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Justice Barkett's Feminist Jurisprudence

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COMMENTS

Justice Barkett's Feminist Jurisprudence

I. INTRODUCTION	1161
II. FEMINIST JURISPRUDENCE	1163
A. <i>Overview</i>	1163
B. <i>Common Themes</i>	1165
C. <i>Misconceptions About Feminist Jurisprudence</i>	1166
III. JUSTICE BARKETT'S FEMINIST JURISPRUDENCE	1168
A. <i>Tort Law</i>	1168
B. <i>Family Law</i>	1173
C. <i>Death Penalty Law</i>	1175
D. <i>Attorney Disciplinary Proceedings</i>	1178
E. <i>Discrimination Law</i>	1179
IV. CONCLUSION	1183

I. INTRODUCTION

Feminist jurisprudence responds to men's societal domination, domination cloaked in neutrality that has oppressed women.¹ This oppression has left women capable of empathy for other women and less powerful members of society. Men, too, through various experiences, can acquire such empathy. Empathy appears in judicial decisionmaking through attention to context, recognition of relationships, and concern for community. This Comment refracts feminist jurisprudence through the lens of Justice Rosemary Barkett of the Florida Supreme Court.²

In Part II, this Comment discusses feminist legal theory and feminist jurisprudence, and attempts to explain the various strains of feminist theory. Then, it considers the relationship of women—like Justice Rosemary Barkett—to feminist jurisprudence. Finally, it discusses the contributions of various scholars and suggests common themes that have emerged in feminist jurisprudence.

Part III shows how feminist jurisprudence plays out in Justice

1. See CATARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); ZILLAH EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* 11 (1984). See generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans. 1953).

2. Justice Barkett was appointed to the Florida Supreme Court in 1985 and is the first and only woman on the court. Michael Moline, *Former Nun Named Supreme Court Justice*, UPI, Oct. 2, 1985. A former nun and former schoolteacher, Barkett is the daughter of Syrian immigrants and grew up in Mexico. *Id.*

Barkett's decisionmaking. It delves into her opinions, showing how her decisional approach employs empathy, which heightens her awareness of context. Justice Barkett staunchly denies practicing feminist jurisprudence.³ An analysis of her opinions, however, suggests that she implements tenets of feminist jurisprudence.⁴

Part III.A shows how Justice Barkett applies feminist jurisprudence to tort law. Part III.B discusses the feminist aspects of Barkett's decisionmaking in family law. Part III.C considers the application of feminist's jurisprudence to the death penalty. It discusses how Justice Barkett's opinions illustrate her empathy for less powerful members of society. Criminal defendants, especially those on death row, are often subjects of her empathy. As Part III.C points out, judges may empathize with different actors in the same setting. Part III.C shows, however, that Justice Barkett does not always empathize with defendants. In bar disciplinary proceedings, she is tough on attorneys who undermine the legal system. Part III.D analyzes Justice Barkett's opinions on discrimination law. These cases, perhaps more than the others, show her extreme sensitivity to less powerful members of society—that is, those traditionally excluded from the community.

Part IV attempts to reconcile feminist jurisprudence and Justice Barkett's approach with traditional legal thought. It concludes that feminist jurisprudence is a legitimate, alternative approach to judicial decisionmaking. Other judges should follow Justice Barkett's example.

This Comment describes only one approach to feminist jurispru-

3. Interview with Rosemary Barkett, Justice, Florida Supreme Court, in Miami, Fla. (April 1991). Upon her appointment, Justice Barkett said that she was not sure if she qualified as a feminist. Moline, *supra* note 2. However, one need not be a self-proclaimed "feminist" to contribute to feminist jurisprudence. This Comment does not intend to praise or stigmatize Justice Barkett as a feminist.

Most judges, Rosemary Barkett included, disavow adherence to any jurisprudential theory. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990). Posner, referring to the Bork controversy, suggests that judges are wise to refrain from articulating any particular jurisprudential theory. After all, a judge's job is to use the law to find the "right" answer—not to implement ideology. This Comment suggests that feminist jurisprudence, as reflected in Justice Barkett's opinions, is one alternative route to the "right" answer. Of course, there is no single "right" answer to every problem, but an approach can be "right" in the sense that it is moral and consistent with the judicial role. See Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988) [hereinafter Cain, *Good and Bad Bias*].

4. This Comment discusses five areas of law in which Justice Barkett has written opinions. These areas—tort law, family law, death penalty law, attorney disciplinary proceedings, and discrimination law—were selected to facilitate discussion of feminist jurisprudence. No major cases or areas of case law that would negate the thesis of this Comment were overlooked.

dence through Justice Barkett's opinions; it does not define feminist jurisprudence in the abstract. Instead, its offering to feminist jurisprudence is contextual.⁵ It demonstrates Justice Barkett's *actual, concrete* jurisprudence and its implications for feminist jurisprudence. This Comment's methodology—a contextual showing of what one judge actually has accomplished through judicial decisionmaking—is part of this Comment's point. One of the major feminist criticisms of traditional legal thought is its constant abstractions of principles, principles without reference to real experiences.⁶ This Comment would be open to the same critique if it attempted to define feminist jurisprudence in the abstract. Though it associates certain characteristics with feminist jurisprudence—empathy, in particular—it does not intend to convey the message that all women, or even all feminists, embrace similar values.⁷

II. FEMINIST JURISPRUDENCE

A. Overview

Feminist jurisprudence has emerged over the last decade as a critique of mainstream (masculine) jurisprudence.⁸ An overview of fem-

5. See Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985).

6. See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376-80 (1986). Scales discusses the "male" concept of abstract universality, contending that it constructs a "dark tunnel to its tainted delusion." *Id.* at 1377. She writes:

It made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality. By this subterranean system, the "relevant" differences have been and always will be those which keep women in their place. Abstract universality is ideology, pure and simple. It is a conception of the world which takes "the part for the whole, the particular for the universal and essential, or the present for the eternal." With the allegedly anonymous picture of humanity reflecting a picture males have painted of themselves, women are but male subjectivity glorified, objectified, elevated to the status of reality. The values of things "out there" are made to appear as if they were qualities of the things themselves. So goes the process of objectification: the winner is he who makes his world seem necessary.

Id. at 1378 (footnotes omitted).

7. See *infra* notes 29-32 and accompanying text.

8. See, e.g., MACKINNON, *supra* note 1, at 124. See generally Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Scales, *supra* note 6; Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Frances Olsen, *The Sex of Law* (1984) (unpublished paper, presented to the Section on Women and the Law, American Association of Law Schools Annual Meeting, Jan. 6, 1985).

Whether feminist jurisprudence has yet succeeded in its critique is a topic of debate. See, e.g., Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic*

inist jurisprudence reveals that feminists fall into three broad categories: cultural feminists, equality feminists, and radical feminists. The categories provide a framework within which to analyze Justice Barkett's opinions.

Cultural feminists—Carol Gilligan and her followers—suggest that women and men reason differently because of their diverse developmental processes.⁹ Gilligan is ambiguous as to whether this difference is biological (inevitable) or a social construct.¹⁰ Boys, she says, create their identity by individuating from their mothers, while girls experience themselves as connected with their mothers.¹¹ As a result, women have a “different voice,” a voice that is relational, connected, caring, and empathetic.¹² Men, by contrast, become objective, individualistic, and more capable of abstraction.¹³ Gilligan concludes that women's “different voice” is not substandard, but another way of relating in the world.¹⁴ Perhaps, she implies, a better way.¹⁵ Few scholars now accept Gilligan's empirical work and conclusions wholesale.¹⁶

Equality feminists comprise a second group of feminists.¹⁷ This group of feminists assert that women deserve the same rights that men enjoy. They focus “on issues of equality—the right to equal treatment and the right to reproductive choice,”¹⁸ for example. These feminists supported the equal rights amendment and other more suc-

of Imagination, 70 TEX. L. REV. 109, 112 (1991) (“[M]uch feminist jurisprudential writing to date might be seen as an attempt to escape one masculinist set of theories by throwing itself into the arms of another masculinist jurisprudence.”); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) (arguing that feminist jurisprudence is a conceptual anomaly so long as legal doctrine does not take women's humanity seriously).

9. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 7 (1982).

10. See *id.* at 7-23. This question, however, is a major one and pervades any discussion of gender differences. Its resolution is beyond the scope of this Comment. For further discussion of this issue, see NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978).

11. See GILLIGAN, *supra* note 9, at 7-9 (explaining Chodorow's attempt to account for personality differences between the sexes).

12. *Id.* at 160.

13. *Id.* at 161-63.

14. See *id.* at 171-74.

15. See *id.* at 171-74; see also Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989).

16. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 871 n.174 (listing critics of Gilligan who argue that Gilligan's material does not support her thesis and that she exaggerates the male-female duality).

17. See, e.g., Wendy O. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

18. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 624 (1986).

cessful legislation.¹⁹ Their search for "equal rights" has succeeded in some areas, but failed in others.²⁰ The equality feminists' quest for rights contradicts cultural feminists' belief that women, for the most part, are not rights-oriented.²¹

A third category of feminists—the radicals—"describe the essence of women as invasion and torment. Radical feminism views women's connection to others—precisely that which is celebrated by cultural feminists—as 'the source of women's debasement, powerless, subjugation, and misery.'"²² Robin West describes radical feminism:

The deepest unofficial story of radical feminism may be that intimacy—the official value of cultural feminism—is itself oppressive. Women secretly, unofficially, and surreptitiously long for the very individuation that cultural feminism insists women fear: the freedom, the independence, the individuality, the sense of wholeness, the confidence, the self-esteem, and the security of identity which can only come from a life, a history, a path, a voice, a sexuality, a womb, and a body of one's own.²³

Catherine MacKinnon, a radical feminist scholar, criticizes "feminine" stereotypes as socially imposed, confining characteristics created by patriarchy to keep women powerless.²⁴

B. *Common Themes*

All three accounts of feminism may be valid. In fact, an overriding theme of feminist jurisprudence is its diversity. Justice Barkett's feminist jurisprudence does not adhere strictly to any of the three accounts of feminist thought, but draws upon all three. She has a great capacity for empathy, perhaps for the reasons cultural feminists give. Or, as this Comment suggests, Barkett's unique experiences—to an extent a product of her gender—have allowed her to develop empathy for powerless individuals. Women, diverse as they are, have

19. See, e.g., Pregnancy Discrimination Act of 1978, 42 U.S.C. S. 2000e(k) (1982). Equality feminists would also give women equal status to men in the military.

20. Almost every equal protection case decided by the Supreme Court in the name of women's equality has come down in favor of a man. For instance, an alimony statute requiring only men to pay alimony was held unconstitutional in *Orr v. Orr*, 440 U.S. 268 (1979), and a man was allowed to attend an all female nursing school, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). For a discussion of where equality feminism has failed, see MacKinnon, *supra* note 8, at 635; Christine A. Littleton, Book Review, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 757 (critiquing MacKinnon's criticism of equality feminism). See also Schneider, *supra* note 18, at 630-33.

21. See GILLIGAN, *supra* note 9.

22. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 282 (1992) (citing West, *supra* note 8).

23. West, *supra* note 8, at 35.

24. See MACKINNON, *supra* note 1.

one commonality. As radical feminists insist, equality feminists agree, and cultural feminists would admit, all women have been oppressed, either personally and knowingly, or on a society-wide basis, often so insidiously that it escapes notice.²⁵ From this common experience of powerlessness, women emerge with an ability to empathize with other less powerful members of society.²⁶

Finally, Barkett draws upon equality feminism for the proposition that the law should treat women equally to men, except in instances where women need extra protection. Barkett does not discuss whether women sometimes need extra protection because of biology, culture, or past oppression.

C. *Misconceptions About Feminist Jurisprudence*

As Professor Bartlett recognizes, the term "feminist jurisprudence" is problematic.²⁷ Many assume, for instance, that "woman" is the analytic basis for feminist jurisprudence. This assumption implies that all women are the same, which they are not.²⁸ Women do not

25. Deborah Rhode describes some of the oppression women have faced:

Long after women gained formal admission to the bar, many educators, employers, and bar associations continued to resist the 'clack of . . . possible Portias.' The stated concerns were manifold, ranging from the risks of unchaperoned intellectual intercourse in libraries to the seemingly insurmountable difficulties of constructing separate lavatory facilities. At least some of the resistance, however, rested on women's presumed intellectual incapacity and emotional instability. . . . Leading law schools, law firms, and law associations excluded women entirely or relegated them to subordinate roles.

Deborah L. Rhode, *The Women's Point of View*, 38 J. LEGAL EDUC. 39, 40 (1988).

26. Less powerful members of society include, for example, African Americans, the poor, the elderly, the uneducated, or the handicapped. This is not to say that men are not capable of empathy. For a complete discussion of empathy, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1578-87 (1987).

27. See Bartlett, *supra* note 16, at 833-36 (discussing problems with the label "feminist").

28. See *id.* at 834 (arguing that "use of the label 'feminist' has contributed to a tendency within feminism to assume a definition of 'woman' or a standard for 'women's experiences' that is fixed, exclusionary, homogenizing, and oppositional, a tendency that feminists have criticized in others"). Accord Elizabeth Spelman, *INESSENTIAL WOMAN* (1990).

have a unitary viewpoint.²⁹ Not only gender,³⁰ but experience, education, race, class, sexual preference, age, religion, and political beliefs (among other factors) construct a woman's—or a man's—perspective.³¹ Using the term "woman" as an analytic base for feminist jurisprudence also excludes men from feminist jurisprudence.³² Yet men can, and do, practice feminist jurisprudence.³³

If women are not the basis for feminist jurisprudence, who or what is? After all, feminist jurisprudence, as its name suggests, grew out of feminism, a political struggle by women, for women.³⁴ Its central concern was women. This Comment contends that feminist jurisprudence, as it evolves, will no longer have women as its primary concern. Feminist jurisprudence may tend initially to favor women,

29. See Rhode, *supra* note 25, at 41 ("To assume that feminism offers one theoretical stance is to miss a central point of recent feminist theory. . . . [C]ontemporary feminists stress the inability of any single overarching framework, including a feminist one, to provide an adequate account of social experience."); see, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989-90); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); Littleton, *supra* note 15. Cf. Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 *STAN. L. REV.* 137 (1990).

30. Gender identity is a complex, socially determined phenomenon. "One is not born, but rather becomes, a woman." SIMONE DE BEAUVOIR, *supra* note 1, at 267 (H. Parshley trans. 1968). "Feminine" and "masculine" points of view (if they exist) vary among individuals, although they may be "demonstrably sex-linked [to] the rites of genderization." Scales, *supra* note 6, at 1373 n.2. This Comment does not suggest that all women subscribe to "feminine" points of view. Both sexes have diverse points of view.

31. See GILLIGAN, *supra* note 9. Some feminists claim that women's experiences are a necessary prerequisite to being feminist. Bartlett, *supra* note 16, at 833 n.7 (citing Christine A. Littleton, *Reconstructing Sexual Equality*, 75 *CAL. L. REV.* 1279, 1294 n.91 (1987)). Others define feminism to include men as well as women. *Id.* (quoting Linda Gordon, *What's New in Women's History*, in *FEMINIST STUDIES/CRITICAL STUDIES* 20, 30 (T. de Lauretis ed. 1986)).

32. This Comment, despite its demonstration of the contribution of a "woman" to feminist jurisprudence, maintains that men must be included in feminist jurisprudence. One need not be a woman to share a woman's perspective. Concededly, it may be easier for women to access a woman's perspective, but it is not impossible for a man to be a feminist or hold feminist views. For an analogy in the context of race, see generally Johnson, *supra* note 29.

