1718.

deny, for the sake of supposed philosophical consistency, things on the other list that are very real and important to [women].”<sup>66</sup> The only way to win this choice is to break the frame of liberal ideology that makes people, including feminists, see these ways of life as mutually exclusive. Radin argues that a fusing of feminism with pragmatism, as elucidated by William James, John Dewey, and their followers, can help feminists break out of this dichotomizing tendency and see that women can both care and have rights.<sup>67</sup>

Pragmatism requires us, Radin argues, to recognize there is no absolute truth; any truth is “provisional and ever-changing.”<sup>68</sup> We must make our decisions based on the context and what works in that context. Philosophical consistency is not a concern. Feminists, for example, should not concern themselves with consistently choosing “special” or “equal” treatment. They should choose what will help women most over the short and long term. One solution to a question may be right at one point; another to the same question may be right later. Solutions will differ “depending on the current stage of women’s empowerment, and how the proposed solution might move the current social conception of gender and our vision of how gender should be reconceived for the future.”<sup>69</sup> The key is to realize that no theory will produce the right answer; feminists must use situated judgment to determine their solutions to particular questions.

There is an obvious and fatal objection to this proposed solution to the feminist dilemmas: merely characterizing the choice faced by feminist thinkers as contextual, as opposed to theoretical, is of no help in making correct decisions. To make these decisions, one must have some idea of what the current status of women is, how these conditions came about, and, most importantly, what you want to achieve. Thus, to say that you should not apply a theory in analyzing the problems of women begs the question; you still need criteria for judgment. None of the feminists wants to hurt women; they disagree

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66. *Id.* at 1717.

67. *Id.* at 1707.

68. *Id.*

69. *Id.* at 1704.

about what will help women the most. To tell them to "do what works" means you know what works. Radin's pragmatism does not give any guidance in determining what is best for women. It is an avoidance of, not a solution to, the dilemmas.

### III. ARISTOTLE AS GUIDE

#### A. *Where We Are*

Feminists appear, to paraphrase Radin, to be in a terrible bind. On the most important issues regarding the role of gender in our law and culture, they are presented with conflicting philosophical explanations of the nature of women and women's role in society that speak truth to them. Given the universal claims to truth made by proponents of these positions, however, feminists who wish to be philosophically consistent seem to be precluded from either acknowledging that all the positions are in some way true or that there can be some philosophical explanation that encompasses all these insights. This failure to develop a coherent understanding of the meaning of gender hinders the feminist attempt to develop a feminist jurisprudence and a politically acceptable reform program.

Radin and an ever increasing number of feminists assert that this bind arises from the philosophical quest to discover right answers to political questions. They urge women to dispense with philosophy and instead proffer pragmatic, contextual solutions to these problems that do not appeal to any natural standard of truth or right. In other words, if philosophy is the problem, get rid of philosophy. This approach, these feminists insist, will allow feminists to support any beneficial reform or idea without worrying that it contradicts some general principle.

There is another solution. If philosophy presents a problem for you, perhaps you need a new philosophy. I submit that if they are willing to fairly confront his thought, Aristotle provides feminists a mode of thinking about politics and human nature that will enable them to dissolve these troublesome philosophical dichotomies without giving up on the possibility of philosophically justifiable answers to particular political questions. If feminists accept the Aristotelian approach to politics, they will find it possible (but not, to be sure, easy) to articulate a juris-

prudence and a reform program that can be both philosophically defended and politically effective.

### *B. The Nature of Nature*

The first obstacle to a true confrontation with Aristotle's thought, particularly for feminists, is the modern notion that Aristotle was a "functionalist."<sup>70</sup> This view holds that Aristotle, locked into the thinking of his time, defined the nature of women, and everyone else in society, by the role they played in ancient Greek society. Women, Aristotle is said to have argued, must stay in the home, because they are by nature inferior to men. Nature gives us absolute commands on how to run society, and these commands include the subordination of women, as well as the widespread practice of slavery. Aristotle, in other words, thought the conventions of his time were compelled by nature, and thus the obvious injustice, as well as the mortality, of his society demonstrates the limited worth of his thought for our time.

This reading of Aristotle, common as it is, is wrong. There are as many reasons for this gross misreading as there are scholars who are guilty of it. Ken Masugi explains that this misunderstanding "arises from what we can call [Aristotle's] method or rhetoric, his political manner of addressing controversial questions."<sup>71</sup> Aristotle starts from the conventions of the day but then engages in careful, dialectical analysis of these conventions, so that when he is finished with them, he has laid bare the foundation of these conventions and demonstrated their irrationality, even where he concludes that, for the sake of prudence, they must be retained. This apparent defense of Greek conventions fools careless modern readers into believing that Aristotle thought these conventions were natural and must be retained at all times and all places.

This misguided belief is rooted in the failure to understand the nature of Aristotle's political science. Modern political theo-

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70. Ken Masugi, *Another Peek at Aristotle and Phyllis: The Place for Women in Aristotle's Argument for Human Equality*, in NATURAL RIGHT AND POLITICAL RIGHT 267-88 (Thomas B. Silver & Peter W. Schramm eds., 1984); Hirshman, *supra* note 7, at 1007.

71. Masugi, *supra* note 70, at 267.

ry, at least since Hobbes and Locke, has attempted to devise a political science that is a science like mathematics or physics. The object of this science is to devise absolute, universal laws of politics that will govern always. Aristotle did not see political science this way; he saw it as a practical, not theoretical, science. Theoretical sciences, like physics, study what cannot change or what can be known. Practical science is concerned with human beings, and because human beings "are inherently variable, . . . to approach them in the spirit of the physicist or the mathematician seeking to discover universal laws is to distort fundamentally the relevant phenomena."<sup>72</sup> Aristotle "does not proceed by deduction from immutable principles of human nature"; rather, he starts with the common opinions on politics and primarily seeks to engage political actors, not philosophers, in a dialogue about these opinions. Aristotle's goal is not to explicate the finest imaginable regime.<sup>73</sup> He instead wishes to subject common practices to philosophical questioning in order to improve these practices.

Aristotle's classification of political science as a practical science does not mean that theoretical philosophy has no place in politics. If this were true, Aristotle's thought would be no different than the pragmatism advocated by Radin. Aristotle differs from the pragmatists in that he teaches that, while it cannot supply ready, specific answers to our questions regarding politics, nature does supply general standards for political actors to judge the rightness of their actions.<sup>74</sup> This standard

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72. Carnes Lord, *Aristotle*, in HISTORY OF POLITICAL PHILOSOPHY 120 (Leo Strauss & Joseph Cropsey eds., 1987).

73. *Id.*

74. Hirshman, while rightly identifying Aristotle's emphasis on practical, contextual reasoning in politics, does not fully comprehend the centrality of Aristotle's appeal to nature as a standard for judging the rightness of actions. In searching for the sources of a vision of the good life that feminists can appeal to for solutions to the problems of gender, Hirshman appeals to what she calls Aristotle's "unifying classical vision of citizenship" based on the understanding of humans as naturally political. Hirshman, *supra* note 7, at 972. Aristotle's vision of the good life, however, is rooted both in his description of human nature and his willingness to use this standard to judge human actions.

As I show below, just because Aristotle believes that one cannot reduce politics to a series of deductions from a set of universal principles does not mean that one cannot devise or does not need rules that are right under the particular circumstances. Aristotle is no relativist; he is willing to judge. Hirshman, in a stunning

may be a flexible one, but nevertheless it is there.<sup>75</sup> Indeed, it must be there because every art or science such as politics seems "to aim at some good."<sup>76</sup> Political scientists must discern that good and use the tools of politics to achieve that good.

