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## SYMPOSIUM

### FROM GENDER DIFFERENCE TO FEMINIST SOLIDARITY: USING CAROL GILLIGAN AND AN ETHIC OF CARE IN LAW

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Even those of you who do not spend your time reading feminist theory have probably heard of Carol Gilligan and her book, *In a Different Voice*.<sup>1</sup> Although she is a psychologist and not a lawyer, her work is cited frequently in legal scholarship, and I include myself among her followers.<sup>2</sup> Gilligan's work epitomizes a school of

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Associate Professor, Syracuse University College of Law. This essay is dedicated to the Feminist Theory and Women's Studies Communities at Syracuse University for their creation of a rich, challenging, and supportive environment for the study and development of feminist thinking. I especially would like to thank Linda Alcoff. I have benefitted greatly from comments by Robyn Wiegman, Sari Biklen, Linda Alcoff and Daan Braveman. Thanks are also due to my research assistants, Melissa M. Davis, Class of 1990 and Karen Kelly, Class of 1992, and my mother, Marion Bender.

The Editors of the VERMONT LAW REVIEW have agreed to include the first names of authors in the first appearance of a citation and to other deviations from standard "Blue Book" form requested by Professor Bender.

1. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). In addition to her frequent citation in academic scholarship, Professor Gilligan's work has received considerable attention in the mainstream press. See, e.g., Francine Prose, *Confident at 11, Confused at 16*, N.Y. TIMES, Jan. 7, 1990, § 6 (Magazine), at 22. She was also named Woman of the Year by Ms. Magazine. Lindsay Van Gelder, *Carol Gilligan: Leader for a Different Kind of Future*, MS. MAGAZINE, Jan. 1984, at 37.

2. For an underinclusive sampling of works that refer to and apply Gilligan's analysis to law, see Judith Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988) (Book Review, DALTON, BURRIS AND THE YALE AIDS LAW PROJECT, AIDS AND THE LAW (1987)); Peter A. Bell, *The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177 (1990); Leslie Bender, *Feminist (Re)torcs: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibility*, 1990 DUKE L.J. 849 [hereinafter Bender, *Feminist Retorts*]; L. Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990); L. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL ED. 3 (1988) [hereinafter Bender, *Primer*]; Ellen DuBois, Mary Dunlap,

feminist theory that acknowledges women's gender differences. For

Carol Gilligan, Catharine MacKinnon & Carrie Menkel-Meadow, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985) [hereinafter *Feminist Discourse*]; Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989); Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Linda Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775 (1990); Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (hereinafter Littleton, *Reconstructing*); Mari Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia*]; C. Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law*, 42 U. MIAMI L. REV. 29 (1987); C. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988); Judith Leonie Miller, *Making Change: Women and Ethics in the Practice of Law*, 2 YALE J. L. & FEMINISM 453 (1990); Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) [hereinafter Minow, *Foreword*]; Katherine O'Donovan, *Engendering Justice: Women's Perspectives and the Rule of Law*, 39 U. TORONTO L.J. 127 (1989); *Project: Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988); DEBORAH RHODE, JUSTICE AND GENDER (1989); Deborah Rhode, *The "Woman's Point of View,"* 38 J. LEGAL ED. 39 (1988); ANN C. SCALES, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Joan M. Shaughnessy, *Gilligan's Travels*, 7 L. & INEQUALITY 1 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); CAROL SMART, FEMINISM AND THE POWER OF LAW 72-75 (1989); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL ED. 243 (1988); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) [hereinafter West, *Jurisprudence*]; Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) [hereinafter Williams, *Deconstructing*].

Needless to say, Gilligan's work has also proved useful to theorists in other disciplines. See, e.g., Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in FEMINISM AS CRITIQUE 77 (Seyla Benhabib and Drucilla Cornell eds. 1987) (political theory); *Symposium on Feminist Political Thought*, 99 ETHICS 219 *passim* (1989) (political theory); KATHY E. FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY (1984) (social theory); Gertrude Nunner-Winkler, *Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility Versus an Ethic of Rights and Justice*, in MORALITY, MORAL BEHAVIOR AND MORAL DEVELOPMENT 348 (W. Kuretnes & J. Gewirtz eds. 1984) (ethics); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984) [hereinafter N. NODDINGS, CARING] (ethics); Lawrence Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472 (1988) (ethics); WOMEN AND MORAL THEORY (E. Kittay & D. Meyers eds. 1987) (moral philosophy); SCIENCE, MORALITY & FEMINIST THEORY (Marsha Hanen & Kai Nielsen eds. 1987) (moral philosophy) [hereinafter SCIENCE, MORALITY & FEMINIST THEORY]; Annette Baier, *The Need for More Than Justice*, in SCIENCE, MORALITY & FEMINIST THEORY, *supra*, at 41; Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622 (1987) (moral philosophy); MARY BELENKY, BLYTHE CLINCHY, NANCY GOLDBERGER & JILL

clarity, I will call this school of feminism "difference theory" or "gender difference theories."<sup>3</sup> When I refer to Gilligan's work in this essay, it is as a heuristic device or metaphor for these feminist theories that recognize gender differences as a salient point for analysis.<sup>4</sup> Feminist gender difference theories also argue for the inclusion and appreciation of gender differences typically associated with women. My arguments about using feminist theories to transform law rely on this aspect of gender difference theories.

### Gilligan's work and the work of feminist gender difference the-

TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* (1986) [hereinafter *WOMEN'S WAYS OF KNOWING*] (education).

3. Sometimes Gilligan's approach is called cultural feminism or relational feminism (and even a variation on feminist standpoint theory). JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* (1985); HESTER EISENSTEIN, *CONTEMPORARY FEMINIST THOUGHT* (1983). See also Linda Alcoff, *Cultural Feminism versus Post-structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405 (1988); Alice Echols, *The New Feminism of Yin and Yang*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (Ann Snitow, Christine Stansell & Sharon Thompson eds. 1983); SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 *SIGNS* 119 (1988); Rhode, *The "Woman's Point of View," supra* note 2. Rosemary Tong classifies Gilligan's approach within psychoanalytic feminism. ROSEMARY TONG, *FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION* 161-72 (1989). I prefer not to use any of those labels because they have developed a great deal of excess baggage.

Gilligan's writings fit into a trend within feminist theory that took hold in the last ten years. The 1980's saw a reclaiming of gender difference theory with an embrace of women's perspectives and experiences as its theoretical foundation. *E.g.*, THE *FUTURE OF DIFFERENCE* (Hester Eisenstein & Alice Jardine eds. 1980) (interdisciplinary collected writings on gender difference and feminist theory); Caroline Whitbeck, *A Different Reality: Feminist Ontology*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* (Carol Gould ed. 1984); Nancy Harstock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY AND PHILOSOPHY OF SCIENCE* 283 (Sandra Harding & Merrill Hintikka eds. 1983).

Writings of other leading feminist difference theorists include SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989) [hereinafter S. RUDDICK, *MATERNAL THINKING*]; NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) [hereinafter N. CHODOROW, *MOTHERING*]; DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1977); Marilyn Friedman, *Beyond Caring: The De-Moralization of Gender*, in *SCIENCE, MORALITY & FEMINIST THEORY*, *supra* note 2, at 87; N. NODDINGS, *CARING*, *supra* note 2; *WOMEN'S WAYS OF KNOWING*, *supra* note 2.

4. I would like to emphasize that although I will discuss Gilligan's work here, I do not intend to do a careful reading of her texts to prove certain points or to challenge her studies and conclusions. I also do not intend to make a fine distinction between gender as a psychologically constructed concept and gender as a socially or culturally constructed concept. These are intriguing issues, but my arguments in this essay for the recognition of gender difference and the benefits we might garner from the transformation of our laws and legal system based on things we learn from women and gender dynamics do not rest on that distinction at all.

orists have generated a certain degree of controversy.<sup>5</sup> Feminists who struggle against acknowledgement of sex or gender differences find Gilligan's variety of theory damagingly reminiscent of a romanticized 19th century "separate spheres" ideology, and hence quite pernicious.<sup>6</sup> Other feminists, who assert that gender relations are power hierarchies and about institutionalized privilege, consider Gilligan-type works disturbing, because they valorize "voices" of women that are arguably results of subordination and oppression.<sup>7</sup> Some feminists combine both these arguments and criticize Gilligan's work for its vulnerability to cooptation, misuse, or appropriation by the conservative right.<sup>8</sup> Lately, another feminist cri-

5. Some criticisms of Gilligan's work are from outside the feminist community. See, e.g., Blum, *supra* note 2; Flanagan & Jackson, *supra* note 2; B. Bradford Brown, Book Review, *In a Different Voice*, 9 *SEX ROLES* 756 (1983); John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 *SOC. RES.* 597 (1983); Bill Puka, *The Liberation of Caring: A Different Voice for Gilligan's "Different Voice,"* 5 *HYPATIA* 58 (1990). See also Review Symposium on Nel Noddings' *Caring*, 5 *HYPATIA* 101 (1990) (collection of critiques of Noddings' approach and her response).

