Can women be “different” and “equal”?

Equality is a platitudinous concept that practically everybody supports because it can be given any meaning we like. . . . Formal agreement on equality as a value masks the fact that we haven’t a clue as to what is supposed to be equal to what, and in what way, or to what degree. 30

—Phillip E. Johnson, Stanford Law Review

During a recent dinner party, a friend of mine got himself into a charming verbal muddle. In his desire to use the encompassing “he or she” instead of the generic male “he,” my friend found himself referring to the “pregnant person”—“he or she. . . .” Surely, we all agreed, this was carrying equality too far! But my friend’s gaffe got right to the heart of the legal dilemma of sexual equality. As in medicine, the law regards the male as the legal standard of a human being. Therefore, women may be treated like men, in which case they are equal to them, or not like men, in which case they are deficient or special. But they are never treated specifically as women. There is no concept in the law of what is normal for women.

Robin West, Professor of Law at the University of Maryland, argues that modern jurisprudence (like medicine) is masculine rather than human: the values, dangers, fears, and other real-life experiences of women’s lives are not, she says, “reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine.” The Rule of Law does not value intimacy, for example, but autonomy: “Nurturant, intimate labor is neither valued by liberal legalism nor compensated by the market economy. It is not compensated in the home and it is not compensated in the workplace—wherever intimacy is, there is no compensation. Similarly, separation of the individual from his or her family, community, or children is not understood to be a harm, and we are not protected against it.” 30 The law, she argues, simply does not reflect the female experience: “Women are absent from jurisprudence because women as human beings are absent from the law’s protection” (emphasis in original). 31

Christine Littleton, Professor of Law at UCLA, argues that women’s inequality in society results from devaluing women’s real-life biological and cultural differences from men. Efforts to achieve equality through precisely equal treatment, therefore, are doomed to fail, because men and women are not starting from the same place. “As a concept,” she says, “equality suffers from a ‘mathematical fallacy’—that is, the view that only things that are the same can ever be equal.” 32 Equality has been the rallying cry of every subjugated group in American society, she maintains, but the time has come to examine its inherent dangers and fallacies.

The ideology of equality evolved from legitimate attacks on the “separate spheres” theory of blacks and women—i.e., that blacks and women “naturally” inhabit separate arenas of life (for blacks, their own race; for women, the home and family). The separate-spheres ideology historically put both blacks and women at a disadvantage; it kept black people out of white railway cars and white law schools, for example, and kept women at home. It is no wonder, then, that women and minorities are rightly wary of any legislation or legal ruling based on arguments about natural differences or separate spheres, for such regulations have invariably served to exclude them from many areas of social, political, and economic life.

For example, special protection laws—such as those forbidding women to work at night in some jobs or to lift heavy objects—were used to restrict women’s opportunities and relegate them to lower status and poorer-paying occupations. There were no special laws, however, protecting women from long and excruciating labor in sweatshops. So the modern women’s movement has understandably opposed any laws or policies that would essentially be female-specific, fearing these would be used against women’s best interests. Their attitude reflects Mae West’s observation: “Men are always trying to protect me,” she said, “Can’t imagine what from.”

For these reasons, the initial response of legal scholars to the traditionally asymmetrical treatment of women and men under the law was to argue in favor of perfect symmetry: because there are no natural differences and no inevitably separate spheres, both sexes must be treated alike. Women cannot be given any special considerations and be considered equal. Wendy Williams, an articulate spokesperson for this view, has warned that “we can’t have it both ways [and] we need to think carefully about which way we want to have it.” 34 And Wendy Kaminer has written a brilliant analysis of
the issue of sexual symmetry under the law in her book *A Fearful Freedom: Women’s flight from equality*.

Christine Littleton calls the model of legal symmetry the “assimilation” ideal, for it is based, she says, on the “notion that women, given the chance, really are or could be just like men.” Thus, institutions should be required to treat women as they already treat men, admitting those who are “qualified,” and demanding that once admitted, women behave like men. If a law firm requires that its partners put in long hours and sacrifice their family relationships and child-care obligations, then that’s what a woman must do if she wants to be a successful attorney. If a gadget manufacturer requires workers to be at least 5’9” tall, because of the height of the conveyor belt on the assembly line, then only women who are at least 5’9” can be hired. It is a “woman’s gotta do what a man’s gotta do” model of equality.