33. See, e.g., William J. Brennan, *Reason, Passion, and "The Progress of the Law," The Forty-Second Annual Benjamin N. Cardozo Lecture*, 10 *Card. L. Rev.* 3 (1988) (suggesting that "sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is an inevitable but desirable part of the judicial process. . ."); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 *Stan. L. Rev.* 1529, 1547 (1989) (arguing for context-dependent allocation of water use entitlements and suggesting that a more humane jurisprudence incorporates and "insist[s] on the particular"); JOHN R. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976) (asserting that judges emphasize rules too much and people too little).

34. Feminism began as a political struggle to empower women by ending male domination of societal institutions.

but only to the extent that laws have excluded them and left them powerless in the past. Its aim, however, is not for jurisprudential theory by women, for women, but for a jurisprudence that allows understanding of experiences, relationships, and relative power of individuals.

Another obstacle to feminist jurisprudence is the widely received negative implication of "feminist." To many, a feminist is a radical, a man-hating militant. There are women afraid to join women's organizations for fear of being dubbed a feminist or a lesbian.³⁵ This Comment urges readers to disregard these unfortunate, outdated misconceptions about feminism.³⁶

A third problem with feminist jurisprudence is that many consider it a subversive jurisprudential approach.³⁷ Like the critical legal studies movement, feminist jurisprudence frightens formalists who guard and honor the traditional Rule of Law.³⁸ Feminist jurisprudence, this Comment explains, does not subvert the Rule of Law; it merely suggests alternative applications of the Rule of Law where the Rule of Law discounts the experiences of certain individuals.³⁹

III. JUSTICE BARKETT'S FEMINIST JURISPRUDENCE

A. Tort Law

*Kendrick v. Ed's Beach Service, Inc.*⁴⁰ is an example of Justice Barkett's ability to empathize with a *man* in an unfortunate situation.

35. Cf. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (lesbian critique of feminism).

36. Leslie Bender discusses the hostility toward and misconceptions about feminism:

Feminists are portrayed as bra-burners, man-haters, sexists, and castrators. Our sexual preferences are presumed. We are characterized as bitchy, demanding, aggressive, confrontational, and uncooperative, as well as overly sensitive and humorless. No wonder many women, particularly career women, struggle to distance themselves from the opprobrium appended to the label. . . . And for every woman that cowers from the word, even more men recoil and raise defenses that cloud their vision and deafen their ears. Although these negative responses make it extremely difficult to understand what feminism is and what promise it holds for all of us, let us try to look with an open curiosity at feminist projects.

Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 3 (1988).

37. People had similar fears about legal realism and critical legal theory. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 632 (1990).

38. See, e.g., Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) (contending that new jurisprudential approaches threaten the Rule of Law). But see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (arguing that formalism has an undeserved bad reputation).

39. For a reconciliation of feminist jurisprudence and the Rule of Law, see *infra* Part IV.

40. 577 So. 2d 936 (Fla. 1991).

Raymond Kendrick dove from a lifeguard stand into a pool three-and-a-half feet deep and badly hurt himself. Barkett's opinion suggests that she empathized with his experience. She wrote:

Evidence . . . showed that Raymond Kendrick . . . believed the water was at least six feet deep. No lifeguard occupied the lifeguard chair when the accident occurred, and there was some testimony that Kendrick would not have sustained the injury had a lifeguard been present in the chair. Other evidence was presented to show that no warning signs were visible, and had warning signs been posted, Kendrick may not have made the dive.⁴¹

This passage shows Barkett's concern for Raymond Kendrick's situation. She recognized his belief—that the water was deep enough for diving—and legitimized that belief, pointing out the absence of a lifeguard and warning signs. Barkett went further to find that even had Kendrick known of the danger and acted unreasonably, the doctrine of assumption of risk would not bar his recovery.⁴² That is, she refused to apply a harsh, abstract rule—assumption of risk—that would ignore Kendrick's actual situation.⁴³

Leslie Bender argues in her article on *Feminist Theory and Tort*⁴⁴ that tort law should lessen its reliance on "universal" rules of negligence.⁴⁵ In *Kendrick*, Barkett applied Bender's theory by rejecting a rigid tort rule. Professor Bender also theorizes that tort law should take account of relationships, care, and responsibility.⁴⁶ *Casby v. Flint*⁴⁷ illustrates Barkett's own concern for the care required in the relationship between a host and his social guests. The majority in *Casby* decided as a matter of law that a host's duty of reasonable care does not extend to warning a social guest about multiple floor levels in a dimly lit or overcrowded room because such a condition is obvious and not inherently dangerous. The plaintiff had fallen because of a

41. *Id.* at 938.

42. *Id.*

43. According to Barkett, Kendrick could recover damages "under the principles of comparative negligence if the elements of the tort [had] been proven." *Id.* A concurring opinion did not reject the doctrine of express assumption of risk. *Id.* at 939 (McDonald, J., specially concurring).

44. See Bender, *supra* note 36.

45. See *id.* at 20-25. Mainstream legal doctrine teaches that negligence represents a breach of the duty of care. In order to determine whether a duty of care has been breached, the actor's conduct is measured against what a "reasonable man" would do under same or similar circumstances. Bender argues that even the recent shift to "reasonable person" implicitly measures against the male norm. *Id.*

46. According to Bender, judges could convert the present standard of "care of a reasonable person under same or similar circumstances" into a standard of "conscious care and concern of a responsible neighbor or social acquaintance for another under same or similar circumstances." *Id.* at 31.

47. 520 So. 2d 281 (Fla. 1988).

difference in floor levels, allegedly obscured by other guests. Barkett, in her special concurrence, would have submitted the issue to the jury.⁴⁸ The jury could weigh the facts of the situation and make a decision on their perception of what happened and whom should be responsible. For instance, the jury might have recognized the relative knowledge of the actors involved. The host knew of the precarious condition in her home. This knowledge placed the host in a position of power over the social guest. Barkett probably would empathize with the less powerful actor, and require responsibility from the more powerful actor.⁴⁹

*Horne v. Vic Potamkin Chevrolet, Inc.*⁵⁰ provides another example of Barkett's keen awareness of actual relationships between unequal parties. In *Horne*, an auto dealer allowed an elderly woman to drive away in a new car despite the salesperson's knowledge that she was an incompetent driver.⁵¹ The salesperson had witnessed two near accidents by the woman while she test drove the car.⁵² At one point, the salesperson had to grab the steering wheel to avoid a colliding with a bus.⁵³ He predicted (accurately, as it turned out) that the elderly woman "would not drive one block without causing an

48. *Id.* at 283 (Barkett, J., specially concurring).

49. Along the same line, in *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987), the majority refused to hold a social host liable for serving alcohol to a minor invited to the host's party. The majority held that, because the applicable state statute was intended to limit a vendor's liability in this situation, it would be illogical to assume that the statute created a new cause of action against a social host. *Id.* at 1387. Barkett wrote specially to state that she would place more liability on social hosts in this situation because of the special relationship created between a social host and minors served alcohol. *Id.* at 1387-88 (Barkett, J., specially concurring). Although she agreed with the majority that the statute was not intended to create a cause of action against a social host, Barkett stated that if she were writing "on a clean slate," she would create a cause of action against a social host for furnishing alcohol to minors. *Id.* Barkett empathized with the minor, who stands in a position of powerlessness relative to the social host.

In *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989), Barkett found a duty of care where the dissent did not. Writing for the majority, she concluded that a police officer who ordered a motorist to stop and pull off the road established a custodial relationship with the motorist, creating a duty of care to minimize traffic hazards. *Id.* at 734. She reasoned that the motorist was not free to leave or to protect himself from onrushing traffic. The motorist's only alternative would have been to disobey the officer's instructions and thus subject himself to immediate arrest and criminal charges. *Id.* Barkett showed feminist empathy for the motorist, powerless in the custody of a police officer. The dissent "fail[ed] to see where a duty existed to the plaintiffs from the [police officers] requiring the [officers] to protect the plaintiff from the negligent act of the driver of the car which collided with the police car." *Id.* at 739 (McDonald, J., dissenting).