What is the good at which the city aims?<sup>77</sup> In Book I of the *Ethics*, Aristotle informs us that politics is the master human science in that, because it encompasses all that we call society, it must govern all the human sciences.<sup>78</sup> In other words, because politics governs all that human beings do, its

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understatement, acknowledges that learned students of Aristotle such as Martha Nussbaum have made clear that Aristotle, unlike the pragmatists, does believe in the possibility of obtaining right answers to political questions, however elusive and conditional these answers. *Id.* at 983 ("[T]here are strong indications of an ultimate recognition of the limits on relativism throughout Aristotle's work.") (citations omitted). She does not seem to understand, though, the implications of this appeal to nature. Aristotle, as even a cursory reading of the *Nicomachean Ethics* would tell you, does not hesitate in telling us what the serious, or good, person is like; how the city can best be arranged to help produce this person under particular circumstances is not easy to determine, but it can be done. After all, teaching statesmen how to make right decisions is the whole point of a treatise on politics.

In discussing the substantive philosophical guidance Aristotle can provide feminists, Hirshman avoids confronting Aristotle's reliance on nature. She avers her desire to make "legitimate an inquiry into the substantive answers about the human good Aristotle provided for feminist legal issues in particular." *Id.* at 990. She then proceeds to analyze the issues of the inclusion of women in the military draft and women's freedom to make surrogate motherhood contracts in terms of Aristotle's discussion of the duties of a good citizen. *Id.* at 990-1005. This focus on citizenship, rather than on virtue as a whole, avoids the crucial issue; how does being a good citizen help you to be a good person? One must know both what a good person is and how to balance the conflicting goods at issue, such as the inclusion of women as full citizens and the need for a strong military, in order to establish the laws that will most effectively advance the end of the city, the development of good people. Once one has the courage to confront the full range of human needs, in light of the ultimate human end, political choices, while still excruciatingly difficult, can be judged.

75. STEPHEN G. SALKEVER, *FINDING THE MEAN: THEORY AND PRACTICE IN ARISTOTELIAN PHILOSOPHY* 5 (1990).

76. ARISTOTLE, *NICOMACHEAN ETHICS* 1094a2-3 (Martin Oswald trans. 1979) [hereinafter *ETHICS*].

77. "City" is a common translation for *polis*, but it must be made clear that in the Aristotelian context city does not mean the political or geographical unit we refer to as the city. See Lord, *supra* note 72, at 134. Aristotle did not recognize the state-society distinction so central to modern political philosophy. His city encompasses most of those activities we would relegate to society. I use "city" in the Aristotelian sense.

78. *ETHICS*, *supra* note 76, 1094b4-8.

good must be the good of human beings. What is that good? Aristotle tells us that the "proper function" of human existence "consists in an activity of soul in conformity with a rational principle or at least not without it."<sup>79</sup> In other words, the fully human person lives her life in accordance with reason. Only then will she achieve true happiness.

It is vital, however, to distinguish what Aristotle means by the reasonable life from the way of life of the calculating, narrowly self-interested person of utilitarian theory that critics of liberal democracy so often assume, without proving, underlies our regime.<sup>80</sup> To Aristotle, one who lives a reasonable life will live, as much as possible given one's circumstances, in conformity with the human virtues, such as courage, liberality, gentleness, and moderation.<sup>81</sup> To be happy, you must be a good person. A good person, rather than seeking narrow, personal advantage, will often decline to seek that advantage and instead act in conformity with the virtue that a particular situation requires, knowing that acting virtuously is the path to true happiness. For example, when presented with danger, a good person will act with courage, but when presented with a situation that produces anger, she will be gentle, and not react with fury.<sup>82</sup> This conception of the good is neither male nor female,

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79. *Id.* 1098a8-9.

80. As Carnes Lord puts it, "it is of the essence of moral behavior that the actions of virtue be performed for their own sake rather than for the sake of their consequences. It is thus a fundamental error to ascribe to Aristotle what would today be called a 'utilitarian' conception of morality. The good man is not guided in all his actions by a calculation that honesty is the best policy or that every virtuous deed contributes to his own happiness." Lord, *supra* note 72, at 125.

81. ARISTOTLE, THE POLITICS 1332a9-10 (Carnes Lord ed. & trans. 1984) [hereinafter POLITICS] ("[H]appiness is the actualization and complete practice of virtue."). Furthermore, with regard to the question of male versus female nature, one must note Steven Salkever's persuasive case that among the virtues, Aristotle derogates the classical republican virtues of virility or courage and emphasizes virtues such as moderation, liberality, truthfulness, gentleness, and affability. The practice of these virtues are very often associated with the nurturing, communitarian nature associated with women, as opposed to the independent, aloof nature associated with men. As he concludes, "[The Aristotelian] list [of virtues] seems to fit the sense of human happiness that informs Benjamin Franklin and Fanny Price much better than it would the standard roster of the heroes of neo-Machiavellian republicanism." SALKEVER, *supra* note 75, at 241.

82. SALKEVER, *supra* note 75, at 240.

but human. We are, thus, all equal in at least the sense that we all aim at the same human good.

It is not easy, however, to live the reasonable life. We are not simply soul, we are also body, and while soul is the natural ruler of body, sometimes body rules soul, prohibiting us from living the fully human life.<sup>83</sup> While everyone strives to live the best life, "[i]t is open to some to achieve these things, but to others not, on account of some sort of fortune or nature; for living nobly requires a certain equipment too—less of it for those in a better state, more for those in a better one."<sup>84</sup>

So while our nature inclines us to reach our highest end, it also inclines us to depart from it. We, therefore need help—art, in addition to biology—to help us fulfill our natures.<sup>85</sup> We will not live virtuously on our own; we must be habituated to virtue. In other words, we must be educated. This is the central concern of political science. The city, thus, comes into being not simply for the sake of helping us live by, for example, facilitating exchange or common defense; "it exists for the sake of living well."<sup>86</sup> Because, alone among the animals, human beings have the gift of speech, they can unite with other persons, deliberate upon the just and unjust, and formulate laws that can lead human beings on the path to virtue.<sup>87</sup> Aristotle tells us that the first founder of a city was responsible for the greatest of goods because when humans are "separated from law and adjudication" they are the worst animals of all. Without law, humans are "the most unholy and savage of the animals

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83. *POLITICS*, *supra* note 81, 1254a35-40, 1254b1-15.

84. *Id.* 1331b40-43.

85. This distinction between our fundamental nature as beings capable of living the reasonable life, and the various potentialities we are endowed with by biology, often eludes modern thinkers, including most feminists. As I will discuss later, just because women have more potential for connection with children because of their particular physical endowments or because a man has a physique suitable for being a laborer or a soldier does not change a person's ultimate aim. No matter what your biological endowments or deficiencies, all human beings should strive toward the aim of achieving the greatest human good. It is the search for that good that is the center of our nature and, thus, the center of politics. Our inherited potentialities are only important as means to the end of the ultimate good.

86. *POLITICS*, *supra* note 81, 1252b30.

87. *Id.* 1253a15-19.

and the worst with regard to sex and food.”<sup>88</sup> We need the city if we are to achieve our goal of complete virtue, the definition of happiness.