6. See, e.g., CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER* (1988) [hereinafter C. EPSTEIN, *DECEPTIVE DISTINCTIONS*]; Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate Over Special Versus Equal Treatment for Women*, 4 *LAW & INEQUALITY* 143 (1986); Williams, *Deconstructing*, *supra* note 2; Wendy Williams, *Notes from a First Generation*, 1989 *U. CHI. LEGAL F.* 99.

For generalized descriptions of separate spheres ideology, in which woman's nature determines her appropriate domestic role, see ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM* (1982); DEBORAH RHODE, *JUSTICE AND GENDER* 9-50 (1989). Justice Bradley's concurrence in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1876), represents a most injurious and overt manifestation of this separate spheres ideology in law. Another flagrant legal example is the series of laws that deprived married women of their separate identities and their rights to possess property. See Nadine Taub & Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117, 125 (D. Kairys ed. 1982).

7. E.g., CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 51 (1989); Judy Auerbach, Linda Blum, Vicki Smith & Christine Williams, *Commentary: On Gilligan's In A Different Voice*, 11 *FEMINIST STUDIES* 149 (1985) [hereinafter *Commentary*]; Claudia Card, *Caring and Evil*, 5 *HYPATIA* 101 (1990); *Feminist Discourse*, *supra* note 2, at 73-75; Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 *SIGNS* 621 (1987); MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* (1983); Sarah L. Hoaglund, *Some Concerns About Nel Noddings' Caring*, 5 *HYPATIA* 109 (1990); Barbara Houston, *Caring and Exploitation*, 5 *HYPATIA* 115 (1990); Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 *SIGNS* 644 (1987); Martha J. Reineke, *The Politics of Difference: A Critique of Carol Gilligan*, 2 *CAN. J. OF FEMINIST ETHICS* 3 (1987).

8. See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373 (1986); *Commentary*, *supra* note 7, at n.4; Reineke, *supra* note 7; Linda Kerber, Catharine Greeno, Eleanor Maccoby, Zella Luria, Carol Stack & Carol Gilligan, *Viewpoint: On In a Different Voice: An Interdisciplinary Forum*, 11 *SIGNS* 304-33 (1986) [hereinafter *Viewpoint*]; Greeno & Maccoby, *How Different is the "Different Voice"?*, 11 *SIGNS* 310, 313-14 (1986); Karen Offen, *supra* note 3; JEAN GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 218 (1986). See also Susan Moller Okin, *Reason and Feeling in Thinking*

tique of gender difference theories has emerged. This criticism is laced with postmodernist/poststructuralist theoretical concepts.<sup>9</sup> It eschews difference theory's reliance upon a universalized liberal-humanist "subject" or, more pointedly, on an unspoken assumption of a "white, economically comfortable, heterosexual woman." A similar criticism is wielded by critical race and sexuality theorists. These powerful challenges contend that gender difference theories are essentialist, ahistorical, and insensitive to differences of race, class, sexual preference, ethnicity, age, motherhood, and physical challenges.<sup>10</sup> Specific criticisms of Gilligan and other feminist difference theory projects are more prevalent in the non-legal literature, but they have made their way into law journals and legal conferences as well.<sup>11</sup> Does all this debate lead to a conclusion

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about Justice, 99 ETHICS 229 (1989) (arguing that gender is increasingly indefensible as mode of social organization and rejecting Gilligan's division of morality into a care and justice dichotomy).

Some prominent, contemporary "real-world" cases have painfully illustrated how a theory based on gender differences, even when those differences are validated and affirmed rather than denigrated and excluded, can be appropriated and used to hurt women. Perhaps the most poignant example is Equal Employment Opportunity Commission v. Sears, 839 F.2d 302 (7th Cir. 1988) (Judge used feminist theorist's expert testimony about gender differences and his "separate spheres" ideology to justify sex-based disparity that kept women in lower paying, non-commission sales jobs). See Ruth Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUDIES 375 (1986); Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUDIES 33 (1988).

9. On my campus, these theorists are affectionally called the "po-mo" or "pomo" feminists (for postmodern). For an overview of the relationship between feminist theory and post-structuralism and postmodern theory, see CHRIS WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* (1987).

10. See, e.g., Nancy Fraser & Linda Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19, 27-34 (L. Nicholson ed. 1990) [hereinafter FEMINISM/POSTMODERNISM] (other essays in this collection also discuss the postmodernist turn in feminist theory and how it tends to accuse gender difference theory of essentialism); Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, in FEMINISM/POSTMODERNISM, *supra*, at 324; *Commentary*, *supra* note 7; Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1989); Ann Ferguson, *A Feminist Aspect Theory of the Self*, in SCIENCE, MORALITY & FEMINIST THEORY, *supra* note 2, at 339; Judith Grant, *I Feel Therefore I Am: A Critique of Female Experience as the Basis for a Feminist Epistemology*, 7 WOMEN AND POLITICS 99 (1987); BELL HOOKS, *Sisterhood: Political Solidarity Between Women*, in FEMINIST THEORY: FROM MARGIN TO CENTER 43 (1984) [hereinafter B. HOOKS, *Sisterhood*]; Audre Lorde, *Age, Race, Class and Sex: Women Redefining Difference*, in SISTER OUTSIDER 114 (1984); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115; ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

11. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*]; Williams, *Deconstructing*, *supra* note 2; Rhode, *The "Woman's Point of View," supra* note 2; Scales, *supra*

that although Gilligan's work provided a useful platform in the early 1980's for validating women's perspectives and knowledges (particularly when they deviated from the norms of the dominant discourses), hers is no longer a persuasive or viable theory?<sup>12</sup>

I have been struggling with this idea of post-Gilliganism<sup>13</sup> (not to mention post-feminism) and the imminent demise of difference theory.<sup>14</sup> What is the value or "truth" of a theory of gender differ-

note 2; Shaughnessy, *Gilligan's Travels*, *supra* note 2; Panel presentations by Professors Mary Joe Frug and Kimberle Crenshaw entitled, *Feminist and Critical Activism: Can We Claim a "Different Voice"?*, Critical Legal Studies Conference on "The New Public Interest Law," (Jan. 7, 1990) (audio tapes available from Conference Audio Services, 806 Lombard, San Francisco, CA 94133) [hereinafter Frug & Crenshaw, Panel Presentations]; Address by Professor Frances Olsen, Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990) (videotape available at Duke Law School) [hereinafter Olsen].

In legal circles, difference theory debates are most prevalent in the areas of pregnancy and maternity in the workplace and the sameness-differences debates in equality theory. Those debates and writings on that topic are easily located in law libraries and too cumbersome to cite here. Feminists on each side of the divide have strongly and carefully articulated positions for and against the use of difference theory in these legal settings.

12. Williams, *Deconstructing*, *supra* note 2; Flax, *supra* note 7; Fraser & Nicholson, *supra* note 9; Tronto, *supra* note 7.

This position would probably be accompanied by an aside that difference theory, because of its important contribution to feminist theory, should remain a prized cameo in the displayed jewels of the historic struggle for gender equality. Feminist theorists of this ilk agree with difference theorists that it is valuable to appreciate women and their contributions generally, and to recognize and name male bias, but not to attach traits or values to women as a gender.

13. I say "post-Gilliganism" facetiously. We inhabit an era of "post" theories—postmodernism, poststructuralism, post-Marxism, post-history (*à la* Fukiyama) and some even claim post-feminism. I tend to be amused by the naming of these theories. Do they seek legitimacy by tying themselves to other accepted theories and using the "post" prefix to indicate that they are superior, more advanced, more thoughtful? Or does it just mean that these theories came later in time or after? (If that is so, then all theories are post something and pre something else.) What comes after after? Will it be like the letters I wrote as a teenage girl with series of post-scripts labeled P.S., P.P.S., P.P.P.S., P.P.P.P.S., ad nauseam?

I do agree that the metaphor of voice has been painfully overworked. However, its overuse can hardly be attributed to Carol Gilligan who introduced it into the feminist theoretical analysis of difference. The problem with the metaphor is that it works so well. It would be terribly unfair to Professor Gilligan to demean or reject her theoretical work because its rhetorical power is so great that it has been overused.

14. Perhaps the "reports of [difference theory's] death are greatly exaggerated." Mark Twain, *Cable from Europe to the Associated Press* (1897). While difference theory as such is waning, there is a renewed consciousness about the need for something to-ground feminism. See, e.g., Alcoff, *supra* note 3 (positionality); Susan Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in *FEMINISM/POSTMODERNISM*, *supra* note 10, at 133 (rejecting the move toward gender-scepticism and the radical instability of categories); Teresa de Lauretis, *The Essence of the Triangle or, Taking the Risk of Essentialism Seriously: Feminist Theory in Italy, the U.S., and Britain*, 1 *DIFFERENCES* 3 (1990) (suggesting that charges of essentialism made against feminism might mask homophobia); Diana Fuss, *Reading Like a Feminist*, 1

ences? What is the meaning of the charge of essentialism?<sup>15</sup> Does the rejection of difference theory mean that we will lose the category of women for purposes of our critiques and analyses? If so, what are the political and theoretical consequences of that move? I want to argue against critiques of feminist difference theory that lead to our inability to speak of women as a category for theorizing and for political and legal struggle.