50. 533 So. 2d 261 (Fla. 1988).

51. *Id.* at 261.

52. *Id.* at 263 (Kogan, J., dissenting).

53. *Id.*

accident.”⁵⁴

While leaving the dealership, the woman caused an accident that seriously injured her passenger. The passenger sued the dealership on a negligent entrustment theory, and a majority of the court found the dealership not liable. Despite the obvious facts, the majority asserted that the dealership's knowledge of the buyer's incompetence—an element of negligent entrustment—was impossible to determine. Furthermore, the court found that the applicable Florida Statute expressly exempted car dealers from buyers' post-sale negligence in operating the car.⁵⁵

Barkett joined the dissent, which posited a technical argument about the statute's application,⁵⁶ and chastised the court for forgetting that knowledge is a question for the jury, not the court. A feminist analysis of *Horne*—not explicit in the dissent—would empathize with the elderly woman buyer (and her injured passenger), both of whom lacked power in this situation. The power imbalance between the elderly woman and the relatively young male car salesman is blatant. Yet the majority ignored this discrepancy. Although the passenger suffered nearly \$200,000 in damages, she was left without recourse.⁵⁷

Celotex Corp. v. Meehan,⁵⁸ which involved personal injury actions arising from asbestos exposure again illustrates Barkett's feminist approach to tort law. One of the plaintiffs, Mr. Meehan, had been exposed to asbestos while working as a pipefitter at a Brooklyn navy shipyard during World War II.⁵⁹ In 1969, Meehan and his wife moved to Florida.⁶⁰ Eight years after their move, doctors diagnosed Meehan with asbestosis and mesothelioma.⁶¹ Under New York law, Mr. Meehan's cause of action arose upon termination of his employment at the shipyard.⁶² However, as Barkett pointed out in her dissent, Mr. Meehan could not have known of his injury at that time because asbestos-related diseases develop very slowly.⁶³ Ignoring that fact, the majority concluded that the plaintiffs could not maintain

54. *Id.*

55. *Id.* at 262.

56. The majority prized the certainty of a universal rule: no car dealers shall be liable for buyers' car accidents. *Id.* at 262. The dissent criticized the majority's reliance on the statute exempting car dealers from buyers' post-sale negligence. The buyer's passenger sued the car dealer for the dealer's negligent sale of the car, whereas the statute only exempted car dealers from liability created by buyers' post-sale negligence. *Id.* at 264 (Kogan, J., dissenting).

57. *Id.* at 263.

58. 523 So. 2d 141 (Fla. 1988).

59. *Id.* at 144.

60. *Id.*

61. *Id.*

62. *Id.* at 145.

63. *Id.* at 149-50 (Barkett, J., concurring in part, dissenting in part).

their personal injury actions under Florida's "discovery rule" because the statute of limitations had run in the state where the "injury" occurred.⁶⁴

Barkett applied the statute of limitations of the state where the injury occurred but reconceptualized "injury" to maximize protection under the statute of limitations rule. Barkett's dissent reframed the issue, focusing on the state that had "the most significant relationship to the cause of action and the parties."⁶⁵ Barkett first recognized the "unique features"⁶⁶ of asbestos-related diseases. In most personal injury cases, the plaintiff's injury is obvious. But because asbestos injuries do not develop until some twenty years after exposure, the time and place of injury is obscure.⁶⁷ Therefore, a court must decide whether the injury occurred at the time of asbestos exposure or later in the disease's progression.⁶⁸ Not everyone exposed to asbestos becomes ill; consequently not everyone exposed to asbestos is injured.⁶⁹

Barkett reasoned that the state where the alleged wrongful conduct occurred—the place of exposure to the asbestos—may not be the state with the "most significant relationship" to the cause of action.⁷⁰ Barkett argued that the court should evaluate all aspects of the "injury" to determine which state has the most "significant relationship" to the claim.⁷¹

Barkett also advocated considering the state's interest in adjudicating the claim, availability of witnesses, and hardship to the defendant.⁷² Florida had an interest in protecting its residents from the hazards of asbestosis and providing them with a cause of action, limited only by their discovery of the disease.⁷³ Because the disease developed in Florida, all the witnesses and testimony on damages were in Florida.⁷⁴ Furthermore, because Celotex Corporation was a Florida corporation, it would have suffered no hardship if it had to litigate the plaintiffs' claim in Florida.⁷⁵ Finally, and perhaps most

64. *Id.* at 143-45.

65. *Id.* at 148 (Barkett, J., concurring in part, dissenting in part).

66. *Id.* at 149.

67. *Id.*

68. *Id.*

69. Barkett noted that the progression of the disease is unpredictable. *Id.* at 149-50.

70. *Id.* at 151.

71. *Id.*

72. *Id.*

73. *Id.*

74. Barkett stated that, "thus, on the damages issue, the relationship between the parties clearly is centered in Florida." *Id.*

75. *Id.*

significant for feminist jurisprudence, the power structure in *Celotex* required empathy for the plaintiffs. *Celotex* was a large, powerful corporation; the plaintiffs were powerless in comparison.

B. Family Law

Writing for the majority in *In Re Browning*,⁷⁶ Barkett allowed a surrogate decisionmaker to refuse artificial life sustenance for an incompetent.⁷⁷ At age eighty-six, Estelle Browning suffered a stroke that left her without the function of the left region of her brain.⁷⁸ The hospital transferred her to a nursing home, where she stayed for two years, bedridden and in need of total care.⁷⁹ The court appointed her cousin and only living relative, Doris Herbert, as guardian.⁸⁰ Barkett's holding—allowing one person to make a decision about the life of another—shows her empathy for and understanding of relationships between people.⁸¹ Doris Herbert had lived with Estelle Browning for four years.⁸² During this time, the two women had discussed Mrs. Browning's desire not to be kept alive artificially.⁸³

Justice Barkett refused to require a "cumbersome legal proceeding" to implement the surrogate's decision, explaining that the decision to terminate artificial life sustenance is made "painfully by loving family members, concerned guardians, or surrogates, in conjunction with the advice of ethical and caring physicians. . . ."⁸⁴ Her decision not to impose a legal proceeding on the family suggests her concern

76. *In re Guardianship of Browning v. Herbert*, 568 So. 2d 4 (Fla. 1990).

77. For a compelling and thorough discussion of the family and right to die issues, see T.A. Tucker Ronzetti, Comment, *Constituting Family and Death Through the Struggle with State Power*, 46 U. MIAMI L. REV. 149 (1991).

78. *In re Browning*, 568 So. 2d at 8.

79. *Id.*

80. *Id.*

81. Barkett may be capable of empathy in this situation because she has experienced close relationships in her own life. Barkett is a daughter, a wife, a grandmother, and a friend to many. The author of this Comment saw Justice Barkett at a social gathering holding one of her grandchildren.

Cf. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, Or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (arguing that Fourth Amendment law should be reconceptualized to take account of people's shared lives).

82. *In re Browning*, 568 So. 2d at 8.

83. *Id.*

84. *Id.* at 14. Barkett refused "to impose a cumbersome legal proceeding at such a delicate time in those many cases where the patient neither needs or desires additional protection." *Id.* Barkett also considered the relationship of the state to preservation of life, protection of innocent third parties, prevention of suicide, and maintenance of the ethical integrity of the medical profession. She stated that these state interests were "by no means a bright-line test, capable of resolving every dispute regarding the refusal of medical treatment." *Id.* After considering each state interest contextually, Barkett concluded that these interests did not outweigh the incompetent's rights. *Id.*

for the relative lack of power of the family against the legal system, a maze of heartless bureaucrats with little knowledge—much less empathy—for the family's actual situation.⁸⁵

In another case, *Department of Health v. Wright*,⁸⁶ the court used a jurisdictional rule to deny recourse to a mother and child in an action against the child's father. Barkett joined the dissent in finding the mother's allegation of paternity and the father's failure to provide child support sufficient to invoke long-arm jurisdiction to enforce a child-support obligation.⁸⁷ The dissent explained: "[A] legal system must necessarily be dynamic in order to survive. Reliance on static, inflexible principles based solely on tradition reflects an inability to adapt to needs of present and future legal or moral problems."⁸⁸

The facts in *Wright* were compelling. The father had vanished to Idaho, leaving the mother pregnant in Florida.⁸⁹ The mother and child had neither power nor resources. While the dissent empathized with their situation, the majority refused to go beyond a rigid jurisdictional analysis. *Wright* is a good example of feminist jurisprudence—in an opinion that Justice Barkett did not even write.