In addition to a proper education, the “equipment” needed to live the virtuous life includes a modicum of what Aristotle calls “external goods.”<sup>89</sup> These goods include wealth; good friends; a caring family; good birth; political influence; physical endowments, like beauty or intelligence; and just plain luck.<sup>90</sup> Obviously, one cannot possess all these things or possess them in the amount we would like, but we, if we are to develop our potential, need some small amount of them to help fight the pull of the body and follow our soul. The city, by, among other things, providing security through laws, also assists us in acquiring these goods.

All human beings, then, share the pursuit of the end of happiness, the living of the reasonable life. This is our true human nature. Because this common nature makes despotic rule of one human over another inherently problematic, equality is the natural, and thus preferred, form of political relationship in human communities. Recognition of this fundamental equality leads Aristotle to distinguish mastery, the rule over slaves, from political rule, which is over free and equal persons.<sup>91</sup> Political rule, because it is between equals, is “nobler and accompanied to a greater extent by virtue than ruling in spirit of a master.”<sup>92</sup> Political rule centers on persuasion, not simply force, bringing the practitioners of it closer to its goal of human rationality.

As we have seen, however, while our nature inclines us to political equality, it also inclines us away from it. While we all have the capability to live the reasonable life, we do not all equally fulfill our natural potential. This inequality results in part because of differences in our particular natures; we, for example, may be endowed with more or less intelligence or more or less resistance to certain kinds of temptation.<sup>93</sup> These

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88. *Id.* 1253a36-37.

89. Lord, *supra* note 72, at 124.

90. *Id.*

91. POLITICS, *supra* note 81, 1255b16-20.

92. *Id.* 1333b27-28.

93. In the words of Leo Strauss,

endowments make it less likely that the person in question will be able to learn virtuous habits and, thus, become a complete person. What nature giveth, it can also take away.

It is also clear, however, that these differences also result from convention; while our nature may incline us to rationality, we must have that potentiality nurtured for it to bloom into virtue. If human beings are thrust into a way of life that either leads them away from the virtue needed to govern or does not provide them with the necessary conditions for forming the needed character, they will not, and should not, be the political equal of someone who has been taught the requisite virtues. Because the city plays the central role in leading its citizens to virtue, it is vital that those who are in charge of the city possess the appropriate virtue.<sup>94</sup> As Aristotle explains:

The political partnership must be regarded . . . as being for the sake of noble actions, not for the sake of living together. Hence those who contribute most to a partnership of this sort have a greater part in the city than those who are equal or greater in freedom and family but unequal in political virtue, or those who outdo them in wealth but are outdone in virtue.<sup>95</sup>

Aristotle gives an example of a group that should not hold political office because of its role in the conventional division

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Considering the connection between intelligence and prudence on the one hand, and between prudence and moral virtue on the other, one must admit a natural inequality among men regarding morality; that inequality is perfectly compatible with the possibility that all men possess by nature equally the capability to comply with the prohibition against murder, for example, as distinguished from the capability of becoming morally virtuous in the complete sense or of becoming perfect gentlemen.

LEO STRAUSS, *THE CITY AND MAN* 39 (1964).

94. This does not mean, however, that these governors are entitled to act as tyrants. Simply because one is not an officer of the city does not mean that one is not a free and equal person who can be governed by mere force. The need for persuasion is still a fundamental element of just political rule. This is illustrated by Aristotle's warning that even if the city could find someone who is superior in virtue, it should not submit to that person's absolute rule; it is better that the city be ruled by law, because even the best men can be corrupted. *POLITICS*, *supra* note 81, 1287a30-32.

95. *Id.* 1232a12-8.

of labor. Mechanics and artisans—manual laborers—should not participate in the governing of the city because they do not have the necessary leisure to develop the knowledge and character needed for politics. Aristotle concludes that such persons cannot govern in any city “in which prerogatives are granted in accordance with virtue and merit; for it is impossible to pursue the things of virtue when one lives the life of a vulgar person or laborer.”<sup>96</sup>

This is not to say that these laborers are not an indispensable part of the city. They clearly are. After all, someone must work to create the wealth needed to finance the leisure required to teach and learn virtue. This is true whether the virtue sought is that necessary to govern the city or that necessary for personal happiness. The consolation for mechanics, artisans, and all the other people in the city who provide the necessary material for the city is that they will benefit from a well-governed city. A good city will supply all its residents what they need for happiness: good laws that will lead them to virtue. You will only have such a city if you possess the best governors possible.

In sum, in order for the city to achieve its end of facilitating the pursuit of virtue by its citizens, certain, perhaps even many, of its members should be excluded from politics.<sup>97</sup> The

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96. *Id.* 1278a19-22. It is vital to recognize, however, that the presumption of equality is so strong that prudence often dictates that even those who do not have the leisure to develop the character of a good governor should somehow participate in the regime. This is so because if such a large element of the city is excluded from the regime, they will oppose it and endanger the good of the city. *Id.* 1281b28-31. The trick is to make this participation as safe and conducive to the good as possible. As Leo Strauss eloquently put it, “The political problem consists in reconciling the requirement for wisdom with the requirement for consent.” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 141 (1953). Aristotle asks his readers to consider, as a possible solution, allowing the multitude of the people to participate in choosing and monitoring officials, but not ruling. *POLITICS*, *supra* note 81, 1281b32-34. This solution, however, without proper education of the people, will not lead to better government. *Id.* 1282a10-20. The Founders of the American republic certainly based their faith in self-government in part on the explicit proposition that the American people were capable of exercising this kind of responsibility. *THE FEDERALIST* NO. 55, at 346 (James Madison) (Clinton Rossiter ed. 1961).

97. While American sensibilities are disturbed by such arguments, we should understand that Aristotle would not consider our limited right to vote deep participation in politics. We, in effect, through our complicated electoral, political, and legal system, attempt to choose the most virtuous citizens as our rulers. The vast ma-

reasons for this exclusion may be natural deficiencies, or, more likely, deficiencies resulting from one's way of life. These exclusions are inevitable for, as Catherine Zuckert argues, "[s]ince most human beings have to devote most of their lives to acquiring the necessities of existence, very few will ever participate in politics."<sup>98</sup> The extent to which more human beings can develop the character needed to deliberate well about the laws, the more citizens can participate in the governing of the city.

Aristotle leaves no doubt that women are to be excluded from politics. He flatly states that the male shall always rule the female.<sup>99</sup> We cannot stop there, however. Aside from offending our modern notions of right, we should see that this apparently unshakable conclusion contradicts Aristotle's own premises. He, after all, has connected political rule to virtue and virtue to the human capabilities of reason and speech. Women are as capable of exercising reason and speech as are men. They therefore should be just as able to participate in the governing of the city as men, but are excluded.

Before concluding that Aristotle is simply a hypocrite or an incoherent thinker, we should closely examine his stated reasons for the exclusion of women from politics and see whether he states that women are naturally unsuited for political rule or whether they are excluded due to convention. If he argues that women are naturally unsuited for politics, I agree that this would count heavily against using him as a guide for our political deliberation. If, however, he argues that the exclusion of women is based on convention, not natural deficiencies, then we know that, under the right circumstances, these conventions can be changed. We must then examine the reasons for the convention and see to what extent, given Aristotle's analysis of the practical reasons for the exclusion of women and today's circumstances, we can, through the laws, reform government and society to improve the status of women.

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jority of us do not directly participate in governing. Is this system really so remote from Aristotle's teachings?