The symmetrical model has great appeal for the legal system, for liberals, and for many people who see in this vision a way to eradicate rigid sex roles that constrain men as well as women. It seems to be fair and logical, and applying it universally is certainly easier than trying to grapple with slippery exceptions. Nevertheless, notice that at the core of this vision is our now-familiar male standard of normalcy: The goal is to treat women as men already are treated. “To the extent that women cannot or will not conform to socially male forms of behavior, they are left out in the cold,” observes Littleton. “To the extent they do or can conform, they do not achieve equality as women, but as social males” (emphasis in original).

Now many scholars of legal issues are questioning the wisdom and the consequences of the symmetrical vision of legal equality, as focusing on the male bias at its heart. One of their most powerful arguments against symmetry is the accumulating evidence that treating women like men often produces disastrously unequal outcomes. In 1986 a New York State Task Force on Women and the Law found that on virtually all issues of specific concern to women—notes domestic violence, rape, child support, day care, and pregnancy—being treated equally under the law leads to unequal results. So did a major review in 1990 of gender bias in the courts conducted by the Judicial Council of California. Following are some illustrations of high women’s experience has gone unrecognized in the law, and in which being treated equally has produced unequal results.

- **Divorce and custody laws.** Almost everyone by now is familiar with the highly publicized finding of what happened after changes in the divorce and custody laws. The new laws were designed to treat divorcing couples “fairly” (that is, the “same”), without apportioning fault. The laws were based on the assumption that the sexes have equal social and economic standing, and that now that so many women are working, they should be able to support themselves. Judge Robert Satter, of the Connecticut Superior Court, reflected this attitude in his autobiography, commenting that he awards alimony to unemployed women in their forties for only two to five years, “sufficient for [them] to acquire skills and return to the job market.”

This assumption has proved to be false. Women’s wages and benefits are not the same as men’s: Until recently, women earned, on average, only 60 percent of what men with comparable education and skills were earning. The gap today has narrowed to 70 percent, not because women’s salaries have risen appreciably but because in the cost-cutting, union-busting 1980s, men’s salaries dropped. Moreover, in spite of Judge Satter’s optimism, it is not easy for middle-aged, unskilled women to get good jobs that pay well. Leaving the job market for several years to raise children makes it difficult to re-enter the field later at competitive wages; and good day care is costly, if it is even available. For these reasons, divorce typically lowers a woman’s standard of living by an average of 73 percent, and raises a man’s by an average of 42 percent.

“The impact of the divorce revolution is a clear example of how an equal-rights orientation has failed women,” writes Mary Ann Mason, a professor of Law and Social Welfare, in *The Equality Trap*. Judges have taken the position that women with children can support themselves as well as men can support themselves. It is as if every time the media announces that a woman has been appointed to a judgeship or a high corporate position thousands of women lose spousal support.” And as if every time a celebrity wife gets a settlement of $250,000 a month, thousands of working-class women lose their meager $250 a month.

In most divorce cases today women are awarded no alimony at all,
or possibly short-term alimony for "rehabilitative" purposes. In California, after no-fault divorce became the law in 1970, only 13 percent of mothers with preschool children got spousal support. The amount of child support awards has dropped as well. When it is collected, which is less than half the time, it pays for much less than half the cost of raising the child. The New York State Task Force reported that many if not most awards in child-support cases are made with the needs of the father rather than the needs of the children in mind; when women protest or demand enforcement of child-support payments, judges typically regard them as being vindictive.

The elimination of long-term support for older women who were divorced after twenty- and thirty-year marriages caused such grievous hardship for so many thousands of women in California that the state legislature eventually passed the "Displaced Homemakers' Relief Act." Judges were instructed not simply to divide all assets "equally," but to consider "the earning capacity of each spouse," the supported spouse's contributions to the family in terms of child care and domestic work, and history of unemployment. But in many other states, such as Idaho, no such relief exists. Mason reports the case of Edith Curtis, whose husband, a college professor, abruptly left her after thirty years of marriage. Curtis argued before the Idaho Supreme Court that she should be allowed to draw unemployment insurance, because she had worked for her husband during their marriage, helping his career and carrying out the duties of a faculty wife. Curtis, whose B.A. degree in English was useless on the current market, was only able to get a job as a part-time cashier at the minimum wage. She was forced to live in a one-room cabin without plumbing, eating charity food. The Idaho Supreme Court dismissed her case as "frivolous."39

No-fault divorce was an "egalitarian triumph," Mason argues, whose main effect was to impoverish women, from young single mothers to older displaced homemakers. More than half of all single-parent families now live below the poverty line; of those, more than 90 percent are headed by women. There is, she adds, no Single Parent Relief Act in sight.