Later, writing for the majority in *Shriners Hospitals for Crippled Children v. Zrillic*,⁹⁰ Justice Barkett struck down a statute nullifying charitable devises made by a testator less than six months before death.⁹¹ In her last will and testament, Lorraine Romans bequeathed most of her estate to a hospital for crippled children, leaving only the antique dishes to her daughter.⁹² The object of the statute was to

85. The dissent would have required a judicial proceeding. *Id.* at 17 (Overton, J., concurring in part and dissenting in part). *Cf.* *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), a case involving parental consent to abortion that demonstrates the court's concern for relationships. Although Barkett did not write an opinion in *In re T.W.*, she agreed with the majority opinion that a statute requiring parental consent for a minor's abortion was unconstitutional. The opinion recognized the relationship of minors to the legal system and to their families. The court reasoned that minors are "unable to understand how to navigate the complicated court system on their own or . . . are too intimidated by the seeming complexity to try." *Id.* at 1196. The court also noted the minor's statement that it "would kill" her mother to find out about the pregnancy. *Id.* at 1189.

The parental consent to abortion issue has generated considerable feminist scholarship. *See, e.g.,* Bartlett, *supra* note 16, at 852.

86. 522 So. 2d 838 (Fla. 1988). The court refused to find the father subject to Florida's long-arm jurisdiction under the "tortious conduct" section of the long-arm statute. The court stated that the father could not have committed a tort because he had no duty to the mother and child without a full paternity adjudication. *Id.* at 840.

87. *Id.* at 841 (Kogan, J., dissenting).

88. *Id.* at 842.

89. *Id.* at 839.

90. 563 So. 2d 64 (Fla. 1990).

91. *Id.*

92. *Id.* at 65.

protect a testator's family from "imprudent" devises to charity.⁹³ In holding the statute to be an unconstitutional restriction on an owner's right to dispose of property,⁹⁴ Barkett displayed empathy for (and respect for the dignity of) an older person who wanted to give to charity.⁹⁵

Barkett could just as easily, it seems, have directed empathy at the testator's daughter, who stood to lose an inheritance. However, she did not forget about the testator's family; in fact, her analysis uncovered laws to protect surviving family members dependent on the testator.⁹⁶

C. Death Penalty Law

Justice Barkett also practices feminist jurisprudence in death penalty cases. Her opinions urge personalized decisionmaking, which allows her—or the jury—to empathize with each capital defendant.⁹⁷ Admittedly, a judge could use empathy in a death penalty case and

93. *Id.* at 69.

94. *Id.*

95. *Zrillic* also might be read as facilitating a testator's relationship to her community. Giving to a charity may be an elderly person's only means of including herself in the community. *Cf.* discrimination cases *infra* Part III.E.

96. "Although it may be reasonable . . . to protect [dependent] family members . . . , it is unreasonable to assume . . . that all lineal descendants are dependents, in need, or are not otherwise provided for. Florida law is replete with protections for surviving family members who may have been dependent on the testator." *Zrillic*, 563 So.2d at 69.

Barkett concurred specially in another family law case, *Doe v. Roe*, 543 So. 2d 741 (Fla. 1989). In that case a father did not provide pre-natal support and then sought to invalidate the adoption of his child on the grounds that he had not consented to it. Justice Barkett had little empathy for this father, and agreed with the majority that a father had no right to consent to adoption of his child when he did not support the mother during her pregnancy. *Id.* at 749. Barkett added in her special concurrence that the *Doe* holding would require modification if it involved the mother's consent to adoption. *Id.* (Barkett, J., specially concurring).

97. Professor Resnik asks:

How can we be sure that connection and care are qualities we want for our judges? How . . . could an empathetic judge sentence another-in-whom-one-sees-oneself to years of incarceration? . . . For those of us who might applaud a possible reduction in criminal penalties which such intimacy and empathy might foster, we must recognize that our empathetic judges would not simply experience connection with defendants, but also with victims. Might such judges respond with too harsh condemnations? Or with paralysis from being torn in many directions?

I think paralysis-by-connection to be no more likely than paralysis-by-intellectualization. In our current world, in which we do not ask judges to recognize their connectedness to those before them, some judges impose harsh sentences and some more lenient ones; some judges impose obligations upon litigants without much apparent stress while others appear reluctant to sanction.

Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1924 (1988).

reach results different from Justice Barkett. This too, would be a legitimate exercise of feminist jurisprudence.

Barkett imposes the death penalty only after thorough consideration of a defendant's situation. She carefully examines all mitigating factors, and the effectiveness of counsel, and she advocates evidentiary hearings, written findings, and special verdicts. She holds special empathy for young and mentally ill defendants in death penalty cases.

Barkett dissented in *Smith v. State*⁹⁸ and *Adams v. State*,⁹⁹ concluding that the judges' failure to instruct the jury to consider all non-statutory mitigating factors required reversal of death sentences. Barkett joined the majority's holding in *Heiney v. Dugger*¹⁰⁰ that a judge's departure from the jury's recommendation of a life sentence based on the belief that he could not consider nonstatutory mitigating factors required reversal. In her concurrence, she pointed to facts that could have formed the basis of the jury's recommendation. The record, for instance, showed evidence of extreme alcohol and substance abuse.¹⁰¹

Barkett frequently dissents on the basis of ineffective assistance of counsel.¹⁰² A lawyer who represents a defendant effectively will bring to the court's or the jury's attention all facets of the defendant's life and experiences. Without this information, decisionmaking would rely on an objective abstraction of persons like the defendant.¹⁰³ Such abstract decisionmaking would not allow for empathy. At the very least, Barkett believes, the court should allow an evidentiary hearing to determine a defendant's claim of ineffective assistance of counsel.¹⁰⁴

Barkett frequently would require evidentiary hearings when the remainder of the court would not, on the basis that evidentiary hearings promote full consideration of facts. For instance, she dissented

98. 556 So. 2d 1097 (Fla. 1990) (Barkett, J., dissenting)

99. 543 So. 2d 1244 (Fla. 1989) (Barkett, J., dissenting).

100. 558 So. 2d 398 (Fla. 1990).

101. *Id.* at 401 (Barkett, J., specially concurring).

102. See, e.g., *White v. State*, 559 So. 2d 1097, 1100 (Fla. 1990) (Barkett, J., dissenting); *Eutzy v. State*, 536 So. 2d 1014, 1017 (Fla. 1988) (Barkett, J., dissenting). See also *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) (Barkett, J., specially concurring) (stating that effective assistance of counsel requires counsel to have knowledge of all mitigating factors); *O'Callaghan v. State*, 542 So. 2d 1324, 1327 (Fla. 1989) (Barkett, J., specially concurring) (stating that she would grant an evidentiary hearing on the defendant's claim of ineffective assistance of counsel); *Francis v. Florida*, 529 So. 2d 670 (Fla. 1988) (Barkett, J., dissenting) (finding that counsel made virtually no effort to obtain mitigating evidence on behalf of his client).