98. Catherine H. Zuckert, *Aristotle on the Limits and Satisfaction of Political Life*, 11 INTERPRETATION 185, 186 (1983).

99. POLITICS, *supra* note 81, 1259b9.

Modern readers would have you believe that Aristotle ratified the exclusion of women from politics because he believed that women were naturally inferior in reason. A close reading of *The Politics* demonstrates that Aristotle concluded no such thing. In fact, *The Politics* suggests quite the opposite. For example, while Aristotle characterizes a master's relationship to his slaves as one between unequals and therefore mastery, he states that the rule of a man over a wife is political rule and thus a relationship between equals.<sup>100</sup> The barbarians, therefore, show their ignorance when they treat woman like slaves.<sup>101</sup> Indeed, women constitute half of the free citizens in a city.<sup>102</sup>

Why then are women excluded from politics? In explaining why men are superior to women, Aristotle says that men are "more expert at leading" than women.<sup>103</sup> Women do have reason, or what Aristotle calls the "deliberative element", but they do not exercise it with "authority."<sup>104</sup> What does this mean? Well, it certainly does not mean that women are inferior to men in their ability to reason; he could very easily have said that if he wished. The statement appears to be a tautology; women do not lead because they do not lead. Can we just dismiss Aristotle as someone who simply, in his unthinking agreement with the misogyny of his time, cannot think or write sensibly on the subject of women?

In order to understand what Aristotle is saying, we have to approach his teaching from his situation and his objectives. He is attempting to counsel would be statesmen of his own time on how to improve their political actions by thinking philosophically about politics. These men assume that the leaders of their communities will be men; political leadership, for the Greeks, was intimately connected with military leadership. Women were excluded from the military and hence from politics, first of all, for their relative physical weakness.<sup>105</sup> Aristotle, because he

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100. *Id.* 1259a39-41.

101. *Id.* 1252b4-9.

102. *Id.* 1260a18.

103. *Id.* 1259a44.

104. *Id.* 1260a12-13.

105. Zuckert, *supra* note 98, at 195.

cannot change it, accepts this assumption.<sup>106</sup> He does not, however, give in to the popular conclusion that women are inferior in reason. He implicitly criticizes that wrongheaded notion, while continuing the dialogue with his audience. The careful reader is left with the knowledge that by nature women are just as qualified for political office as men, and it is only convention that prevents them from taking their rightful place in the city.

This convention is also founded on the belief that it is necessary, if the city is to survive, for women to be relegated to the domain of the family. In criticizing Plato's suggestion that the best regime must implement the equality of women, the abolition of the family, and the communal raising of children, Aristotle opines that this cannot be done. He reaches this conclusion based on the premise that men will not take care of these children because "[w]hat belongs in common to the most people is accorded the least care: they take thought for their own things above all, and less about things common."<sup>107</sup> The city will not survive if men are not convinced that their children are theirs and that they should educate them. In addition, if women are equal and need not stay in the household, the household will not be well run, destroying one of the necessary conditions for virtue.<sup>108</sup> Thus, like mechanics and artisans, women are not afforded political equality because of what they do, not who they are.

When deciding whether and how to change these conventions, however, we must remember that what people do helps form who they are. As the character of laborers is formed by their role in society, the character of women is formed by their

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106. Indeed, Steven Salkever has powerfully made the case that in *The Politics*, Aristotle seeks to convince statesmen to move away from an emphasis on martial virtues, such as courage, which were assigned to and developed in males, and move toward other virtues such as moderation and justice, which are more often associated with women. The good city, according to Salkever's superb reading of Aristotle, ought to seek to produce well-rounded citizens, not one-dimensional soldiers. In a society, such as ours, where war is not the central concern, the political equality of women becomes much easier to implement, as we recognize that the virtues considered "male" and "female" are in fact all human virtues that need to be fostered in all of us. SALKEVER, *supra* note 75, at 165-204.

107. *POLITICS*, *supra* note 81, 1261b30-35.

108. *Id.* 1264b1-2.

role. Aristotle explains that the particular virtue for different members of society differs from group to group, as well as from the virtue of the reasonable person.<sup>109</sup> The virtue of women, for example, is silence.<sup>110</sup> Because women are forced to be subordinate, they must develop the virtue of a subordinate. They must also develop the virtues of the nurturer because that is their crucial role in the society. It would not surprise Aristotle that after thousands of years of playing this role, women's characters would be formed in the manner described by Gilligan.

These character traits persist in women not only through years of indoctrination and social pressure but also because they are rooted in, though not required by, biology. One cannot deny, for example, that, by virtue of pregnancy, women are in some way more connected with their children than are men. At the very least, according to Aristotle, women consider children more their own because they suffered more to bring them into the world.<sup>111</sup> By building on this natural difference, the convention of female responsibility for the nurturing of children possesses a strong foundation that is difficult to shake.

Thus, if we follow Aristotle, the question of the existence of women's nature is far more complex than much modern thought, including feminism, is willing to admit. It is the thinking through of this very complexity, however, that will enable us to know how to think about these problems, rather than continuing to be trapped by the simplistic dichotomies of modern thought. While difference feminists rightly describe the features of women's particular nature, they do not recognize that a just politics must focus on our common human nature. We are all the same in our pursuit of the reasonable life, the conformity of our actions to virtue. The particular virtues that women have been forced to develop are not the virtues of the reasonable person; they are the virtues of a particular role. Because they are not the virtues that constitute the rational life,

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109. POLITICS, *supra* note 81, 1260a19-25 ("[T]he moderation of a woman and a man is not the same, nor their courage or justice, as Socrates supposed, but that there is a ruling and a serving courage, and similarly with the other virtues.").

110. *Id.* 1260a30-32.

111. SALKEVER, *supra* note 75, at 195.

despite their rootedness in biology, they are conventional, not natural.

Anti-difference feminists, however, do not recognize that through the passage of time and their rootedness in biology, the particular virtues developed by women over the centuries do, as a practical matter, describe how many women think and behave. Reforms based on the simple proposition that women need not share these characteristics do not sufficiently confront the reality that if you formulate policies without taking into account how many women will behave, you will hurt them.

One can argue that this is exactly what happened with the liberal family-law reforms. These laws were based on the noble idea that men and women were essentially the same. The legislators, however, did not understand that while men and women have the same fundamental nature, laws must account for the nature created by convention. The prudent Aristotelian legislator will design laws that will assist citizens to fulfill their common human nature while recognizing that particular parts of society have developed, through powerful conventions, peculiar characteristics that must be considered.

### *C. Reform Sex Roles?*

Given that women possess, in effect, two natures, one natural and one conventional, how should the Aristotelian feminist approach the question of sex roles? It is tempting to say that since women's conventional nature prevents them from living the fully human life, conventional sex roles, and the laws that support these roles, should immediately be dismantled, allowing women to take the places to which their true nature entitles them. Aristotle teaches us that we must resist the temptation to act rashly. We must be prudent in reforming these roles because, by performing them, women have supplied a necessary condition for the achievement of virtue by *any* citizens. If we take away what women have supplied without providing an equally effective substitute, we will make it impossible for anyone to fulfill their natures.

To understand why this is so, one must understand that the primary function of the city is the education of its citizens

for virtue.<sup>112</sup> The city, however, cannot manage this project on its own. It cannot supply the attention and affection needed to teach the young how to order their thoughts and actions in accordance with virtue. The family, because of the natural affections between parent and child, must be the primary agency for completing this all-important task. As we have seen, Aristotle tells us that the father will not take on this task unless he is sure that the children are his. Aristotle argues that, under the circumstances of his time, women's freedom must be circumscribed so that men can be sure of paternity and, thus, ensure their affection for their children. Women, therefore, are excluded from public life, making it logical to assign them responsibility over the private life, including the raising of children.