- Violence. On December 17, 1988, Robin Elson picked up her sleeping 70-kilogram son from the nursery and walked into the back of the head while he was

sleeping. For years, Elson had been severely battered and abused by her husband, and on this occasion he had been railing around the house, waving the gun and threatening to kill her and their children. Elson was arrested and charged with murder. Should she have been acquitted, on the grounds that she believed she was in imminent danger of death, was unable to escape, and had no choice but killing her husband if she were to survive? Or should she have been convicted, on the grounds that she could have walked away from the marriage, taking the children with her?

Elson's jury found her not guilty of murder. But a short distance away, another jury convicted a battered woman who killed her abusive husband, a conviction that was upheld on appeal. The difference in the two cases was the admission of evidence, in Elson's case, of "battered woman's syndrome," a psychological pattern of fear, helplessness, and passivity that results from living with constant abuse and threats of death. As Sheila James Kuehl, an attorney for the Southern California Women's Law Center, has observed, until recently "the real lives of women have not been reflected in the interpretation of California's law of self-defense. The law has generally been interpreted only from the male experience, which gives no basis for understanding how any decent, sane person would stay with an abuser. This interpretation of the law conceives of self-defense as a kind of schoolboy battle in which people of equal strength are matched, gun for gun and fist for fist."40

But a battered woman is psychologically and physically no match for a battering husband, nor is she equal to him in opportunities for escape. (I am not talking about garden-variety verbal hostility, abusiveness, and rudeness in the family, in which men and women are all too equal.) Like prisoners of war, abused women come to believe —indeed, for many of them, to know with certainty—that they have no exit. They know that their husbands will track them down and murder them if they leave, as many battering husbands do, if indeed leaving were even economically feasible. By ignoring the reality of the battered woman's life, the law assumes a woman will behave as a "reasonable woman" would: defend herself in the heat of passion. But most battered women who kill their abusers do not dare to do so in the heat of passion. They know they would die if they tried to fight back. So they wait until their husbands are asleep or drunk, and kill them with whatever weapon is at hand.
Until recently, most courts have not even considered the evidence of battered woman’s syndrome and have applied the self-defense rule to both sexes equally. Efforts are now underway to make additions to the Evidence Code in a number of states that would admit expert testimony about the possible relevance of this psychological syndrome. “In this way, the real, lived-out experiences of women, not generally found in assumptions made by American law, may be taken into account,” says Kuehl.14 Juries may then decide whether to punish or vindicate battered women who kill, but without falsely assuming that men and women are equally matched in physical strength or in the ability to fight back.

- **Rape.** Courts still place much blame on victims of rape rather than on rapists. Judges, juries, and defense attorneys continue to put the victims on trial for their dress, demeanor, previous sexual activities, and relationship (if any) to the rapist. Laws about rape, almost entirely a crime against women, conform to the male experience of violence, not to the female’s experience of invasion, fear, and humiliation. Robin West writes:

  Sexual invasion through rape is understood to be a harm, and is criminalized as such, only when it involves some other harm today, when it is accompanied by violence that appears in a form men understand (meaning a plausible threat of annihilation); in earlier times, when it was understood as theft of another man’s property. But marital rape, date rape, acquaintance rape, simple rape, aggravated rape . . . are either not criminalized, or if they are, they are not punished.42

  The reason is that from the male point of view, these rapes, if they do not involve violence, cannot possibly be “harmful”; why are women making a fuss about “nonviolent” sex? The law expects battered women, like a battered wife, to behave like a man when raped; it demands that a woman behave like a reasonable man and fight back. It does not demand that a man behave like a reasonable woman and understand the difference between consent and coercion, between the words “yes” and “no.”