I believe it is politically and theoretically premature to give up the "class" of women for our analysis. Differences among women based on particularized cultural, historical, and political factors ought not be ignored, but they also ought not serve to break down the category of women into infinitely smaller groups, until we end up with an analysis that can only effectively cover individuals. Real differences among women notwithstanding, there is enough that is cohesive and common about the category of women to bridge the differences for purposes of political solidarity and legal analysis. Domination, subordination, exclusion, lesser status, and interpersonal caregiving responsibility infuse women's experiences and gender construction in patriarchal societies, even though these phenomena manifest themselves differently in different women's particularized lives. Yet, we can say meaningful things about

DIFFERENCES 77, 89-90 (1990) (proposing a grounding for feminism in politics rather than identity); Donna Haraway, *A Manifesto for Cyborgs: Science, Technology and Socialist Feminism in the 1980s*, in FEMINISM/POSTMODERNISM, *supra* note 10, at 190 (suggesting a postmodern metaphor of cyborgs instead of gender, and ideas like affinity instead of identity); Harris, *Race and Essentialism*, *supra* note 11 (calling for a move from what she calls gender essentialism to multiple consciousness); GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 202-07 (1987) (arguing for a strategic interventionist essentialism rather than a total rejection of ability to speak from locations of oppression); B. HOOKS, *Sisterhood*, *supra* note 10 (suggesting political solidarity as a form of sisterhood and as the coalition base for feminist movement).

After the writing of this essay, but immediately before its publication, a wonderful collection of essays on gender difference by leading theorists was published by Deborah Rhode. THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (D. Rhode ed. 1990). This confirms my argument that the theoretical and political implications of gender difference continue to be compelling and debatable concerns for feminist theory.

15. In the last few years, I feel like essentialism has become a kind of litmus test for feminist theories—if they are essentialist, they are bad; if they are not essentialist, they can be explored further. See, e.g., Olsen, *supra* note 11 (telling about a nightmare in which her niece wanted to be an essentialist when she grew up); Frug & Crenshaw, Panel Presentations, *supra* note 11.

The purchase of the charge of essentialism in the feminist community can also be illustrated by the spate of recent publications focusing on this debate. See, e.g., *The Essential Difference: Another Look at Essentialism*, 1 DIFFERENCES No. 2 (1989); FEMINISM/POSTMODERNISM, *supra* note 9; DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE (1989); Alcoff, *supra* note 3.

women that respond to the concerns, needs and experiences of women from different economic classes, different races, different privileges and statuses. Women, with all our differences accounted for, can achieve a feminist solidarity for social and legal transformation. Gender difference theories, which investigate and work from these acknowledged commonalities among women, provide a rich vein (a motherlode) for us to tap in our reconstructive and transformative efforts.

Even though some feminist theories may be so advanced that they triumph over gender difference analysis, the historical and particularized context of the 1990's in which feminists are working for change is mired in the consequences and experiences of gender differences. In reflecting on feminism's contributions in the 1980's and envisioning its future for the 1990's and beyond, I want to share some of my thoughts about the continued usefulness of a theory sown in the field of gender differences. Whether we like it or not, gender is still (and historically has been) an organizing concept in our society. We have no choice but to work and theorize for change from a position within a bi-polar gender system. We can challenge its dichotomized thinking and bi-polar substantive construction, but we cannot ignore its systemic, political, practical, and lived effects. Gender may not be a unified concept or separable experience, but it is a coherent, functional springboard for change. By combining what we gain from existing differences analyses with a dominance (or power) analysis and emphasizing feminist methods,<sup>16</sup> we can design a useful theoretical base for our next decade. I prefer to call this modification of gender difference theory by another name—feminist solidarity.<sup>17</sup> My argument is that gender difference analysis can give birth to feminist solidarity. I offer these thoughts as part of an ongoing conversation.<sup>18</sup>

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16. By feminist methods I mean collective knowledge formation based on experience and sharing; power balancing from center to margin; participatory, cooperative endeavors; concern for the material reality and conditions of women's lives; exposure of invisible norms and biases; and openness to change and revision. For a wonderful elaboration of feminist method, see Katharine Bartlett, *Feminist Legal Methods*, 103 HARV L. REV. 829 (1990).

17. I particularly want to acknowledge my debt to bell hooks for the idea of "feminist solidarity." B. HOOKS, *Sisterhood*, *supra* note 10.

18. Though this essay is more conversational and personal in tone than a traditional law review article, and it is intended to engage the reader in a different manner than research and analysis of a doctrinal area of law, I would like to insist that it is no less a contribution to legal thinking and scholarship. I am advocating basic changes in law and legal method, which has traditionally been the goal of legal scholarship. *Accord*, Minow, *supra* note 10. I am also trying to emphasize that these arguments can be made in the first

This essay was particularly difficult for me to write, because it is part of a conversation with feminists and other progressive legal scholars about preferred strategies for social, legal, and political transformation.<sup>19</sup> With trepidation, but conviction, I will explain reasons why I have concluded that we still ought to use the concept of gender difference to inform our theorizing, and how some of the traits, values, and orientations that have been assigned to females through our gendered cultures are useful models for transformative arguments in law. Furthermore, I will make the more risky point that we cannot neuter the strategies and seek the transformative potential they offer by ignoring their source in women's acculturation and socialization. Other theorists for whom I have enormous respect are highly critical of this approach and even argue that it is regressive or potentially conservative. Finding these labels attached to my theoretical understandings troubles me. I am devotedly committed to progressive ends and would be devastated

person with passion and feeling, rather than from a dispassionate, third person, distanced, neutral observer stance.

As Professor Fran Olsen wrote about the purposes of scholarship in her review of Catharine MacKinnon's *FEMINISM UNMODIFIED*:

Whatever criticisms one may have of MacKinnon, in her writing she is a true "professor" in the nineteenth century European sense, namely a person who advocates and defends a position. The assumption that scholarship is supposed to be "objective," "well-balanced," and set forth "competing views," is distinctly American and was introduced into the United States as a limitation on academic freedom. . . . MacKinnon offers a powerful challenge to this impoverished view of proper scholarship. To the extent American academics limit themselves by an arbitrary or artificial requirement of (false) neutrality, they restrict their work unnecessarily. Professors should be more than propagators of the status quo; maintenance of the status quo cannot be a valid goal of . . . any other scholarship that searches for understanding.

Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1177-78 (1989) (Book Review, CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)) (footnotes omitted).

19. I do not want any readers to think that my stance is intended to denigrate theorists who have chosen alternative strategies, and I hope that those same people will appreciate my reasons for taking this position. I have come to believe that there is no single method that will yield progressive social change. If we can develop solidarity in support of common ends of social justice and transformative politics (such as the elimination of oppression, domination, substantive inequality, and aggression, and the creation of possibilities for peace, justice, substantive equality, economic and environmental security, and dignity), we can work effectively and collectively in groups differentiated solely by the means chosen. Although we do not want our differing strategies to undermine one another, I think the differences in strategies are valuable. We must put pressure on existing unjust systems in as many places and ways as possible. Nonetheless, each of us must think carefully about the pitfalls and benefits of the strategies of resistance and for change that we choose. Knowing that my stance might be quite controversial with many of the theorists whose works I admire most, I am anxious, but committed to continuing the dialogue.

if my arguments and efforts somehow undermined this struggle. But since I believe that this approach can make our feminist and progressive projects more accessible and effective, I am braving the publication of these arguments.<sup>20</sup>

## I. OVERVIEW OF GENDER DIFFERENCE THEORIES

Gender difference theorists begin with the simple claim that there are behavioral, social, cultural, and psychological differences between men and women. Some argue that the differences are biologically based.<sup>21</sup> Most argue that (rightly or wrongly) women and men are socialized, acculturated, or psychologically constructed differently from each other.<sup>22</sup> I do not think any theorist argues that these differences hold true in every case, but all agree that gender differences are strongly linked to sex differences.

Working from this premise of difference, gender difference theorists identify the traits, characteristics, and orientations of gender construction and study how the gender woman is distinguishable from the gender man.<sup>23</sup> These theorists often need to redescribe and name women's approaches and orientations, because if those characteristics had been defined at all, it was from a

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20. What I have learned from feminism and feminist theories has informed and transformed my political consciousness. I feel that I am always open to being convinced that I am mistaken or that there is a better way or that there are things that I have overlooked because of my limited perspective. In the meantime I offer this essay as my current perspective on the struggle to "take all women seriously by challenging the patterns of hierarchal power that have at times excluded or degraded all or some women." Minow, *Beyond Universality*, *supra* note 10, at 116.

As Katharine Bartlett has so cogently explained, part of feminist legal method is positioning oneself and then listening carefully and adjusting one's position accordingly based on insights gained from interactions and perspective-sharing with others. Bartlett, *supra* note 16.