More importantly, Aristotle contends, society must also require women to accept these roles because men, busy with the public tasks of military service and politics for which their physical nature suits them, will not devote the necessary attention to educating the young. He demonstrates the need for this attention in his discussion of the nature of education. Human beings draw their knowledge of how to live from three sources: nature, habit, and reason.<sup>113</sup> Nature does not sufficiently guide us toward the good life because habits can alter our natural inclinations and because these inclinations are often ambiguous and are given better or worse content by one's habits.<sup>114</sup> Nature and habits, however, can be overcome by reason, for humans "act in many ways contrary to their habituation and their nature through reason, if they are persuaded that some other condition is better."<sup>115</sup>

Despite the power of reason, though, education must necessarily first take place through the formation of habits. While reason and good habits must cooperate to produce virtue, when we are born our nature is dominated by our body and appetite rather than our soul and reason. Our appetites must be con-

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112. *POLITICS*, *supra* note 81, 1337a10-11 ("That the legislator must, therefore, make the education of the young his object above all would be disputed by no one.").

113. *Id.* 1332b41-42.

114. *Id.* 1332a44, 1332b1-3.

115. *Id.* 1332b6-8.

trolled in order to prepare ourselves to exercise reason. These desires are civilized through the learning of good habits; without them, reason will never have a chance to take hold.<sup>116</sup> This habituation must start at infancy for "[i]n all matters where habituation is possible, it is better to habituate immediately from the beginning, not to habituate gradually."<sup>117</sup> Aristotle provides detailed advice for the rearing of children from birth until adulthood. For example, the activities of children must be closely supervised, including the play of toddlers, so that they do not develop "illiberal" habits.<sup>118</sup> Children must not be exposed to vulgar language, unseemly stories or paintings, because "everything mean should be made foreign to the young, particularly of this sort that involve either depravity or malice."<sup>119</sup>

Thus, without the closest attention to every aspect of a child's life, it is impossible to inculcate the good habits needed for a life of virtue. Starting at the earliest ages and, hence, necessarily in the home, those members of the regime responsible for the raising of children must devote all their time and attention to this crucial task. In Aristotle's time, men required women to perform this role and attempted to form their character so that they would be suited for this work.

The traditional American understanding of this problem follows Aristotle. Alexis de Tocqueville's observations of the American character reflected this understanding:

[Americans] think that nature, which created such great differences between the physical and moral constitution of men and women, clearly intended to give their diverse faculties a diverse employment; and they consider

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116. As Aristotle explains,

[S]piritedness and will, and furthermore desire, are present in children immediately on their being born, while reasoning and intellect develop naturally in them as they go along. Hence in the first instance the superintendence of the body must necessarily precede that of the soul; next comes that of appetite; but that of appetite is for the sake of intellect, and that of the body for the sake of the soul.

POLITICS, *supra* note 81, 1334b23-38.

117. *Id.* 1336a17-19.

118. *Id.* 1336a27-31.

119. *Id.* 1336b33-34; *see also id.* 1336b3-6; 1336b13-14.

that progress consists not in making dissimilar creatures do roughly the same things but in giving both a chance to do their job as well as possible. The Americans have applied to the sexes the great principle of political economy which now dominates industry . . . .

You will never find American women in charge of the external relations of the family, managing a business or interfering in politics . . . . No family is so poor that it makes an exception to this rule.<sup>120</sup>

While American society has immeasurably changed since Tocqueville wrote, women's primary responsibility for the domestic sphere has not. We must now ask ourselves whether it is still necessary for women to perform this role. For example, we do not make eligibility for military service dependent on gender or physical strength. Indeed, we do not even make military service a political prerequisite for elective office. The nature of work and of business has also changed so that women can, and do, successfully compete in these worlds. Do these changes permit us—indeed, require us—to immediately dispose of traditional sex roles? In other words, does, or should, anything stand in the way of reform?

Aristotle teaches us, first of all, that reform is always a perilous enterprise; indeed, "to reform a regime is no less a task than to institute one from the beginning, just as unlearning something is no less a task than learning it from the beginning."<sup>121</sup> Erstwhile reformers must remember that different cities create different ways of life based on the particular character of their citizens. When laws are out of step with the character of the people or when laws are precipitously changed, a city risks serious harms. The most pressing danger is that reform will disable the city in accomplishing its necessary func-

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120. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 601 (J.P. Mayer ed. 1969). It must also be remarked that Tocqueville comments that Americans, like Aristotle, while perpetuating the social inferiority of women, recognize that they are the moral and intellectual equals of men. He avers that "Americans constantly display complete confidence in their spouses' judgment and deep respect for their freedom. They hold that woman's mind is just as capable as man's at discovering the naked truth, and her heart as firm to face it." *Id.* at 602.

121. *POLITICS*, *supra* note 81, 1289a3-5.

tions. In this instance, if a city places the responsibility for the rearing of children on women, it simply cannot say that women need not fill this role without making alternate provision for this function. The need for the education of the young has not subsided. It never will subside. We must, therefore, be careful that before we destroy traditional sex roles, we formulate and begin to implement some other, at least equally effective method for the education of children, for without effective education for virtue, the liberation of women would be nearly pointless. They would only be freed for a life that is less than fully human.

We must, as I remarked in my discussion of women's nature, also be careful that we, in reforming laws, do not assume that women will not act in accord with the virtues they have been required to develop over centuries of relegation to the domestic sphere. We cannot base regulation on the premise that women will act as men, when they do not. Women, we have seen, request child custody more than men and are more willing than men to sacrifice in divorce settlements to receive custody. A reformation of sex roles that does not take into account this conventional but nevertheless real nature will only succeed in harming women.

In addition to these particular dangers regarding the reform of sex roles, the very idea of comprehensive reform of a constitutive part of the city endangers the effectiveness of all law, without which human beings cannot achieve the good. Citizens do not obey law simply by force or by rational choice; they obey because they are habituated to do so. Reform jeopardizes this obedience because "law has no strength with respect to obedience apart from habit, and this is not created except over a period of time."<sup>122</sup> Too extreme and premature an "alteration of existing laws in favor of new and different ones weakens the power of law itself."<sup>123</sup> Aristotle urges us to accept some injustice, rather than risk the dissolution of law, for without law, humans are no better than beasts.

In sum, we must be careful, then, that in trying to ensure that women are provided fair opportunities to live more human

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122. *Id.* 1269a20-22.

123. *Id.* 1269a22-23.

lives, we do not destroy the conditions for anyone to live that life. Simply because a role is conventional, and unjustly assigned, does not mean that such conventions can be rudely discarded. We must exercise practical wisdom both in modifying the social positions of men and women to ensure that someone, hopefully fathers, will provide children with the necessary affection and attention for their moral development, and in making fundamental changes in our society without calling into question the legitimacy of the constitutive features of the society.

*D. Toward a Reasoned Understanding of Equality*

If Aristotle teaches us anything at all, it is that the question of human equality constitutes the central problem of political philosophy and jurisprudence. We cannot, as feminists such as Fineman urge, refuse to consider equality as a guiding principle because politics is about choosing who will be unequal, or who will rule. Choosing our rulers would be easy if biology supplied us with a self-evidently superior breed of human that was meant to rule, as it does for bees. No human, however, is born a ruler. We must therefore deliberate upon who should govern, and consequently, who should be governed. We must, in other words, reason about equality.