The male bias in rape laws is further apparent in the fact that several states still define rape as “nonconsensual sexual intercourse by a man with a woman not his wife.” Tell that to the San Francisco wife who told an interviewer that her husband “would put a pillow over my head when he wanted to have sex and I didn’t. He didn’t want others to hear me scream.”43 To consider this episode as an example of marital sex and not rape reflects only the husband’s perspective. The experiences of wives who are raped by their husbands thereby become invisible in the law.

For Robin West, such stories are evidence that the law must recognize experiences that happen mostly or exclusively to women if it is going to become a fully human jurisprudence. “We need to show that the harm of invasive intercourse is real even when it does not look like the kind of violence protected by the Rule of Law,” she argues. “We need to show that invasive intercourse is a danger even when it cannot be analogized in any way whatsoever to male experience” (my emphasis).44

Here too there are harbingers of change. The U.S. 9th Circuit Court of Appeals, in an opinion written by Judge Robert R. Beezer, recently adopted a “reasonable woman” standard in finding for a woman in a sexual harassment case—“primarily because,” wrote Judge Beezer, “we believe that a sex-blind reasonable-person standard tends to be male-biased and tends to systematically ignore the experiences of women.”45

- **Sentencing and stereotypes.** Sometimes a story turns up in the news suggesting that because of the lingering chivalry or sexism of male judges, women get off easy when they commit a crime. U.S. District Court Judge A. Andrew Hauk, declaring that women are “soft touches” for clever men “particularly if sex is involved,” gave a reduced sentence of only two years to a woman convicted of five bank robberies.46 (We all know that men are never vulnerable to clever women when sex is involved.)

  These stories always get media attention, whereas the real news is that women get more severe sentences than men for most crimes, and once imprisoned they are treated more harshly. “Judges are simply being harder on women,” said Tracy Huling, director of public policy for the Correctional Association of New York. “The rate of
incarceration is much higher [for women] than for men.” Even the few women who are on Death Row get fewer privileges than condemned men. In the late 1970s, a federal court ordered San Quentin prison to improve living conditions for the condemned inmates on Death Row. But the privileges apply only to condemned men, so the single woman on Death Row, Maureen McDermott, lives in isolation, has no access to typewriters, games, or sports, and may see visitors only if separated from them by a glass wall.47

While women often get many years in prison for killing their abusers, many men get reduced sentences for killing their wives or girlfriends. In 1986 alone, 1,500 women were murdered by their husbands or boyfriends, and the average sentence for these killers was two to six years. In Illinois, James Lutgen strangled his wife in front of their children. His provocation, he said, was that she refused to do the Christmas shopping for him. (She had just filed for divorce and received a court order for protection from him.) Lutgen served twenty months in jail, and then won custody of his children. A woman in Massachusetts asked a judge for protection from her husband who bragged, even to the police, that he would kill her. The judge said, “This court has a lot more serious matters to contend with.” The woman was murdered by her husband not long after. This case is not unusual.48

The California Judicial Council report describes widespread stereotyping that affects how the courts treat women. For example, information about a mother’s sexual behavior is acceptable evidence in probation reports, and puts her at a disadvantage when the court is considering placement of her child. But, as one witness at a Council hearing said, “[i]f a father who has been absent for eighteen months shows up on the scene at last, and has fathered sixteen children by twenty-four women, that never becomes material to the court record.”49

Women are frequently held to a different standard from men, the Council concluded. Judges expect more from mothers than fathers and thus treat them more harshly if the women fall from grace. If a father is seen as “less than proficient in caretaking,” in the words of one testifying attorney, “[the court’s attitude is] well, gosh, we need to teach him.” But a mother who lacks skills in child-rearing, is poor and illiterate, is seen as unnatural, unfit. “She’s not given in many cases, the same kind of benefit of the doubt that she wants to take care of the child properly,” the attorney added.50

In custody battles, which without doubt are terrible for everybody, women often find themselves in no-win situations. They have been denied custody both because they have paying jobs (which shows they care more about their careers than their children) and because they don’t have paying jobs (which shows they don’t love their children enough to support them well). They have been denied custody if they are living with a man (which shows they are promiscuous) and if they aren’t living with a man (which shows they can’t provide a “stable heterosexual environment”). When a woman provides evidence of the husband’s abuse of the child, she is often accused of being crazy, hysterical, or sexually cold—which the husband claims is what drove him to commit incest. When a woman provides evidence that the husband is violent, irresponsible, or disturbed, she often finds the tables turned on her. She will be portrayed as the one who is crazy; the father, despite his problems, will be praised for caring enough about his children to sue for custody.51