103. See Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1958 (1988).

104. See, e.g., *Heiney v. Dugger*, 558 So. 2d 398, 400 (Fla. 1990); *O'Callaghan*, 542 So. 2d at 1327.

in *Buenoano v. State*,¹⁰⁵ chiding the majority for not allowing a hearing to determine the factual question of whether a defective electric chair had been properly fixed before the state proceeded with the defendant's execution.¹⁰⁶

Barkett also advocates written findings and special verdicts to expose decisional facts, thereby preventing non-fact specific decisions.¹⁰⁷ She wrote specially in *Stewart v. State*¹⁰⁸ to add that the trial court should have provided specific written findings of fact showing the aggravating and mitigating circumstances that supported imposition of the death penalty.¹⁰⁹ She concurred specially in *Haliburton v. State*,¹¹⁰ asserting that she would require a special verdict delineating the basis of conviction in all death penalty cases.¹¹¹

Barkett's dissent in *Hamblen v. Dugger*¹¹² illustrates her compassion for young and mentally impaired defendants in death penalty cases. She contends that youth and mental disturbance are always mitigating factors. In *Hamblen*, she found the "complete failure to consider [the defendant's] mental disturbance, as well as the failure to consider any other mitigating factors," to rendering the sentence unreliable.¹¹³ Barkett chastised counsel in *Woods v. State*¹¹⁴ for failing to discover and present the defendant's documented history of almost lifelong psychosis, which dated back to age eight.¹¹⁵ In *Woods*, Barkett also found that the defendant's age at the time the crime was committed—eighteen—and his mental retardation consti-

105. 565 So. 2d 309, 312 (Fla. 1990).

106. *Id.* at 312-13 (Barkett, J., dissenting). Barkett's dissent adopted the compassionate view that the death penalty would be cruel and unusual punishment in light of a malfunctioning electric chair. *Id.* See also *Johnson v. Feder*, 485 So. 2d 409 (Fla. 1986). Barkett wrote the court's opinion in *Feder* requiring that evidentiary hearings be held upon the defendant's request in involuntary hospitalization cases.

107. Written findings of fact also allow reviewing courts to understand how the court or jury analyzed the facts, thus focusing on the responsibility of the factfinder.

108. 558 So. 2d 416 (Fla. 1990).

109. *Id.* at 421 (Barkett, J., specially concurring). FLA. STAT. ANN. § 921.141(3) (West 1985), provides that specific written findings of fact must support all death penalty determinations. A case interpreting the statute to require reversal of the death sentence without written findings of fact postdated the sentencing hearing in this case. See *Stewart v. State*, 549 So. 2d 171 (Fla. 1989). Notwithstanding the lack of this interpretation at the time this case arose, Justice Barkett recommended applying the writing mandate. *Stewart*, 558 So. 2d at 421 (Barkett, J., specially concurring).

110. 561 So. 2d 248 (Fla. 1990).

111. *Id.* at 252 (Barkett, J., specially concurring). Barkett would have required the special verdict to state whether a first-degree murder conviction was based on felony murder or premeditated murder. *Id.*

112. 546 So. 2d 1039 (Fla. 1989).

113. *Id.* at 1042 (Barkett, J., dissenting).

114. 531 So. 2d 79 (Fla. 1988).

115. *Id.* at 84 (Barkett, J., dissenting).

tuted significant mitigating factors.¹¹⁶ In *Le Croy v. State*,¹¹⁷ Barkett explained: "I believe the death penalty is totally inappropriate when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior."¹¹⁸ She added that "there is some age below which a juvenile's crimes can never be constitutionally punished by death."¹¹⁹

D. Attorney Disciplinary Proceedings

Although Barkett has great empathy for capital defendants, as the death penalty cases show, she is considerably less sympathetic toward more powerful groups like attorneys. Consequently, Barkett is strict in bar disciplinary actions. Her empathy favors the community, which is the ultimate victim of undisciplined lawyers.

In *Florida Bar v. Wishart*,¹²⁰ the majority held that a three-year suspension rather than disbarment was the appropriate sanction for an attorney who defied court orders in custody proceedings involving his step-granddaughter.¹²¹ Justice Barkett, arguing for disbarment in dissent, wrote that she could "think of no more flagrant misconduct by an attorney than deliberately disobeying a series of direct orders by the court."¹²² She expressed concern that lawyers like Wishart cause our legal system to fall into shambles.¹²³

Barkett, dissenting in *Florida Bar v. Golden*,¹²⁴ again preferred disbarment to suspension for an attorney who committed insurance fraud by deleting a line from a doctor's report to obtain a settlement for a client.¹²⁵ She asserted that the attorney's fraud drastically undermined the judicial process.¹²⁶ As in *Wishart*, she emphasized protection of the process, the system, and the community.¹²⁷

116. *Id.* at 83-84.

117. 533 So. 2d 750 (Fla. 1988).

118. *Id.* at 758 (Barkett, J., concurring in part and dissenting in part).

119. *Id.* at 759 (quoting *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring)). Barkett does not specify whether seventeen—the age of the defendant in *Le Croy*—should be the minimum age.

120. 543 So. 2d 1250 (Fla. 1989).

121. *Id.* at 1253.

122. *Id.* (Barkett, J., dissenting). According to Barkett, the attorney stated plainly that he willfully disobeyed the court order because he believed the judge was wrong. *Id.* Furthermore, he said that he would engage in this conduct again, on behalf of other clients as well, if he felt it necessary. *Id.* Barkett stated: "No attorney is ever privileged to arrogate to himself or herself the right to say with finality what the law is." *Id.*

123. *Id.*

124. 544 So. 2d 1003 (Fla. 1989).

125. *Id.* at 1004 (Barkett, J., dissenting).

126. *Id.*

127. In *Florida Bar v. Patarini*, 548 So. 2d 1110 (Fla. 1989), the majority ordered suspension for an attorney who hired a muscle man to inflict physical harm on his ex-wife's

In contrast, *In re Application of VMF for Admission to Florida Bar*¹²⁸ demonstrates Barkett's leniency in bar proceedings when the context demands it. She concurred specially with the majority's opinion allowing bar admission of an attorney who withheld information on his bar application concerning an eleven-year-old drug incident.¹²⁹ She noted that the applicant had relied on his father, an attorney, in withholding the information.¹³⁰ She also empathized with the fact that the applicant was required to care for his father who was confined to a wheelchair.¹³¹ Unconcerned by these mitigating factors, one of the dissenters would have required mandatory application of the universal rule that willfully withholding pertinent information calls for denial of bar admission.¹³²

E. Discrimination Law

The cornerstone of Barkett's approach in discrimination cases is her support of full participation in society for all members, especially the less powerful ones who typically have been excluded from community membership.¹³³ In seeking to empower disenfranchised individuals in society, she frequently disagrees with the majority of the court. This subpart thus explores Barkett's opinions on gender dis-

counsel. Barkett dissented, recommending disbarment, because "the nature of this conduct, in addition to its illegality, flagrantly undermines the entire judicial process." *Id.* at 1112 (Barkett, J., dissenting). The majority considered the attorney's emotional strain as a result of his divorce as a mitigating circumstance. However, this emotional strain was not enough to prompt Barkett's compassion. Her concern for community trumped empathy for the attorney. *But see* DeBock v. State, 512 So. 2d 164, 169 (Fla. 1987). Dissenting, Barkett stated: "To say that bar disciplinary proceedings are remedial in order to protect the public and are not penal in nature is pure semantic tomfoolery." *Id.*

128. 491 So. 2d 1104 (Fla. 1986).

129. *Id.* at 1107.

130. *Id.* at 1108 (Barkett, J., concurring specially).

131. *Id.*

132. *Id.* at 1108-09 (Ehrlich, J., dissenting). Ehrlich reasoned from an abstract principle with no reference to context. On the other hand, Barkett's attention to context shows empathy for the bar applicant's situation and his relationships.

133. One theme of feminist theory is the relationship of individuals to community. *See* Schneider, *supra* note 18, at 603. "Feminist discourse and practice entails a struggle for individual autonomy that is with others and for community that embraces diversity—that is, for an integration of the individual and the collective in an ongoing process of authentic individuation and genuine connectedness." *Id.* (quoting K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 198 (1984)). *See also* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-613 (1986) (suggesting that Justice O'Connor subscribes to communitarian theory). Liberal theory, in contrast to feminist theory, insists on the primacy of individuals, rather than community, and views the individual as the object of rights. *See* Charles Fried, *The Supreme Court, 1989 Term: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 108 (1990) (contrasting a communitarian and an individualistic view of rights).

crimination, alienage discrimination, race discrimination, and voter discrimination (or apportionment).