Aristotle tells us that it difficult to reason about equality:

[J]ustice is held to be equality, and it is, but for equals and not for all; and inequality is held to be just and is indeed, but for unequals and not for all; but . . . [all] disregard this element of persons and judge badly. The cause of this is that the judgment concerns themselves, and most people are bad judges concerning their own things.<sup>124</sup>

The consequences of reasoning poorly about equality, though, are fatal to the prospects for a viable regime. Failure to base one's regime on a realistic and accepted understanding of equality leads to factional conflict which, as all students of *The*

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124. *Id.* 1280a12-15.

*Federalist* know, so often leads to the dissolution of regimes. In Aristotle's words,

[M]any sorts of regimes have arisen, because while all agree regarding justice and proportionate equality, they err about [justice and equality] . . . Rule of the people arose as a result of those who are equal in any respect supposing they are equal simply, for because all alike are free persons, they consider themselves equal simply; and oligarchy arose as a result of those who are unequal in some one respect conceiving themselves to be wholly unequal, for as they are unequal in regard to property they conceive themselves to be unequal simply . . . when either group does not share in the regime on the basis of the conception it happens to have, they engage in factional conflict . . . .

Factional conflict is everywhere the result of inequality, at any rate where there is no proportion among those who are unequal (a permanent kingship is unequal if it exists among equal persons); in general it is equality they seek when they engage in factional conflict.<sup>125</sup>

We therefore must deliberate well about equality, meaning that we must take care to treat people equally when they are equal, but unequally when they are unequal. The trick is both to know in what respects people are equal and unequal and to know how they should be treated so to best achieve the human good. This daunting task is more difficult than it appears because these questions cannot be answered in the abstract; the human things are so changeable that these decisions must be based on the particular circumstances of the people involved. It is the lot of the statesman to develop the wisdom necessary to make these decisions.

If feminists are correct, and I believe they are, that many of the equality based reforms in areas such as family law harmed the very people we wanted to assist, we must understand that the problem is not thinking about equality. Rather, the problem is thinking about it poorly. We have failed to un-

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125. *Id.* 1301a28-34, 1301a36-38, 1301b26-30.

derstand the ways in which women are equal and unequal to men. Men and women are equal in the most important sense; they are equally capable of living the full human life. They are equal by nature. They are not, however, equal by convention.

In order to provide the necessary conditions for men to lead the rational life, women have been relegated to the private sphere. This relegation has resulted in obvious inequality such as less power in the marketplace and, less obvious, the formation of character traits that, while conventional, are deeply rooted. These traits, if not taken into account by legislators, will result in laws that will harm women. A wise legislator, therefore, will see that women may have to be treated unequally in order to help them fulfill their equal natures.

This legislator, seeing that conditions have sufficiently changed so that reform is possible, will attempt to devise reforms that will free women to pursue the rational life, thus making citizens more equal, while preserving the necessary conditions for that life, which may require the acceptance of some inequality. A pure pragmatist, *ala* Radin, will be incapable of making such choices because she has no standard of the human good, other than her subjective opinions, to judge the wisdom or foolishness of legislation. Once we know the good we are trying to achieve, we can evaluate proposed actions to see if they will help or hurt us in the pursuit of the good.

In making this evaluation, one must act prudently so as not to destroy the necessary conditions for a good city while attempting to achieve a greater equality for women. Aristotle teaches us that in order for humans to fulfill the nature they equally share, it may be necessary to tolerate inequalities that make that fulfillment possible. Some people must be farmers so others can be philosophers, artists, or statesmen. Thus, the danger in invoking equality, as do the feminists who call for an "equality of acceptance", in support of a thorough dismantling of the institutions of society—for example, the wage labor system—is that one will destroy those social institutions that, while they produce inequality, supply the necessities for the full human life. I have already discussed one of these necessities: the need for the education of the citizenry. If reforming the laws means that the young will not be educated, we must refrain from making these changes because ultimately the city, in-

cluding both men and women, will be worse off than before.<sup>126</sup>

Another necessary condition for the good of the city is material wealth. The wise legislator acknowledges that without an appropriate portion of material wealth, which buys leisure for study and reflection, a human being cannot live the rational life. Legislators must refrain from passing laws, therefore, that impede a city from producing the wealth necessary for the maximum amount of citizens to live the best kind of life even if that means the acceptance of some inequality. The question of when one should trade economic prosperity for increased equality cannot be answered in the abstract; one must know the particular circumstances and weigh the effect of different policies on citizens' ability to pursue the good.

Scrutinizing proposed policies from this perspective makes the formulation of a feminist agenda much more difficult, but makes its ultimate efficacy more promising. Take the recent federal legislation requiring employers to provide family leave to their employees. Proponents, including many feminists, argued that this legislation will be helpful in providing families with two wage earners the flexibility to allow fathers and mothers to share responsibility for family duties. This law, thus, would serve as a spur to fathers to take on more family responsibilities, and eventually free women for other pursuits. Opponents argued that the costs these mandates impose on business will reduce employment and ultimately make it more unlikely that people with family responsibilities (who, of course, are largely women) will be employed. These arguments were dismissed as anti-family.<sup>127</sup> After some time, however, we may find that both the harm to women's ability to succeed in the workplace and the loss of economic growth outweigh the benefits of this reform of the current wage-labor system.

Feminists must learn that this dilemma will arise with all proposals to dismantle our economic system. In order for feminist politics to succeed in improving the lives of women, reforms must be designed with these considerations in mind. It

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126. See Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, April 1993, at 47-84.

127. See James V. DeLong, *Crass Act*, NEW REPUBLIC, April 19, 1993, at 14-19.

strikes me as foolhardy to advocate reform of the wage-labor system without considering in detail how we can move to more equitable economic arrangements and, at the same time, produce economic growth, maintain international competitiveness, and increase opportunity for all our citizens. Many feminists believe these considerations are not relevant to the questions with which they are concerned.<sup>128</sup> They are mistaken. No sensible people will consent to reforms that, in the name of improving the lives of some, will destroy the conditions of the good life for all. They might, however, consent to prudent, limited reforms that preserve economic opportunity while accommodating, for example, the need of working parents to spend time with their families through part-time work, flexible hours, or working at home.

Another necessary condition for happiness that feminists must consider in formulating their political program is the need for stability in the laws of the city. As I have explained, human beings, because of our imperfect natures, need good government to live well. These flawed natures, however, make it unlikely that we will find incorruptible individuals with unsurpassed reason to govern us. Aristotle, therefore, tells us that it is better to be governed by the law, rather than men, because law is more likely to be based on reason than the decisions of any man. As he explains,

One who asks law to rule, therefore, is held to asking god and intellect alone to rule, while one who asks man adds the beast. Desire is a thing of this sort; and spirit-edness perverts rules and the best men. Hence law is intellect without appetite . . . . [I]t is clear that in seek-

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128. Note the strange, but enlightening, colloquy between Hirshman and classics scholar Martha Nussbaum regarding Nussbaum's response to Hirshman's article. Nussbaum, in a friendly critique, tries to nudge Hirshman toward a deeper understanding of Aristotle and his relevance to feminist reform by emphasizing the importance Aristotle places on the material conditions of happiness. Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019 (1992). Hirshman responds that she wishes to concentrate on the conditions for the flourishing of women as opposed to taking on the problems of poverty. Linda R. Hirshman, *Big Breasts and Bengali Beggars: A Reply to Posner and Nussbaum*, 70 TEX. L. REV. 1029, 1034 (1992). It is, however, precisely Nussbaum's—and Aristotle's—point that one cannot consider the content of human happiness apart from the conditions needed for that happiness.

ing justice they are seeking impartiality; for law is impartiality.<sup>129</sup>

The rule of law, however, is not perfect. It cannot be because, while law is more likely to be reasoned than the dictates of individuals, it is still made by humans. Thus, it will share the flaws of the people it serves. Nevertheless, it is better to have flawed laws than not to have law at all, because law, despite its imperfections, is the best means to our end, the human good.