- Property vs. emotions. The law values physical security and property more highly than emotional security and relationships. This hierarchy of values seems to be neutral, simply a reflection of societal values; but, writes attorney Martha Chamallas, it has “privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned. The law has often failed to compensate women for recurring harms—serious though they may be in the lives of women—for which there is no precise masculine analogue” (my emphasis).52 For example, until recently, if a pregnant woman watched her two-year-old child be killed by a hit-and-run driver, and in her shock and fright subsequently miscarried, she would have been treated like any (male) bystander: no special harm was done to her.

For that matter, consider how the law has typically construed the categories of “physical” and “emotional” harm. A husband enraged by his wife’s infidelity was treated as if he had suffered a loss of property, compensable under the law; but a wife’s outrage at her husband’s infidelity was considered a “subjective” harm, noncom-
pensable “hurt feelings.” “By locating the wife’s injury within her own mind,” observes Chamallas, “the court could dismiss the harm and blame the victim for not mitigating her own injuries.” But the husband’s hurt feelings are transformed by the court into objective harm: loss of a valued object, his property, his wife.

- The pregnant person: Woman as flowerpot

Do you agree with this view?

Of course, pregnancy is unique, but should its uniqueness matter in the workplace? Shouldn’t disabled male workers have their jobs reserved for them as well? The notion that women are affected by pregnancy... in a way that no man is ever affected by a slipped disc or prostate surgery has always been used to justify their marginal status in the workforce.5

Or do you agree with this view?

... there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn’t be stuck with always using a male model, trying to twist pregnancy into something that’s like a hernia.54

Both of these views make sense to me, and both of them are true. How might we get out of this impasse?

The simpering ideas of equality versus sameness come to a boil on the one great indisputable sex difference where law and medicine combine forces: The male body doesn’t become pregnant; the female body does. Efforts to combat the illogical belief that the female body is not a deficient male body, however, have led to the equally illogical conclusion that the female body is just like the male body—even the pregnant female body.

Certainly the law itself goes around in circles. Sometimes it has regarded pregnant women as being different from men, and, as many experts fear, it has used that difference to justify inequalities. At various times and places, required pregnant teenagers to leave school (but not penalized teenage fathers); allowed pregnant women to be fired from their jobs; or required nonpregnant women to be sterilized in order to keep their jobs. Sometimes the law has regarded pregnant women as being the same as men, thereby denying them special considerations. And sometimes the law has granted pregnant women, but not men, those benefits.

In the famous case of the California Federal Savings and Loan Association v. Guerra (hereafter Cal Fed), a woman named Lillian Garland took an unpaid pregnancy leave from her job at the Savings and Loan. Under a 1978 law, she was entitled to get her job back after four months, but Cal Fed challenged the law on the grounds that it discriminated against men. This case polarized many women’s groups. Some supported Garland, but others, including the National Organization for Women and the National Woman’s Political Caucus, supported Cal Fed’s reasoning. The case made its way to the Supreme Court, which had to resolve the conflict in this situation between equal treatment and preferential treatment. They ruled, six to three, that preferential treatment of pregnant women is not unconstitutional. California and other states may pass laws to permit maternity leaves.

According to equal-rights advocates, pregnancy should be treated like any disability that might cause workers of either sex to lose a few days’ or a few months’ work. Women’s-rights advocates disagree. Sociologist Barbara Rothman puts the matter this way:

A woman lawyer is exactly the same as a man lawyer. A woman cop is just the same as a man cop. And a pregnant woman is just the same as... well, as, uh... It’s like disability, right? Or like serving in the army?

“Pregnancy is just exactly like pregnancy,” she concludes. “There is nothing else quite like it. That statement is not a glorification or a mystification. It is a statement of fact. Having a baby grow in your belly is not like anything else one can do. It is unique. How can uniqueness be made to fit into an equality model?” To Rothman, not weaker or stupider than men or nonpregnant women; but it is...