In *Byrd v. Richardson-Greenshields Securities, Inc.*,¹³⁴ Barkett entertained sexual harassment claims brought by female employees for assault and battery, intentional infliction of emotional distress, and negligent hiring and retention of employees based on incidents of sexual harassment.¹³⁵ Under existing law, the workers' compensation statute provided the sole remedy for workers injured in the workplace.¹³⁶ Barkett, nevertheless, allowed the women in *Byrd* to maintain a tort action against the employer. She surveyed other statutes, finding a strong public policy against workplace sexual harassment.¹³⁷ Noting that sexual harassment creates an offensive environment for members of the workplace and an arbitrary barrier to sexual equality,¹³⁸ Barkett suggested that the women in *Byrd* had suffered injury to a "personal right"¹³⁹—the right to full membership in the workplace without fear of degradation.

One of the concurring justices disagreed with Barkett's analysis, finding the only issue to be whether the worker's compensation statute covered the injuries to these women.¹⁴⁰ If it did, the statute would be the exclusive remedy, and the women could not recover because the statute provided no damages for sexual harassment injuries. If the workers' compensation statute did not cover the injuries to these women, they could bring a private tort action for damages. The concurring justice found that because the language of the statute required accidental injury in the workplace, and the actions in *Byrd* were not accidental, the statute did not apply.¹⁴¹

Barkett applied feminist jurisprudence in the alienage discrimination case of *De Ayala v. Florida Farm Bureau Casualty Insurance*

134. 552 So. 2d 1099 (Fla. 1989).

135. For an insightful analysis of sexual harassment in the workplace, see Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991).

136. The workers' compensation statute traditionally had not provided damages for injuries caused by sexual harassment. *Byrd*, 552 So. 2d at 1102. If the women had been forced to quit their jobs because of the sexual harassment, they might have sought damages for lost salary under Title VII. Because these women were still working, Title VII would not have allowed them to receive damages.

137. *Id.* at 1102-03.

138. *Id.* at 1103.

139. *Id.* at 1104.

140. *Id.* at 1106 (Ehrlich, J., concurring).

141. Justice Ehrlich reasoned that the acts being sued for simply did not fall within the statute. No injury occurred "'by accident arising out of and in the course of employment,' § 440.02(14), Florida Statutes, for which worker's compensation benefits would be payable." *Id.*

Co.¹⁴² In *De Ayala*, the Florida Supreme Court struck down a statute that limited death benefits for nonresident alien beneficiaries of deceased workers, except Canadians, as a violation of equal protection.¹⁴³ Writing for the majority, Barkett empathized with the plight of nonresidents—Mexicans in this case—and refused to exclude them from coverage. She could find no justification for “giving a benefit to nonresident Canadians that is denied Mexicans.”¹⁴⁴ *De Ayala* shows Barkett’s empathy for the less powerful people, those generally excluded from the community.¹⁴⁵

In *Kibler v. State*,¹⁴⁶ a case involving race discrimination, Barkett joined a majority of the court in granting a white defendant standing to object to the prosecutor’s use of peremptory strikes to excuse black jurors. The district court of appeal denied Kibler standing because he was not of the same race as the jurors who were challenged.¹⁴⁷ In addition to recognizing Kibler’s standing, the Florida Supreme Court found the prosecutor’s explanation that he wanted to make room to add other prospective jurors to the panel insufficient to rebut the defendant’s *prima facie* showing of discrimination.¹⁴⁸

Barkett concurred specially, adding that to hold otherwise would mean that racial discrimination would be permitted in the use of peremptory challenges unless “by happenstance” the defendant and the challenged juror were of the same racial minority.¹⁴⁹ Although she expressed some concern with choosing between unfettered peremptory challenges and anti-discrimination measures, she chose to prohibit discrimination “regardless of the cost.”¹⁵⁰ Thus, instead of allowing complete autonomy to the individual, the prosecutor in this

142. 543 So. 2d 204 (Fla. 1989).

143. *Id.* at 207-08.

144. *Id.* at 207.

145. The dissent, in contrast, believed that equal protection should apply only to United States citizens and residents. *Id.* at 208 (Overton, J., dissenting). Justice Overton’s dissent is another example of the abstract, universal rules that Barkett seeks to avoid. In an equal protection case similar to *De Ayala*, Justice Barkett, again writing for the court, struck down another statute with an alienage restriction as unconstitutional. See *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987). In *Kelly*, a non-citizen applied for a license to act as a business agent for the Palm Harbor Fire Fighters Union. *Id.* at 250. Section 447.04, Florida Statutes (1985) provided that “[n]o person shall be granted a license or permit to act as a business agent in the state . . . who is not a citizen of the United States.” *Id.* Barkett asserted that “[t]he mere fact of alienage does not of itself render a person unfit to be a business agent,” and struck down section 447.04 as a denial of equal protection. *Id.* at 251, 253.

146. 546 So. 2d 710 (Fla. 1989).

147. *Id.* at 710-11.

148. *Id.* at 714.

149. *Id.* (Barkett, J., concurring specially).

150. *Id.*

case, to exercise peremptory challenges,¹⁵¹ Barkett opted for the decision that would indiscriminately include less powerful persons in the legal process. She stated her belief that every juror has a right to participate fully on a jury, an integral aspect of community membership.¹⁵² The defendant, too, would benefit from consideration of her case by a true cross-section of the community.¹⁵³

Barkett dissented vigorously in an apportionment case concerning Florida Bar voting when the majority allowed deviation from the one person, one vote rule. In *Florida Bar re Amendments to the Rules Regulating the Florida Bar (Reapportionment)*,¹⁵⁴ the Board of Bar Governors' proposal to reapportion the board resulted in one representative for the 117 members of the Third Circuit and six representatives for the 8,225 members of the Eleventh Circuit. Barkett found no useful purpose served by a provision that the membership of the Third Circuit have more than ten times the representative power of their counterparts in the Eleventh Circuit.¹⁵⁵ Barkett would likely agree with the conclusion of one feminist scholar that apportionment cases "involve one of the most fundamental aspects of community membership, the right to participate in the shaping of the community's values through the electoral process."¹⁵⁶

IV. CONCLUSION.

Professor Katharine Bartlett observed the similarities and dis-

151. The dissent argued that despite its inherently discriminatory nature, the peremptory challenge is essential in the trial lawyer's quest to obtain a fair and impartial jury. *Id.* (Ehrlich, J., dissenting).

152. *Id.*

153. In another case involving the selection of jurors, *Cook v. State*, 542 So. 2d 964 (Fla. 1987). Barkett dissented from the majority's determination that a juror should not be dismissed upon his subjective assertion that he did not understand English. Was Barkett unconcerned about the inclusion of non-English speaking jurors, while eager to include racial minorities? Or, rather, was she empathizing with the non-English speaking juror, and the unfairness that would result for the defendant?

154. 518 So. 2d 251 (Fla. 1987).

155. *Id.* (Barkett, J., dissenting). Barkett declared that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a democratic government." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

156. Sherry, *supra* note 133, at 596-97.

Age discrimination cases are a category of less controversial discrimination cases addressed by the court. See *Metropolitan Dade County Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So. 2d 962 (Fla. 1987) (Barkett agreed with majority that refusing to allow a 29-year old to move into a "retirement community" constituted age discrimination); *Morrow v. Duval County School Bd.*, 514 So. 2d 1086 (Fla. 1987) (Barkett joined unanimous decision that school board had practiced arbitrary age discrimination in refusing to rehire a seventy-year-old teacher).

tinctions between feminist jurisprudence and traditional legal theory as follows:

When feminists 'do law,' they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide resolution of the dispute, and they apply those principles to the facts. This process unfolds not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner.¹⁵⁷

However, Bartlett adds, feminists go one step further—they seek “to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups.”¹⁵⁸

Professor Bartlett's description makes clear that feminist jurisprudence is not just a mechanism used to achieve desired results. Rather, it involves a legitimate and practical reasoning process. Justice Barkett engages in this reasoning process when she carefully examines the facts of each case. In doing so, she exposes the bias in existing rules and challenges the existing power structure.