For this reason, Aristotle instructs us that all political reformers who seek to do real good must criticize the laws from within the regime, not from without.<sup>130</sup> In other words, true reformers will not allow their criticism of the laws to undermine the foundations of the regime. They will be careful to accept the fundamental premises of their own regime, while moving the laws slowly in the right direction. This care is not patriotism; it is prudence. It is prudent to act in this way because if the people believe that you seek to undermine the regime either they will reject your proposals and refuse to listen to your arguments or, if they accept such criticisms, they will lose confidence in the reasonableness of the law, subverting the regime and making impossible the achievement of human good.<sup>131</sup>

Feminists must be careful, then, to moderate their critiques so as not to undermine the respect for the laws that attach citizens to the regime. I do not mean to say that feminists should not criticize predominant conceptions of the rule of law. Feminists such as West, for example, have justly criticized modern liberals for adhering to a rigid concept of a rule of law that states that all rules must apply equally to all people at all times.<sup>132</sup> This idea treats the concept of neutral rules as an

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129. *POLITICS*, *supra* note 81, 1287a28-32, 1287b3-5.

130. As Catherine Zuckert has cogently stated, "Aristotle addresses the *Politics* primarily to potential rulers, and his advice, most simply stated, is obey your own laws. Political association depends on friendship, trust in the character, and faith in the good intentions of the governors . . . . The most important factor in maintaining any government, therefore, is that the rulers obey their own laws; they must want to preserve the constitution. Any infraction of the law must be immediately and seriously punished." Zuckert, *supra* note 98, at 204.

131. *Id.* at 202.

132. Hirshman, *supra* note 7, at 987-90. Many feminists, however, do not acknowl-

end in itself, rather than as a means to the good. Aristotle's description (and defense) of the rule of law does not resemble the picture drawn by West and other critics of liberalism. Instead, Aristotle reminds us that while law is the best way to lead citizens to the good, it must be tempered by the exercise of equity because it impossible to write laws that will result in justice in every particular case.<sup>133</sup>

Thus, an attack on excessive formalism in the law need not deteriorate into a blanket condemnation of the idea of impartial laws or an absolute reliance on discretion, as some feminists are want to do.<sup>134</sup> Aristotle was well aware of, and answered, the argument that because human nature is racked by tensions (making us both rational and passionate or, if you prefer, sepa-

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edge that the rule of law predates modern liberals such as John Rawls and even older liberals such as Thomas Hobbes. See, e.g., West, *supra* note 23, at 7-10 (defining the rule of law as a product of thinkers such as Hobbes, Ackerman, and Nozick). There is great reason to doubt that the Founders of our regime either solely or even primarily drew their notions of the rule of law, as opposed to their ideas regarding political obligation, from liberal theorists like Hobbes or Locke. It is more likely that their concept of law was drawn from the English common law, which in the hands of judges like Coke, took on a decidedly Aristotelian cast. See JAMES R. STONER, JR., *COMMON LAW & LIBERAL THEORY* (1992); see also Hirshman, *supra* note 7, at 976-79 (Exemplifying this all too common ignorance of the intellectual origins of our regime, Hirshman, in discussing the similarities between Aristotelian practical reasoning and recent feminist writings in the context of judicial reasoning, does not even mention common law jurisprudence, the epitome of Aristotelian reasoning.). One can, therefore, criticize the *liberal* conception of the rule of law and still support the sovereignty of law as understood by Aristotle.

133. POLITICS, *supra* note 81, 1282b1-5 (arguing that nothing is "more evident than that it is laws—correctly enacted—that should be authoritative and that the ruler, whether one person or more, should be authoritative with respect to those things about which the laws are completely unable to speak precisely on account of the difficulty of making clear general declarations about everything.").

134. West provides a good example of a critique that shows little grasp of the subtleties involved in understanding the historical and philosophical meaning of the rule of law:

According to the Hobbesian story, the Rule of Law significantly improved the quality of men's lives: men's lives became longer, less nasty, less brutish (even if somewhat more alienated), and more productive. But not so for women: the same Rule of Law left women's natural lives intact, worsened her material condition, and reified her sexual vulnerability into a male right of access. The Rule of Law changed the conditions that uniquely pertained to women in the state of nature, but the change was for the worse . . . .

West, *supra* note 23, at 63.

rate and connected), an excessively rigid adherence to laws will result in human unhappiness. Aristotle tells us that proponents of this notion argue that just as you would not limit a doctor, or a practitioner of any art, by rules, you should not limit the governors. Aristotle acknowledges both that politics is an art and that some discretion is required, but responds that if you thought that doctors, like many rulers, desired to do you harm, you would want them constrained by law.<sup>135</sup> The rule of law, with all its imperfections, administered so as to do justice in particular cases, is the best we can do.

In sum, an immoderate rejection of the rule of law will not advance the feminist cause. For better or worse, we Americans are attached to the idea that, in general, laws should treat everyone equally. A continued frontal assault on this notion, rather than a measured criticism of its results in particular instances, will eventuate either in the marginalization of feminism or the undermining of faith in American government.

Another condition for happiness that is directly derived from a correct understanding of equality is the need for any political reformer to obtain, as much as possible, the citizens' consent to proposed reforms. This need for consent is not only a particular requirement of democratic governments. Consent is an issue in all regimes, because of the unalterable fact that no race of humans is born with the inherent right and power to govern another. In the words of Jefferson, "the palpable truth" is that "the mass of mankind has not been born with saddles on their backs, nor a favored few, booted and spurred, ready to ride them."<sup>136</sup> This is the meaning of "all men are created equal."

Aristotle, even with his emphasis on finding the best, meaning unequal, citizens to govern, concedes this fundamental human equality and teaches us that it must be taken into account:

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135. *POLITICS*, *supra* note 81, 1287a39-41 ("[I]f doctors were suspected of being persuaded by a person's enemies to do away with him for profit, he would be more inclined to seek treatment from written [rules].").

136. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), in *THOMAS JEFFERSON, WRITINGS*, 1516 at 1517 (Merrill D. Peterson ed. 1984).