21. See, e.g., Robin West, *Jurisprudence*, *supra* note 2; Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) [hereinafter West, *Hedonic Lives*]; SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR A FEMINIST REVOLUTION* (1970).

22. MAKING A DIFFERENCE: PSYCHOLOGY AND THE CONSTRUCTION OF GENDER (Rachel T. Hare-Mustin & Jeanne Marecek eds. 1990); THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah Rhode ed. 1990); N. CHODOROW, *MOTHERING*, *supra* note 3; GILLIGAN, *supra* note 1; Littleton, *Reconstructing*, *supra* note 2. The construct of woman is usually attached to a female person and man to a male person.

23. Some theorists emphasize that just as gender is socially constructed, what we perceive as differences between the sexes are also socially constructed in contexts of male dominance and bias. C. EPSTEIN, *DECEPTIVE DISTINCTIONS*, *supra* note 6; Alison Jaggar, *Sex Inequality and Bias in Sex Differences Research*, in *SCIENCE, MORALITY & FEMINIST THEORY*, *supra* note 2, at 25.

male observer's perspective and measured against a norm of male traits.<sup>24</sup> Unlike some feminist theorists who want to eliminate gender differences,<sup>25</sup> once differences are redefined, difference theorists celebrate and learn from gender differences. In addition, many gender difference theorists privilege some or all of women's gender traits.<sup>26</sup>

Traditional descriptions of gender difference theories end here, but I think it is unfair to assume that difference theorists are oblivious to the painful reality of gender power dynamics. Despite Professor Catharine MacKinnon's authoritative distinction between difference and dominance theories,<sup>27</sup> I find that gender difference theories incorporate premises of gender dominance theory. They recognize that women have been denied political power and other significant kinds of social and interpersonal power. It is a chicken-and-egg problem whether gender differences precipitated power/treatment differences or power/treatment differences created gender differences. I maintain that this unresolvable causal

24. Feminist theories about the production of knowledge (epistemology), in both difference and dominance varieties, differ from dominant Enlightenment assumptions that knowledge can be produced by objective, neutral observations. Feminist theories appreciate that knowledge is created collectively by sharing stories based on our located, particularized perspectives. There is no neutral vantage point—no god's eye view. Each of our understandings, no matter how informed or acquired, is partial and limited. Each is interpreted through our own cultural understandings. Feminists stress that the more we listen to various stories from as many perspectives as we can find to form our knowledge base, the closer we can get to truth.

25. Here I mean feminists who have been characterized as dominance theorists or liberal feminists.

26. Advocacy for women's gender traits might be expected. Gender difference theorists are almost exclusively women. In some ways it is odd that gender study has been interpreted as a "women's issue" since both men and women are gendered, see Lucinda Finley, *Breaking the Silence in Law: The Dilemma of Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 889 n.10 (1989), but we see the same kind of phenomenon with all politically disempowered or marginalized groups. For example, African-American, Asian-American, Native American, Caribbean and Latin-American scholars study and write about the dynamics of race in the United States in significantly greater proportions than Euro-American scholars, even though "whites" are equally "raced" and affected by, as well as implicated in, race relations.

Recently men have begun to take up the gender issue. See, e.g., CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY (Michael S. Kimmel ed. 1987); JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE (1989); Harry Brod, *Scholarly Studies of Men: The New Field is an Essential Complement to Women's Studies*, THE CHRONICLE OF HIGHER EDUCATION, Mar. 21, 1990, at B2-B3; MEN'S STUDIES TASK GROUP, NATIONAL ORGANIZATION FOR CHANGING MEN, MEN'S STUDIES NEWSLETTER (available from P.O. Box 32, Harriman, TN).

27. For explanations of difference and dominance theories, see C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987).

problem is an incoherent inquiry in the first instance, because the phenomena are not neatly dichotomized, but interrelated and interactive. Feminists ought not let our theory-building be immobilized by the muck of this causation quagmire. However it was that the domination of women got started, throughout our history and up to the present, women have lived in a society that treats us differently from men. Difference theorists claim that different treatment, roles, expectations, and experiences based on gender correlate with different modes of thinking, acting, interrelating, and interpreting reality. These differences from men create issues of common concern and interest for women. Dominance theorists may even agree, but they part company on ways in which they understand and utilize these differences.

At a minimum, difference theorists clearly understand that privileging some speakers and stories (men's) excludes and marginalizes others (women's).<sup>28</sup> Because of those power dynamics, gender difference theories insist on uncovering the stories of people, particularly women, who traditionally have been excluded, subordinated and marginalized in the power structures of society. As difference theories have developed and as gender theorists have learned more about the structures of domination, feminists have come to understand that even people who have been excluded from power in important ways (for example, white, middle-class, heterosexual women) can unconsciously reproduce patterns of exclusion in their own theorizing (by excluding women of color, lower class and impoverished women, lesbians). This failing, to which difference theories admittedly originally fell prey, can be corrected, so that theorizing can begin anew without giving up on gender difference theories entirely.

We can learn important things about the consequences of exclusion and the need for inclusion from the experience of being excluded. Women have multiple experiences of exclusion or oppression because of our sex/gender. Women's shared experiences of family and interpersonal responsibilities, of invisibility and marginality, of violence and harassment, of the limitations on our political power and public roles, and of our support systems and successes help shape a feminist solidarity. Part of feminist struggle is to name these experiences as political rather than personal.

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28. In fact, Gilligan's work grows out of her recognition of how male dominance has written gender bias into theory and morals. C. GILLIGAN, *supra* note 1.

Without a doubt, women of color are excluded and oppressed in more complex and different ways from white women, just as poor women are oppressed and excluded in more dramatic ways than rich women. We cannot separate which parts of our oppression are gender-based and which parts are race or class-based. These dominating and oppressing forces interact synergistically. But, that does not mean that women of all races, classes, and identities cannot work together in feminist solidarity to end unjust discrimination against all women and all people. In the United States, for example, sexual difference remained a formal barrier to women's right to vote until 1920, long after formal barriers of race and property ownership had been eliminated for men.<sup>29</sup> No woman—whether white or Black, rich or poor, physically challenged or able-bodied, heterosexual or lesbian—was allowed to vote in federal elections. Although the Constitution was amended over a century ago in an attempt to provide equal rights and mark a formal end to race discrimination, an Equal Rights Amendment, designed to achieve a similar constitutional guarantee for women, has been repeatedly defeated.<sup>30</sup> Discrimination against women because we are women continues.<sup>31</sup> The Supreme Court has decided

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29. Of course black men and women were denied the vote by informal means such as voting tests, poll taxes, and Jim Crow laws until those were prohibited by additional constitutional amendments and laws.

30. The most recently proposed equal rights amendment for women was defeated in the last decade. Proposed Equal Rights Amendment, Section 1 read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Proposed Amendment to the United States Constitution, S.J. Res. 8, S.J. Res. 9, and H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). The original period for ratification expired on March 22, 1979 with less than the 38 necessary state ratifications. Congress added three years and three months, but that period expired without any additional state ratifications in 1982. See JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986); HERMA HILL KAY, *SEX-BASED DISCRIMINATION* 161-85 (3d ed. 1988); BARBARA ALLEN BARCOCK, ANN E. FREEDMAN, ELEANOR HOLMES NORTON & SUSAN C. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 129-89 (1975).

31. Just a few examples of discriminations include "fetal protection" policies, felony drug delivery prosecutions of addicted women who become pregnant, state anti-abortion legislation with the concomitant judicial restrictions of women's (particularly younger women's) right of choice, denial of federal funds for abortion for indigent women, the statistically significant feminization of poverty in America (e.g., unjust wage scales or no compensation for "women's work," segregation of women into the lowest paying jobs, inadequate mechanisms to require and obtain regular child support, inadequate and unavailable child care), and the consistent reality of physical violence against women on our streets and in our homes.

Fetal protection policies: See, e.g., *International Union v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990) (upholding fetal protection policy which excludes women of childbearing age from high lead exposure jobs under a disparate impact/business necessity analysis); *Oil, Chemical & Atomic Workers Int'l Union v.*

that legislatively enacted discriminations based on race are subject to the strictest scrutiny by the courts under the equal protection clause of the Fourteenth Amendment,<sup>32</sup> but discriminations based

American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (business necessity defense justifies fetal protection program). *But cf.* *Grant v. General Motors Corp.*, 908 F.2d 1303 (6th Cir. 1990) (exclusion of fertile women is overt discrimination which is illegal unless it can be justified as bona fide occupational qualification); *Johnson Controls, Inc. v. California Fair Employment & Hous. Comm'n*, 267 Cal. Rptr. 158 (Cal. App. 4th Dist. 1990) (plan could not be justified as bona fide occupational qualification).