Justice Barkett's methodology also defies the pervasive notion that feminist jurisprudence is irrational, value-laden, and subversive to the Rule of Law. Neither Justice Barkett nor feminist jurisprudence reject the Rule of Law; they simply place more emphasis on personal experience, which is accessed through empathy. Instead of using universal rules as a starting point for analysis, Justice Barkett analyzes human experience to determine the applicability of rules. Then, she uses human experience to determine the applicability of rules. Then, it modifies those rules to take account of the relative power of the people involved and their relationships to each other. As illustrated with the sexual harassment claims in *Byrd*, this sometimes requires supplementing the existing rule. At other times, as in *Wright*, feminist jurisprudence requires recasting a rule, or as in *Celotex*, redefining one of the terms of the rule so that a less powerful person can gain its protection.

Feminist jurisprudence exposes the limits on the Rule of Law's objectivity: the underlying terms of many rules are not predefined or explicit. As Martha Minow stated, “court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated—and treat as a given—the

157. Bartlett, *supra* note 16, at 836.

158. *Id.*

perspective they select.”¹⁵⁹ Thus, feminist jurisprudence, because it exposes the basis of traditional rules is compatible with the judicial role.¹⁶⁰

Feminist jurisprudence is not the first jurisprudential approach to rethink legal rules.¹⁶¹ Not since the days of legal formalism has anyone seriously suggested inflexible application of rules. Karl Llewellyn (legal realism), Richard Posner (law and economics), and Duncan Kennedy (critical legal studies) all have critiqued existing jurisprudential methods.¹⁶² Legal realism, in particular, and its attack

159. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 94 (1987); see also Cain, *supra* note 3, at 1949-50.

If we are willing to admit that our judges naturally bring a point of view with them into the courtroom, then what sort of language should we use to talk about judicial bias? Are we prepared to discuss the good and bad biases of our judges? If we are, does this entail the surrender of all objective notions of the Rule of Law? How can we determine who is competent to judge?

One partial solution to these problems is to transform the practice of judging so that the “power” to validate one perspective over another is never left in the hands of one judge. Another approach to the problem would be to seek judges with varied life experiences, judges with the potential for a better understanding of the multitude of perspectives that are likely to be placed before them in the courtroom.

160. See Resnick, *supra* note 97, at 1909-10 (arguing that adjudication and feminism are not “fundamentally incompatible”). Resnik writes: Judges “change lives, transfer assets, imprison individuals, and even determine life and death.” *Id.* at 1885. Judging “is one instance of governmental deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly.” *Id.* at 1909. Proper adjudication can be fluid and responsive. *Id.* “No judge stands outside a social context.” *Id.* at 1910.

Feminism may help us see that what the universal aspirations are attempting to achieve may vary from context to context, from small community to large urban setting, from trial court to appellate court, from single judge to collective judges, from commercial to constitutional law. If we understand feminist skepticism not as rejecting all levels of generality but rather as reminding us of the limits and risks of such generalizing, we gain in our ability to press beyond the talisman-like phrases.

Id. at 1911.

161. See Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 826 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)) (“[T]he basic claims of feminist theory are in many circles denied credibility and respect, or even a fair hearing.”). Sunstein, a liberal legal scholar, suggests that the emergence of feminist legal theory has “throw[n] into question practices and conceptual structures that had previously been accepted or even invisible,” and may produce “substantial changes in legal rules.” *Id.* Sunstein also notes that the feminist movement in law, like other intellectual and political movements of the past, challenges “practices that had for a long period been taken as natural and inviolate, sometimes even as based on biological differences” by revealing how these practices are “socially created and subject to criticism and change.” *Id.* Sunstein also suggests that the feminist movement is the most powerful of the contemporary movements in legal history. *Id.*

162. At least one legal scholar fears that these new jurisprudential movements mean “the death of the law, as we have known it throughout history, and as we have come to admire it.”

on doctrinal abstractions, provides a historical parallel to feminist jurisprudence.¹⁶³ The Realist's insistence on "situation sense" is similar to the power-empathy inquiry of feminist jurisprudence. Feminist jurisprudence, however, as refracted through the lens of Justice Barkett's opinions, reflects a special concern for human experience and the position of the disadvantaged that goes beyond—although it does build upon—the insights of legal realism.

Traditional legal theory seeks to construct and apply abstract rules.¹⁶⁴ A contract, for instance, requires consideration, and a gift requires delivery. A statute of limitations bars all actions not brought before it expires. Traditional legal thought teaches that a rule is good if it is detached and transcends the results of particular cases.¹⁶⁵ The problem with abstraction is that it overlooks context.¹⁶⁶ Only by looking at context, as Justice Barkett does, can a judge empathize with the actual human situations that gave rise to a dispute, situations to which a jurisprudential theory must respond.¹⁶⁷ Rules without relation to context overlook these human experiences that should

See Fiss, *supra* note 38, at 1 (contending that law and economics and critical legal studies are unhealthy in that they "distort the purposes of law and threaten its very existence").

163. Feminist scholars have acknowledged the contribution of legal realism to feminist jurisprudence. See, e.g., Scales, *supra* note 6, at 1400. Legal realists like Felix Cohen contend that legal scholars should be skeptical about claims of legal objectivity; Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935). Karl Llewellyn attempted to establish a new "Realistic Jurisprudence" that would require judges to look beyond abstract legal verbalism and focus instead on behavioral factors, "such as the area of contact and interaction." See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). One should approach the law, "not with the idea of formulating its rules into a system, but with an eye to discovering how much it does or can effect. . . ." *Id.*; see also Minda, *supra* note 37, at 635.

164. See Bartlett, *supra* note 16, at 832 ("Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility and the ability to identify missing points of view."). See also Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986) (inviting feminist critique of mainstream jurisprudence because of its refusal to acknowledge context).

165. Scales, *supra* note 6, at 1377.

166. One feminist notes that abstract universality provides "no bridge to the concrete." See *id.* (quoting Carol C. Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, in *WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION* 5-6 (Carol C. Gould & Marx W. Wartofsky eds. 1976)).

When Justice Barkett was sworn in to the Supreme Court of Florida, she declared: "The law is not an abstract set of rules and procedures established for its own sake but a living protector of the right of every citizen to be treated fairly and equally in every context." Michael Moline, *Barkett Takes Oath as Florida's First Woman Supreme Court Justice*, UPI, Nov. 15, 1985.

167. See Scales, *supra* note 6, at 1380; see also Bartlett, *supra* note 16, at 850-63. What Bartlett calls "feminist practical reasoning" focuses on the real rather than the abstract, "approach[ing] problems not as dichotomized conflicts, but as dilemmas . . . [which] do not call

form the basis for judicial decisionmaking.¹⁶⁸ In sum, Justice Barrett's feminist jurisprudence provides an exemplary model for judicial decisionmaking.

LANAE HOLBROOK

for the choice of one principle over another," but for attention to context. *Id.* at 851. Each case presents a unique situation and cannot be generalized in advance. *Id.*

168. Minow, *supra* note 159, at 16. Minow urges the judiciary to "approach questions of difference by seeking out unstated assumptions about difference and typically unheard points of view." *Id.* She states that "[t]here will not be a rule, a concept, a norm, or a test to apply" to certain problems. *Id.* The judiciary should avoid categorical solutions, because they cut off understanding. *Id.* Minow defends her approach:

Far from being unmanageable, this approach describes what happens already in the best practices of justice. Justice, in this view, is not abstract, universal, or neutral. Instead, justice is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed.

Id.