

"I WANT YOU:" UNCLE SAM AS MR. RIGHT?

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As important as the issue of race, as important as the phenomenon of multiculturalism, the women's movement has contributed much to an incredible transformation of American society. The changed and changing role of women will have profound consequences for civilization, and as with all such grand changes and transforming experiences, we do not know at this moment exactly what the outcome will be. I predict it will be phenomenal, and I use that word precisely.

Feminism during the 1960s was very clearly modeled on the civil rights movement. The legislation that resulted was passed for the purpose of guaranteeing equal opportunity and lifting barriers that had been created by tradition and by law. All of the early legislation was, in fact, "piggybacked" onto civil rights laws. For example, the first of these, the 1963 Equal Pay Act¹ and the 1964 Title VII inclusion of gender as a basis upon which employers would not be allowed to discriminate,² very much followed the pattern of the civil rights laws. The goal was to ensure that women be treated as individuals and that gender be absolutely disallowed as a characteristic upon which to discriminate between men and women in the public sphere.

There was a concomitant change in law at that time to repeal laws that had treated women as unique, as different, and as in need of special protection. This category of law included laws that limited the number of hours women could work, the amount they could be required to lift on the job, and the kinds of jobs available to them; each had been based on notions of biological limitation.³ All of those laws were pushed aside as the movement pressed for equal treatment without regard to gen-

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1. 29 U.S.C. § 206(d) (1988).

2. See Civil Rights Act of 1964, Title VII § 703, 42 U.S.C. § 2000e-2 (1988).

3. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, STATE LABOR LAWS IN TRANSITION: FROM PROTECTION TO EQUAL STATUS FOR WOMEN (1976).

der. Doors opened up to women in American society, and there was an enormous transformation in terms of the role of women in public life in United States and throughout the Western world.

This transformed society did not simply give women the right to go into the workplace, and did not simply give women equal rights with men. It also imposed on women new obligations that they had not in the past been required to meet. The freedom and liberation that Betty Friedan yearned for in *The Feminine Mystique*, in which she compared women to prisoners in concentration camps and the workplace to freedom outside the walls,⁴ has, in an incredibly short period of time, turned into an obligation. Women are no longer simply allowed into the workplace; they are forced to be there. This is most evident in the statistics on women in the labor force who have young children. In 1960, fewer than one out of five women with children not yet in school were members of the labor force. Today, that ratio is three out of five.⁵

As a result of these changes, there has emerged a "second-stage" feminism that is attempting to undo some of the harm caused by a legal and social denial of women's biological difference. Second-stage feminist legislation has not had as its goal the promotion of equal rights, but rather has sought to protect women. It can be seen everywhere. Laws require pay equity between jobs attracting mostly women and jobs attracting mostly men, effectively giving women artificial raises.⁶ Sexual harassment and date rape laws attempt to exert state control over relations between women and men for the protection of women.⁷

4. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 305-09 (1963).

5. See CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN YEARBOOK* 104 (1995) (including data on married women only).

6. Most of the legislation codifying the idea of "comparable worth" is state law. See Alice H. Cook, *Developments in Selected States*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION* 267 (Helen Remick ed., 1984); Virginia Dean, Patti Roberts & Carroll Boone, *Comparable Worth under Various Federal and State Laws*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION* 238 (Helen Remick ed., 1984). After the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981), it seemed that the federal courts would be free to interpret Title VII as allowing comparable worth analysis. However, the federal courts since generally have refused to rule payment practices illegal under comparable worth analysis. See Jeanne Gregory, *Equal Value/Comparable Worth: National Statute and Case Law in Britain and the USA*, in *EQUAL VALUE/COMPARABLE WORTH IN THE UK AND THE USA* 33 (Peggy Kahn & Elizabeth Meehan eds., 1992).

7. For a survey of state law on the subject, see 2 ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* (2d ed. 1994). For an argument that a public school's approach to behavior between students is regulated by the Due Process Clause

The early feminist dreams of liberation and freedom through an open, equal, individualized workplace have given way to a reality in which women are, in many respects, more vulnerable today than they were at any time in the past.

This movement toward protection of women is a reaction to the success of the notion that women, as individuals, could be freed from dependence on men. The whole theme, the whole anthem of the early feminist movement, was summed up quite well by Gloria Steinem's famous aphorism that women need men like a fish needs a bicycle. Women are, in large part, now freed from their dependence on men. It can be seen very clearly in specific cases such as divorce law, which no longer protects women left by their husbands and no longer protects the children of marriages that have broken up.⁸ At a more general level, the women's movement is clamoring to build some sort of safety net or shield for women. The movement wants to return women to a position where their biological differences are taken into account. But rather than do this through the informal structures that traditionally performed this role, rather than allow men and women to form contracts in marriage and work out an arrangement that provides some security and protection for women, the movement asks the state to take on the role of protector.

This approach has placed Uncle Sam in Mr. Right's shoes. The state places formal rules, laws, and regulations where informal systems of social control formerly existed. Laws insist that women be provided for through equal pay where social structures used to provide the means of survival. Laws command men to behave in a certain way with respect to women, because the informal controls that used to define the boundaries of behavior have been destroyed.

The consequences of this change from social to political control propel America toward a more intrusive state.⁹ This phe-

of the Fourteenth Amendment, see Karen Mellencamp Davis, Note, *Reading, Writing and Sexual Harassment: Finding a Constitutional Remedy when Schools Fail To Address Peer Abuse*, 69 IND. L.J. 1123 (1994). The federal government classifies sexual harassment as discrimination in violation of Title VII. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1995).

8. For a survey of state law on the subject, see Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 533-58, 610-59, 694-741 (1993).

9. Recent feminist literature arguing for radical state involvement in the relationship between men and women includes CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 157-249 (1989); NGAIRE NAFFINE, LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE 69-71, 136-47 (1990); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINIST LEGAL THEORY:

nomenon was nascent in the women's movement from the very beginning. The women's movement in Europe during the early part of this century was quite clear in its desire to see the state replace men as the protector of women. For example, the Fabian socialists and their feminist allies advocated legislation requiring the state to give allowances to women for childbearing.¹⁰ Recognizing the unique role of women in society as childbearers, but rejecting men as the proper providers for those children once they were born, the Western European feminist movement pushed for the child allowances that, along with national health insurance, became the fruit of the state-as-protector line of feminist thought.

This shift in the role of women in American society and the concomitant shifts in the roles of men and government lead away from central American principles. The principles of individualism and the right to be free of government interference in the most private spheres of life are undermined by the conflicting feminist goals of radical equality and independence from men. Denial of the differences between men and women on the one hand, and use of the differences to invoke state protection on the other hand, require an integration of the state into nearly every area of private life. This approaches the definition of totalitarianism. We should stop moving down that road, and choose instead to allow social structures to regain their former role.

READINGS IN LAW AND GENDER 81, 87-91 (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); Diana Marjury, *Strategizing in Equality*, in AT THE BOUNDARIES OF LAW: FEMINISM & LEGAL THEORY 320 (Martha Albert Fineman & Nancy Sweet Thomadson eds., 1991); Nan Stein, *No Laughing Matter: Sexual Harassment in K-12 Schools*, in TRANSFORMING A RAPE CULTURE 311 (Emilie Buchwald & Pamela R. Fletcher eds., 1993).

10. See Fabian Women's Group, *Three Years' Work: 1908-1911*, in WOMEN'S FABIAN TRACTS 156 (Sally Alexander ed., 1988).