Criminal prosecutions of addicted mothers: *See, e.g.*, Jan Hoffman, *Pregnant, Adicted—and Guilty?*, N.Y. Times, Aug. 19, 1990, § 6 (Magazine), at 33; Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J. L. & FEMINISM 239 (1990); Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1987-88); Kary Moss, *Recent Developments: Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

State anti-abortion legislation: *See, e.g.*, J. Michael Kennedy & Karen Tumulty, *Louisiana Governor Vetoes Strictest U.S. Abortion Bill*, L.A. Times, July 28, 1990, at A1, col. 5 (Louisiana legislature enacted nation's most restrictive abortion bill, but the governor vetoed it); Neil Lewis, *Judge in Guam Rejects Strict Law on Abortion*, N.Y. Times, Aug. 24, 1990, at A12, col. 5 (Guam legislature enacted, and Guam governor signed, extremely restrictive abortion law which was later found to be unconstitutional by federal court; Tom Wicker, *In the Nation: A Choice in Idaho*, N.Y. Times, April 2, 1990, at A17, col. 5 (Idaho legislature passed restrictive abortion bill that was ultimately vetoed by governor); *Planned Parenthood v. Casey*, 1990 WestLaw 124835 (E.D. Pa. Aug. 24, 1990) (Pennsylvania legislature enacted highly restrictive amendments to abortion law in 1988 and 1989 that were ruled unconstitutional by district court). Judicial restrictions of right to choice are found in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

Feminization of poverty: *See, e.g.*, Jane Peterson, *The Feminization of Poverty*, 21 J. ECONOMIC ISSUES 329 (1987); Nancy Fraser, *Women, Welfare and the Politics of Need Interpretation*, 2 HYPATIA 103 (1987); Nelson, *Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginalization*, 10 SIGNS 209 (1984); PAULA ROTHENBERG, *RACISM AND SEXISM: AN INTEGRATED STUDY, PART II* (1988); *WOMEN & POVERTY* (Barbara Gelpi, Nancy Harstock, Clare Novak & Myra Strober eds. 1986); U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, *POVERTY IN THE UNITED STATES 1986*, Series P-60, No. 160 (1987).

Physical violence against women: *See, e.g.*, Kathleen McDonald, *Battered Wives, Religion & Law: An Interdisciplinary Approach*, 1 YALE J. L. & FEMINISM 251, 253-62 (1990); Christine Littleton, *Women's Experience and the Problem of Transition: Perspective on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23; RHODE, *JUSTICE AND GENDER*, *supra* note 6, at 246; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 27, at 81-92; David Gelman, *The Mind of the Rapist*, NEWSWEEK, July 23, 1990, at 46; Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1163-66 (1986).

32. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (strict scrutiny necessary for race-based minority set-asides designed to benefit previously subordinated groups); *Korematsu v. United States*, 343 U.S. 214 (1944).

By contrasting race and gender treatment under an equal protection analysis, I am not claiming that strict scrutiny is always the most desirable analysis (*Croson* illustrates how strict scrutiny can be employed to defeat measures designed to benefit unprivileged minorities) nor that race and gender are identical concerns that need to be treated the same by

on gender do not require as close attention.<sup>33</sup> Furthermore, there is an underlying assumption that discriminations that disadvantage women based on their sex, as opposed to their race, may be justified on some occasions. For example, Title VII, a federally enacted equal employment law, permits sex-based discrimination in situations where sex is shown to be a bona fide occupational qualification, but contains no parallel exception for race-based discriminations.<sup>34</sup> Women can work together to change these legal impediments to substantive equality for all women.<sup>35</sup> Where necessary, we can treat gender separately without obscuring racial, economic, or other group struggles.

A jurisprudence that recognizes gender differences seems basically correct to me, whether we like those differences or not, whether we permit courts to rely on them, or whether we believe we can change them once we figure out how they happen. My experiences, my observations of people, my intuitions, my feelings, and my studies lead me to believe that gender differences do exist.<sup>36</sup> If they exist (and for as long as they do), our legal theories ought to take what we learn from gender differences analysis into

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law. Instead I am trying to highlight the fact that the differential treatment of race and gender indicates some assumptions in law about gender that disadvantage women.

33. *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). In addition, the Supreme Court has not been adverse to permitting sex discrimination and calling it something else—discrimination against pregnant people (see, e.g., *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)), or discrimination against non-veterans (see, e.g., *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)).

34. Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e) (1988) (discrimination on the basis of sex permitted where sex is a "bona fide occupational qualification reasonably necessary for the normal operation of that particular business or enterprise.")

35. By contrasting these different legal responses to racial discrimination and sex/gender discrimination, I by no means imply that women have received "worse" or less "fair" treatment. Rather, I contend that it is important to recognize that race and gender, while overlapping, are distinct and can be analyzed in law with these distinctions in mind. Clearly racial discrimination is perpetuated across class and gender lines, as gender discrimination is perpetrated across race and class lines. We must remain vigilant in our struggles against all forms of discrimination and suspicious of any jurisprudence which elevates one over the other.

36. I would ask all of us to examine our own experiences of the world and compare notes. Since we all live in this gendered world and experience being gendered (whether we realize it or not), I would guess that each of us has a sense of whether or not there are generally identifiable gender differences and what they might be. This does not mean gender characteristics are fixed, immutable, or biologically determined, but just that they exist and are recognizable. The socialization process is so intense that we can see some of those differences developing in small infants, even when we as parents and teachers work to avert traditional genderization for our children.

consideration. Even though particularized circumstances and other social-cultural constructs (such as race, class, and sexual orientation) may cause some women to understand themselves and their lives very differently from other women, females are still constructed as women, and as such we share something in the lived experiences of that gender construction. The gender construction of women has strong cultural meanings in patriarchies; it causes people to conceive of women as importantly different from—and often lesser than—men. As a function of being so constructed, women think and act differently from men, even men who are otherwise like us. Part of that difference has to do with power relations. Hence, at this juncture, difference theory is integrally related to—even inseparable from—dominance theory.

Finally, feminist difference theories understand gender differences as affecting or being affected by one's self-perception and one's perceptions about relationships. On this issue gender difference theories may diverge from dominance theories. Carol Gilligan suggests that many gender differences grow out of distinct conceptions of self and relations-to-others. Building on the work of Nancy Chodorow,<sup>37</sup> she submits that women tend to understand people more relationally, as interconnected and mutually dependent, whereas men tend to conceptualize people as more independent, autonomous, and ego-boundaried.<sup>38</sup> According to Gilligan, these differing self-conceptions kindle gender-linked concepts of morality, human interpersonal relationships, and appropriate behaviors.<sup>39</sup> Women's predominant focus for resolving ethical dilemmas is the maintenance of relationships and avoidance of hurt.<sup>40</sup> This is achieved through a contextualized ethic of responsibility and care.<sup>41</sup> Men focus more heavily on ordered hierarchies of principles

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37. N. CHODOROW, *MOTHERING*, *supra* note 3.

38. C. GILLIGAN, *supra* note 1. See also Lorraine Code, *Second Persons*, in *SCIENCE, MORALITY & FEMINIST THEORY*, *supra* note 2, at 357.

39. C. GILLIGAN, *supra* note 1, at 64-105. She never states that these differences hold true for all women or all men, or that they do not cross gender lines. Rather she contends that women are more likely to utilize a care perspective, while men are more likely to rely upon a justice perspective.

40. This analysis is further developed in Nona Plessner Lyons, *Two Perspectives: On Self, Relationships, and Morality*, in *MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION* 21 (C. Gilligan, J.V. Ward, J.M. Taylor, with B. Bardige, eds. 1988) [hereinafter *MAPPING THE MORAL DOMAIN*] and Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in *id.* at 73.

41. I have elaborated on Gilligan's ethic of care elsewhere in my writings. See Bender, *Primer*, *supra* note 2, at 28-32; Bender, *Feminist Retorts*, *supra* note 2. For a further discussion of the ethic of care, see *infra* Section V.

of justice and rights (such as formal equality) to resolve moral problems. This standard stuff of Gilliganesque analysis, found in many law review articles that discuss her work,<sup>42</sup> is a bit oversimplified and "vulgarized," but it touches on what is helpful for my argument about gender difference and legal change. Later in this essay I will explore the legal and socially transformative significance of the relational and care aspects of gender difference that Gilligan attributes, at least subtly, to women as a "different voice."

Before I explain this "care" analysis and propose a feminist solidarity theory developed from gender differences analysis, I think it is important to summarize the role gender difference theories have played in exposing gender bias in dominant institutions and ideologies. I will also react to some of the critiques of difference theories and explain why I think it is important to retain the unmodified category of gender in our analysis.

## II. GENDER DIFFERENCES AND POINT-OF-VIEW

Although dominant Eurocentric philosophical, historical, scientific, legal, religious, and social science theories are written in authoritative tones as if they are neutral, objective, and universally "true," in fact, these theoretical positions narrowly embody only the experiences and perspectives of those empowered people who authored them and fed the traditions. Men historically have enjoyed the privileges of constructing our cultures. They used themselves as the invisible norms,<sup>43</sup> and their perspectives have been represented as point-of-viewlessness.<sup>44</sup> Not all men were invited to create the components of our dominant ideology,<sup>45</sup> but all who were invited (at least initially) were men. The political, social, and legal cultures they created are infused with their experiences, perspectives, understandings, and assumptions about human nature and human relationships.<sup>46</sup> Patriarchy is the domination of culture

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42. See *supra* note 2.