Now if the [rulers and ruled] were as different from the others as we believe gods and heroes differ from human beings . . . so that the preeminence of the rulers is indisputable and evident to the ruled—it is clear that it would always be better for the same persons to rule and the same to be ruled once and for all . . . . [T]here being none so different . . . it is necessary for all in similar fashion to participate in ruling and being ruled in turn. For equality is the same thing as justice for persons who are similar, and it is difficult for a regime to last if its constitution is contrary to justice.<sup>137</sup>

The legislator, therefore, has a difficult task; she must rule people she is not by nature entitled to rule. This rule must be accomplished as much as possible by persuading the people to consent to what will benefit them. A people's right to consent to their governing arrangements is what marks them as a free people. The difficulty, but rightness, of this governance is why "rule over free persons is nobler and accompanied to a greater extent by virtue than ruling in the spirit of a master."<sup>138</sup>

Feminists should be especially attentive to this need for consent of the governed. The feminist critique of this regime and its laws demonstrates that women have not had the same opportunity to live the full human life as have men. One who has reached this conclusion is likely to desire, in the name of substantive equality, a comprehensive restructuring of the society, including, for example, the economic system. This impulse, and the political proposals that follow from it, must be moderated by the knowledge that the very people you wish to change must consent to your reform. If, though, in the name of equality, you attempt to impose your political program on your fellow citizens either over their objection or without seeking their consent, you are, in its most fundamental sense, violating the very principle you pretend to uphold.

A respect for the equal humanity of each individual requires that you persuade, not force, citizens to make the re-

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137. *POLITICS*, *supra* note 81, 1332b15-28.

138. *Id.* 1333b27-28.

forms you believe necessary. It is true that adherence to this prime tenet of a just regime will necessarily result in a slower pace of reform. For example, it is, and will be for quite some time, very difficult to convince Americans to agree to restructure the workplace. Achieving reforms, however, by persuasion, rather than, say, by judicial fiat, will ensure that the reforms will be both deeply rooted and carefully reconciled with the need to secure the other necessities of a good regime. Thus, adherence to the principle of consent is prudent as well as just.

In sum, the principle of equality rightly understood does not require feminists to choose between adherence to equality and improvement of the welfare of women or between a sterile formal equality and an "equality of acceptance" that is forced upon a recalcitrant citizenry. As Aristotle shows us, the wise practitioner of the science of politics must understand that people are both equal and unequal, and that she must accept those inequalities that facilitate the good life for as many citizens as possible. The only equality that matters in the end is our equal need to live in accordance with virtue. By concentrating on identifying and establishing the conditions for happiness necessitated by that equality, the wise reformer will be less likely to repeat the grievous errors made by those politicians who have treated equals unequally and unequals equally.

#### IV. CONCLUSION

It has been understood since the life and death of Socrates that philosophers serve the city by acting as "gadflies" that startle the people into facing the injustices of their regime. In their critiques of our philosophy, language, politics, and law, feminist theorists have made us confront how often the categories and concepts of Western thought are expressed in rigid dichotomies. One need only reflect on how many political positions are based on distinctions between the public and private, reason and emotion, rights and needs, and justice and care.<sup>139</sup> Feminists have shown us that the result of this dichotomizing of the human condition is that women always get the short end of the dichotomy. Women are emotional, concerned with caring

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139. See SALKEVER, *supra* note 75, at 167.

for people's needs, and relegated to the private. Men are rational, just beings, who rightfully belong in the public sphere. This division leaves women poorer and powerless compared to men.

Feminists trace the creation of these rigid categories to liberal political thought and rule-of-law jurisprudence. They argue that liberalism is the ideological expression of men's desire to exclude women, and the rule of law the institutional means for that exclusion. I agree that the predominant political and legal thought attempts to explain human beings in simple and rigid concepts. I also agree that these concepts tend to exclude women. I disagree, however, that they are the products of patriarchy. Rather, they are the natural consequence of modern political thought. This thought, whether that of Marx, Mill, Rawls, or Nozick, in an attempt to make politics into a science like physics or mathematics, reduces human and political life to a set of a rational principles that can provide the correct answers to the most difficult political questions.

The most persuasive argument that modern political thought, and not patriarchy, is the cause of this tendency to reduce human nature to rigid dichotomies is the tendency of feminists themselves to fall into the trap. Prominent feminists such as West and Williams fundamentally disagree in their analyses of the plight of women. This disagreement can be traced to two sharply differing—or dichotomous—visions of human nature. West insists that feminists must start from the premise that women are by nature different than men, and Williams insists that such a belief is the source of women's oppression. No two positions could be more opposed.

The consequences of this division for feminist reform are grave. It is difficult to conceive a principled and effective program for reform when one's own friends cannot agree regarding the good women should pursue and the relationship of politics to the achievement of that good.

Aristotle is the surest guide out of this dilemma. His understanding of the good transcends that of modern political thinking because he knows that human beings cannot be reduced to a set of scientific propositions. Human nature consists of elements that are in perpetual tension, but are equally human. Thus, we are both reason and passion, body and mind. It is fanciful to believe that we can, or should be, solely one or the

other. The most we can do is attempt to achieve that balance between the parts of our nature which enables us to live the reasonable life. This life is not one of pure rationality; it also includes training ourselves so that we experience the appropriate emotions at the appropriate times.

We know, then, that our goal is to live a fully human life. There is no simple method, however, to becoming a good person. Because human beings and human circumstances are so complex and varied, there are no hard and fast rules that can govern our actions in all times and places. In any particular situation, we must take that action that will do the most to advance us toward the human good under those particular circumstances. In different circumstances, we may do exactly the opposite. No ideology can hand you the correct answers to moral dilemmas; you must use practical reason to reach the best solutions. Given the imperfection of humanity, an action or social structure that in the abstract appears unjust may be the best way to achieve the good at that particular time.

Only when we understand the nature of the human good can we move toward a more realistic foundation for an effective feminism. Aristotle helps us to move beyond the sterile visions of women as identical to men (except for the oppression) or women as fundamentally separate from men. Women are both the same and different from men, but in the most important sense they are the same: they aim at the same human good. Most of the differences in the condition of men and women attacked by feminists are, even when they rely on differences such as pregnancy, conventional, rather than natural. One can make a powerful Aristotelian case that if these constructed differences prevent women from achieving the human good, they are unjust.

Aristotle, however, also teaches us that we cannot assume that the removal of injustice, or if you prefer, inequalities, will lead to a better life for the citizens of a society. The society in question may have relied on the reviled social structures to supply the necessities for the good life. Unless replaced, these structures cannot be dismantled without deleterious effects on the entire populace. One, for example, cannot simply destroy the traditional family without providing some alternative vehicle for the education of the young. Just as clearly, one cannot

dismantle the economic system without considering if the "new" society will produce the wealth needed to live well.

The wise feminist reformer, then, will not promote absolutist schemes that seek to create a perfectly just society right now. Instead, to use Aristotle's metaphor, the reformer will act as a doctor of the society. She knows that her goal is to facilitate the good life for as many people as possible, just as the doctor's is health. The best prescription will depend on the circumstances. Sometimes it is best to operate and directly remove the cause of illness. Sometimes the patient is too weak for an operation and must be treated with lesser measures, such as diet or medicine. Make the wrong choice, and the patient could die. Similarly, in politics, we might be able to afford some reforms that equalize conditions in society, such as discrimination laws, but not others, such as a complete redistribution of wealth.

We must, in short, use prudence in designing and advocating solutions for political problems. This prudence, because of the nature of human beings, must focus on the question of equality. Just as reason and passion exist in all human beings, equality and inequality exist in all human societies. The better society will more effectively combine equality and inequality. Thus, it is not simply enough to desire equality; one must know equality in what. If you legislate using a faulty or incomplete understanding of equality, you will meet the same fate as the liberal reformers of family law. These reformers, because they misunderstood that women are both equal and unequal to men, were unwitting accomplices in both the impoverishment of mothers and their children and the destruction for many children of the family structure that was their sole source of education and support. If we wish to avoid their fate, we must know better than they did. Aristotle did, and, through him, so can we.