43. Minow, *Foreword*, *supra* note 2.

44. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 116-17 (1989). MacKinnon uses the term "point-of-viewlessness" to reflect the metaphysics of male dominance, where "point-of-view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy." *Id.*

45. In Eurocentric and colonial cultures, the creators of the language, norms, laws, and practices of dominant culture and ideology were white, economically privileged, formally educated, able-bodied, heterosexual (or at least not openly homosexual or bisexual) men.

46. For a more complete development of this argument in law, see Finley, *Breaking*

and society by men.<sup>47</sup>

Men with power created the dominant cultural discourses—languages, symbols, disciplines, institutions—that control political, legal, economic, social, scientific, and organizational practices governing our gender-integrated adult society.<sup>48</sup> This male power is concentrated in what Christine Littleton calls the “male club,” which exercises its dominant power by setting the standards against which all are measured and ordering the values that encode our culture. Gilligan’s work illustrates one of the consequences of this male bias: Women have been excluded from studies designed to develop psychological measures for moral development.<sup>49</sup> Similarly, women’s exclusion from the production of the dominant discourses and practices has resulted in the characteristics, responsibilities, and perspectives of women’s gender construction being excluded from the norms, assumptions, and values underlying our society.<sup>50</sup> If, as difference theories suggest, there really *are* differences that correlate with gender, and that which attaches to the gender woman has been left out of the formulation of the dominant norms and values, our dominant discourses and practices are biased, partial, and limited. Hence, while more than half the population by sex was disenfranchised from shaping our cultural discourses, women remain subjected to and molded by them

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*Women's Silence in Law*, *supra* note 26; Mary O'Brien & Sheila McIntyre, *Patriarchal Hegemony and Legal Education*, 2 CAN. J. WOMEN & L. 69 (1986); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980). See also Bender, *Primer*, *supra* note 2.

47. In some ways patriarchy is analogous to the colonization of indigenous societies by European cultures. While remnants and records of indigenous peoples have survived colonization, we do not have adequate histories to know whether women-centered or gender-integrated cultures preceded a “colonization” by men. Stories of those cultures (e.g., matriarchies, goddesses) have been repressed, lost, or stolen.

48. Littleton, *Reconstructing Sexual Equality*, *supra* note 2, at 1280, 1314-23.

I am writing only about the practices of our “gender-integrated adult society.” It is likely that the practices in adult-child relationships are created by women who are primarily responsible for their care. Children’s understandings are still influenced by their awareness of male power in the home and public spheres. Likewise, despite the influence of patriarchy on discourses used by women between women, I make no claims about adult-child or gender-segregated discourses or power dynamics. My focus in this essay is on adult-adult relationships and adult gender-integrated society.

49. C. GILLIGAN, *supra* note 1, at 18. See, e.g., Bender, *Primer*, *supra* note 2, at 18-19 (explaining Gilligan’s critique of Lawrence Kohlberg’s work).

50. See, e.g., Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941 (1989) (workplace); Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989) (workplace); Menkel-Meadow, *Portia*, *supra* note 2 (lawyering).

nonetheless.<sup>51</sup>

Ironically, those same partial, biased discourses legitimated themselves by claims to universality, objectivity, and neutrality. It has never been satisfactorily explained how privileged men could escape their locations and contexts to view the world neutrally and objectively from some outside Archimedian point. How are they so different from the rest of us, whose perceptions they challenge as biased and suspect because of our distinct locations and identities? How can the perspectives of privileged white men represent the experiences of a mother on welfare, a Latina or African-American woman, or a lesbian? Why are privileged white male histories, sciences, laws, and theories paraded as neutral, while the histories and theories of people of color and white women are challenged as biased and political? Limited male perspectives are masked, erased, or universalized through techniques of objective, third-person language and author invisibility, but those techniques do not make them less limited in fact.

By acknowledging, naming, and valuing gender differences, difference theories reveal the great loss and defects created by gender bias in our cultural paradigms. They encourage theorists and practitioners to look for what has been excluded due to gender bias and other biases. Carol Gilligan discovered that a voice of care and responsibility was silenced by the gender biases in psychological measures that privileged voices of rights and justice.<sup>52</sup> Once previously suppressed voices are revealed, gender difference theories lead to one of two conclusions: Either the world should be reconstructed from a base that includes the characteristics and natures of both genders, or it should be reconstructed from the characteristics and values of women's gender construction only. In either case, feminist difference theories, and feminist theories generally, chal-

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51. Most people, not just women of all races, classes and origins, have been denied democratic or fair opportunities for active participation in the structuring of our dominant institutions and culture. Non-white men, poor men, certain ethnic men, physically challenged men, and openly homosexual men, for example, were also excluded. When we add up all the people excluded from opportunities, it is clear that we are an overwhelming majority with the power in numbers to control and define our societies and cultures. Whenever I think about this, I have such a hard time understanding why and how we all can be convinced to "consent" to our own domination? What am I missing in my understanding? It seems so apparent to me that if we united, we could easily bring about significant social change. Do we trust each other less than we trust those in power who have silenced our voices and limited our opportunities? Have we become so complicitous in our own and others' oppressions that we cannot identify our allies?

52. C. GILLIGAN, *supra* note 1.

lenge the legitimacy of any theory's claim to objectivity, neutrality, and universality. In this sense they are similar to other postmodernist and critical theories.<sup>53</sup> Although some argue that feminist theory is just an incorporation of this postmodernist philosophical tradition, or alternative philosophical traditions,<sup>54</sup> it seems to me that feminism has developed its own analysis which happens temporally to coincide with and be similar to these other newer theories as part of this historical moment. Difference theory's persuasive critique of objectivity and its exposure of the partiality and gender bias in our discourses are relevant to my subsequent discussion of the challenges that have been launched at difference theories.

### III. CRITIQUE OF DIFFERENCE THEORIES AS ESSENTIALIST

Many criticisms of gender difference theories fall under the general category of essentialism,<sup>55</sup> although I will argue that charges of essentialism may be misplaced. Other criticisms fear that gender difference theories reinscribe women with the very characteristics that have been used to subordinate us or that the characteristics attributed to women have been imposed upon us through a process of subordination and oppression, rather than freely chosen. Particularized versions of all of these critiques have been made against Gilligan's work, which can fairly be characterized as an archetypical manifestation of difference theory. I will focus on the essentialism critique in this section, and I will address those other criticisms within my discussion of Gilligan's relational and ethic of care claims in the subsequent section.<sup>56</sup>

What is essentialism? In the context of a critique of feminist theories, and particularly feminist difference theories, I think this term is used to mean a belief in, or an assumption that, there is an "essence" to being a woman—that is, some core content to the ex-

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53. Linda Nicholson, *Introduction*, in *FEMINISM/POSTMODERNISM*, *supra* note 10, at 3; C. WEEDON, *supra* note 9; Leslie Wahl Rabine, *A Feminist Politics of Non-Identity*, 14 *FEMINIST STUDIES* 11 (1988); Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 *N.Y.U. L. REV.* 429 (1987); Finley, *Breaking the Silence*, *supra* note 26; West, *Jurisprudence*, *supra* note 2.

54. Williams, *Deconstructing*, *supra* note 2 (New Epistemology); Joan Tronto, *Political Science and Caring: Or, The Perils of Balkinized Social Science*, 7 *WOMEN & POLITICS* 5 (1987) (Scottish Enlightenment).

55. I have subdivided the standard criticisms into categories for purposes of discussion here. These categories are loosely formed, interrelated, and overlapping.

56. See *infra* Section V.

perience of being a woman that transcends particular contexts of history, culture, race, class, sexual preference, physical or mental challenges, age, ethnicity, or national origin.<sup>57</sup> Essentialism presupposes that certain attributes in women are inherent or natural. The ascription of essentialism to a gender difference theory does not depend upon that theory's claim of biological essence or biological determinism, although the relationship between gender (culture) and sex (biology) is inexorably interwoven.<sup>58</sup> I doubt there are even a handful of self-identified feminist theorists who would sign on to essentialism, if biological determinism is what it means. So, I assume at least one of two things is happening. Either the essentialism definition I have proposed is really a "straw man" set up for rhetorical purposes, or I have misunderstood what the charge of essentialism means in the contemporary debates. I understand the essentialism claim to have two interrelated components: a universalism critique and a sameness critique.

#### A. *The Universalism Fallacy*

Part of the charge of essentialism is really a claim about false universalism. Feminist difference theorists are charged with committing the universalism fallacy<sup>59</sup>—that is, speaking in one voice for the many and understanding one's own experience as representing the totality of that experience. When explained as a charge of universalism rather than essentialism, this criticism is actually a

57. See generally Harris, *Race and Essentialism*, *supra* note 11, at 588 (citing E. SPELMAN, *INESSENTIAL WOMAN*, *supra* note 10, at 165 for a description of assumptions that belong to "gender essentialism.").

58. See Bender, *Primer*, *supra* note 2, at 25-27. No doubt I have read into the challenged works of feminist scholars what I would like to be there (I recognize that this is quite likely, and I also suspect that this is no different from what other readers always do), but I have not read an assumption of biological essence in Carol Gilligan's work, or in most of the feminist theory written in the 1980's. Of the feminist legal theorists with whom I am familiar, perhaps Robin West comes the closest to proposing a biological essentialism. See West, *Hedonic Lives*, *supra* note 21; West, *Jurisprudence*, *supra* note 2.

Clearly theorists who do not make claims of biological determinism have been challenged as essentialist. See, e.g., Harris, *Race and Essentialism*, *supra* note 10, at 590-601 (criticizing MacKinnon's work as essentialist).

59. My analytic constructs, the universalism fallacy and the sameness fallacy, are satires of two essays by W.K. Wimsatt and Monroe Beardsley entitled, *The Intentional Fallacy* and *The Affective Fallacy*, reprinted in W.K. WIMSATT, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3, 21 (1964), which charged nonformalist interpreters of literary texts with making these interpretive faux-pas when their interpretive strategies differed from that of Wimsatt and Beardsley. I thank Professor Steven Mailloux for teaching me about their analysis. SANFORD LEVINSON & STEVEN MAILLOUX, *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 37-42 (1988).

more stinging or sensitive challenge to feminist difference theory, because it turns part of feminism's critique of patriarchy back against feminist theory itself. Feminists contend that one of the most insidious ways that patriarchy—systematic male dominance—perseveres, makes us perceive it as truth, and causes us to reproduce it in our children is by etching its perceptions, norms, assumptions and worldviews into law, theory, science, history, and politics as unspoken, invisible, universal truths about human nature, common sense, and values. By failing to identify themselves and their positionality and by writing in an unqualifiedly authoritative voice, patriarchal theories presume to speak for all of us, even though never intending their benefits to inure to everyone.

Feminists have called patriarchal theories' claimed universality into question. We have said, "Wait a minute! Your experiences differ from my experiences; your understandings do not reflect my understandings; your universal assertions of truth have excluded me. Therefore, your claim to represent me is false. You cannot speak for me." Some feminists have followed this by saying, "I want to speak for myself and I want you to listen." Others have said, "I want to speak for excluded women and I want you to listen."

Perhaps some feminist theorists have adopted a universal tone when claiming to speak for women about exclusion and gender hierarchy. If they have, I believe criticism for committing the universalism fallacy is well-deserved.<sup>60</sup> But most feminist difference theories do not attempt to speak in a universal voice. I would argue that because of preconceived notions in the minds of hearers, and our training in the dominant masculinist scholarly traditions, many feminist difference theorists may have been wrongly heard to make authoritarian, universalist claims. Often feminist difference theorists' works have been inappropriately interpreted from outside their intellectual roots in feminist methods and practices.

When feminist theoretical claims are understood as implying a

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60. Clearly some feminist theorists have been justly criticized for insensitivity to race, class, homophobia, and other power dynamics. The flaws in our analyses must be challenged and corrected. Feminist theories are the better for these critiques. Those flaws, however, and others we may make, are not necessarily due to our committing the universalism fallacy, as I try to argue in the text.

Feminist theorists are not wart-less. But it is the willingness of feminist theorists to be more inclusive, to listen to criticisms constructively, to respond and make changes, and to struggle to remedy these flaws that gives feminism its strength and potential.

false universalism, it may be that we as listeners or interpreters are failing to appreciate the tradition out of which feminist theorists are speaking. In dominant academic and legal theoretical discourses, arguments and assertions are best or most potent if they are universal and authoritarian; grand, totalizing theory is a sign of success, and claims constantly are made for or about all of "us."<sup>61</sup> Our academically privileged rhetoric rewards universalizations. Hence, when feminist theorists publish in those domains, it is no surprise that our writings are read through a lens of assumed universalizations as presumptively consistent with those previously privileged academic traditions. Even when some of our argumentation and word usages sound the same as other scholarly writings, the context and history of feminist writing makes them different. Many of our inculcated academic and legal reading styles contradict feminist practices.

If academic and legal theory readers misapprehend what feminist theorists mean when we write about "women's experiences" or "women's differences," they are likely to erroneously charge us with essentialism or universalizing. Were these same writings coming out of a masculinist academic context, the criticisms would be more appropriate. But feminist difference theorists work from alternative histories and unconventional theoretical models. It is both incorrect and unfruitful to read feminist theory from the assumptions of masculinist or dominant academic discourse.

In academic circles, particularly in law, we are trained to play with ideas by hypothesizing parallel scenarios, by looking for negative implications and logical inconsistencies, by classifying and categorizing information into pre-established pigeon-holes, and by making generalizations and abstractions without regard to the particular circumstances of the people involved. These are useful analytic strategies, and I am not dismissing them. Yet, an indiscriminate application of them to feminist theories undermines feminist projects more than improves them. The goals and methods of femi-

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61. In response to Professor Fiss' conclusion that either economic or critical views on law would result in "the death of the law, as we have known it throughout history, and as we have come to admire it," Owen Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 16 (1986), Professor Clare Dalton observed, "It seems, therefore, that those of us who have not been such rank admirers of law's aspiration and operation 'throughout history,' are not members of this community of the faithful—that we are not one with the "we," the "our," or the "us" of Fiss' appeal,—that we are in fact eavesdroppers on a conversation going on between Fiss and—whom?" Clare Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN'S L.J. 1, 6 (1989).

nist theorizing and practices are different from the goals of traditional academic and legal analyses. Critics ought to carefully assess where traditional strategies are incompatible with feminist methodologies. Then gender theory critics can be appropriately sensitive to these differences in ends and means when they interpret feminist writings. But because feminist theorists (and critical theorists, critical race theorists, sexuality theorists, and class-based theorists) often work within the academic and legal systems, we may unwittingly become pawns to those traditional strategies and fall prey to those analytical traps.<sup>62</sup> We need to have our hands called when we digress from our chosen methodologies; at the same time we need to be read consistently with our feminist practices when we are consciously writing in that tradition.

Gender difference theories have their own first premises about privilege, exclusion, knowledge, and relationships.<sup>63</sup> These tenets have often been forgotten when feminist difference theories have been branded as essentialist. A claim that women have experienced exclusion and oppression based on sex/gender does not mean that one woman's experience of oppression can speak for all women. At a most basic level, this universalist translation would contravene feminist theory's premises about the partiality of knowledge and the ways in which knowledge is created.<sup>64</sup> Likewise, a claim that women experience exclusion and oppression based on sex/gender is not equivalent to a claim that all women's experiences of exclusion and oppression are the same (sameness critique)<sup>65</sup> nor does it mean that women who have experienced exclusion and oppression have not also excluded and oppressed others, including other women

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62. Success in academia, as it is currently constructed, attaches to public recognition of individual efforts. (We have a "star" system.) Success in most legal arguments is win/lose, either/or. Both arenas encourage competition, confrontation, and conflicts, where some people's gains are others' losses. Abilities to perform sharp critiques and undermine or challenge another's projects—tearing down and finding flaws—are a staple of our academic and legal diets. We often must caricature and label our target's ideas in inauthentic ways to win our points. Simultaneously, to produce quality feminist theories we must be able to challenge and improve one another's thinking through earnest, and often frank, disagreements. Academic and legal feminists are faced with these conflicts all the time—to be successful academics (or lawyers) we seem to be required to master the art of biting critique and undermining the credibility of others; to be true to feminism we must avoid the pitfalls of zero-sum competitiveness, abstract generalizations, caricature, and dismissive responses to another's work. We must work collaboratively in a world that rewards competitive one-up-personship.

63. See *supra* Section I.

64. See *supra* Section II.

65. See *infra* Section III, B.

(purity critique).

My plea is that critics of feminist difference theory use great care in interpreting claims made by feminist theorists (as well as by other theorists), so that traditional masculinist rhetorical moves are not used to pervert their meanings. When feminist theorists write about understanding the consequences of exclusion from women's experiences of having been excluded, or about women's insights into the importance and implications of interpersonal caregiving responsibilities, or about pervasive fears of sexual violation and physical abuse, or about the need for laws and society to respect our choices about our bodies, we must avoid translating these arguments into statements about universal or identical experiences for all women, for all times, and from all perspectives. By not taking the "feminist" part out of feminist theorizing, we may come to understand these theories as seeking conversation and attempting to build knowledge from experiential bases, rather than as asserting universalist truths. What if these claims are tentative, testing, and sharings of ideas to open up rather than usurp discourse? What if feminist claims about women really end in a question mark, rather than an exclamation point? Maybe feminist difference theorists are really stating, "This is what we have understood and perceived, this is what others have told us, is this your experience, too?" Why caricature these accounts as contentions that every experience of exclusion is the same and then critique feminist theories for making such claims? Even if a theoretical claim had been made for all women for all time, how does a charge of essentialism advance the ends of feminist projects or expose and remedy the theories' flaws?

Feminist difference theories ought to be understood as part of an ongoing conversation rather than as absolutist or universal assertions of truth. They are representations of experiences and understandings of the mechanisms and products of gender relations that are being offered out, tested against and compared to others' experiences and understandings in a process—and feminism is a process—of reinterpreting and remaking our world. If feminist theories claim that some trait or disposition seems constitutive of women, it is an invitation to discuss whether that claim works, to share stories, experiences, discontinuities, and reactions in order to develop better theories about the effects of gender power dynamics on women and society. Nothing in the claim presumes that every woman shares that characteristic, or that every person who has

that characteristic is a woman. We are looking for patterns in the fabric; we are not weaving the fabric from a pattern.

In the same way that feminist theorists ask for vigilance from our critics in reading our works in context, we must judiciously abide by our first principles and listen carefully to criticisms by those who feel excluded and marginalized by our work. We must rethink our practices and build theories together with those whose understandings and experiences we wrongfully had neglected. We must merge our insights and perspectives to create new knowledges as we simultaneously de-center our personal perspectives. White, economically-privileged, heterosexual feminists have learned from valuable critiques that we do not own feminist discourse and that our theorizing is anemic when we fail to inquire about our own positionality within the category "women." The criticisms of white Eurocentric heterosexist feminist thinking from African-American, Latina-American, Native American, Asian-American women, third-world women, and lesbians, among others, were well-placed and have been taken to heart by most of those criticized. Feminist theories have not been stagnant or inflexible—they are ever-changing, multiple, and layered. Such criticisms improve our united feminist endeavor immeasurably.

If a feminist theory is overbroad or underinclusive, we should examine its weaknesses and determine whether it can be amended or needs to be discarded. If a feminist theory seems flawed because it is ahistorical, ethnocentric, racist, or homophobic, our collective enterprise of knowledge formation should encourage us to work together to see how those critiques can be productively addressed and our theories improved. I would argue, though, that those criticisms ought not sabotage the promise of gender difference theories. We must not subdivide the category of women until the power of the category dissipates.

Just as any theory about human relations that ignores race or class is defective, any theory that does not take account of gender as a social structure of power and a component of identity is inadequate and wrong. Likewise, a critical stance that breaks women down into so many distinct subcategories so that all we have left are millions of separate identities and experiences is wholly unsatisfactory. We must be able to speak about gender as a relation of power, and women as a category of analysis, in part because social power structures treat women as a category. And when we speak of

gender dynamics, we speak for more than-ourselves.<sup>66</sup>

Even though speaking universally for all women may be problematic, there are times when it is appropriate and even necessary to speak for more than oneself. Women must be able to speak for and about women. No one woman can be *the* authoritative voice of all women, but certainly one woman can be a voice for more women than herself alone. What makes gender a useful and necessary construct is that it is an experienced history and a societal relationship of power that shapes us in spite of our individual differences. The gender "woman" is not just the cumulative adding up of individual experiences of being female. It is a structure of domination that not only forms identities and practices, but also potentially empowers those experiencing its oppression to speak for others from that location in appropriate contexts. The gender category "woman" affects many people simultaneously. It affects me individually and psychologically, as well as politically, socially, historically, economically, and culturally. I can speak about my personal experiences of being gendered woman, and I can speak about the structure and effects of gender on women in our society. I am not *the* authority, and I make no claims to be, but neither will I be silenced by claims that my speaking for women and about sexism generally commits the universalism fallacy.

I recognize that I have more currency to speak in certain contexts and to certain audiences than others. Yet I will not grant that every one who speaks for or about women has equal authority.<sup>67</sup> Likewise, African-Americans can speak of their personal experiences and can speak for their race about the structure and effects of racism in our society. Some individuals have more authority to speak than others, but no one spokesperson is *the* authority. As Linda Alcoff has persuasively argued, one's privilege to "speak for" is tested by the location and context of speech and its intended and potential effects.<sup>68</sup> The appropriateness of "speaking for" is

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66. My thinking here has been greatly influenced by the work of Professor Linda Alcoff. See Linda Alcoff, *The Problem of Speaking For* (unpublished manuscript, 1990) [hereinafter Alcoff, *Speaking For*].

67. Authority to speak on different issues involves experience, study, knowledge, and sometimes in our business, formal credentials.

68. Alcoff recommends that we measure the appropriateness or value of our "speaking for" others by four procedures which focus on the locatedness and context in which we are speaking and the effects/consequences that our speech might have: (1) ask about our impetus to speak and realize that sometimes it is better to actively listen and not speak; (2) attend to the bearing of our location and context on what we say; (3) carry responsibility

context-bound and relative to the dynamics of privilege and responsibility between speakers and listeners.

Analytic categories like race and gender ought not be infinitely "deconstructed." There must be stopping points, or the power of the political critique dissolves.<sup>69</sup> There are times when the differences of race, class, and other social relations are critical to our theories; and there are contexts where those differences ought to be subsumed. If the category of woman is broken down so far that all that is left are individual experiences, the forest may be lost for the trees. Gender matters. It has material consequences in the world. A critique that claims that the category of women is essentialist or incoherent defuses identity politics and its concomitant empowerment of women. It interferes with potential for political solidarity. The category "women" may not be appropriate for all analyses in all contexts, but it is vital to many analyses in law. Women are collectively affected by laws and our legal order, and women need to organize around this political reality. Our common need to work together for all of us does not require us to ignore the differences in our experiences and political power. Nothing prevents us from being different yet still working together for common ends.

Most contemporary feminist difference theories avoid the universalism fallacy because they listen carefully to others' claims, recognize their own partiality, and seek a politics of inclusion based on an appreciation of human dignity and the value of diversity and multiculturalism.

### B. *The Sameness Fallacy*

The second component of the essentialism critique indicts gender difference theories for their tendency to assume a set of at-

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and accountability for what we say (remain open to criticism); and (4) analyze probable or actual effects on discursive and material context ("event"). Alcoff, *Speaking For*, *supra* note 66.

69. I question whether some of the postmodern, post-structuralist discourses that dominate current academic thinking aim to that end. See Susan Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in *FEMINISM/POSTMODERNISM*, *supra* note 10, at 133. Professor Bordo writes, "Could feminist gender-scepticism, in all its multifaceted 'deployment' (to continue the Foucauldian motif), now be operating in the service of the reproduction of white, male knowledge/power?" *Id.* at 151.

Linda Alcoff has also argued that insisting upon the illegitimacy of anyone speaking for another encourages individualism and avoidance of responsibility. The consequent "retreat" from speaking leads to political ineffectivity. Alcoff, *Speaking For*, *supra* note 66.

tributes that define the category "woman," when in fact those attributes are not true of all women. I call this the sameness fallacy, because it presumes that gender difference theories claim that some things about the gender category "woman" are always the same for all women. Again, I would argue that this critique misreads difference theorists and their projects. Arguing that difference theories regard "woman" as a unified core that is the same across time, locations, race, class, and other categories of social relations seems disingenuous to me. Feminist difference theorists certainly realize that women differ from one another in terms of age, race, class, sexual preference, physical ability, religion, ethnicity or nationality, motherhood, and politics. Those differences among people do not erase gender differences; they *interact* with gender. Gender differences and gender relations of power between men and women exist within and across other social categories, classes, families, races, and communities. Gender differences may manifest themselves differently depending upon how they interact with other aspects of identity and social constructions, but they still are differences based on gender constructions and gender power dynamics.

When gender difference theories recognize gender as a vital relation of difference, it does not follow that other relations of difference are ignored, lumped together, subverted, or subordinated. Some women have much more power than other women. Some women oppress other women. Yet, that does not mean they are not themselves women, or that they do not have identifiable and comparable experiences as women in a patriarchal society.

Rather than claiming that all women are the same or that all women are different from all men, difference theorists propose hypotheses about gender differences to be tested against our experiences and adjusted incrementally as we share our stories. What constitutes the category "woman" varies from time to time and place to place, but the variances do not undermine or make useless the category.<sup>70</sup> Our laws and our society categorize us as women despite our differences. We do not have to be the same to be women; nor do we lose our identity as women because of our differences. We know whether we are persons who will be perceived and

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70. Hopefully by working with these theories built on stories of lived experiences, we will get a clearer picture of our material realities—their similarities and their differences. All our perceptions and understandings must be counted and interwoven in order to discover what correlates with gender.

treated as women by others. We know whether we perceive ourselves as women. We recognize others as women and therefore somehow like us. The category has meaning to us and meaning within our political, social and legal structures. The variety of power relations within the category of women does not mean that there is an equivalent variety in power relations between the categories of women and men in patriarchal societies. Gender is about the relative positions of women and men.<sup>71</sup>

Since women's identities have been formed from a subordinate position in the gender power hierarchy, we may share similar or common experiences—in roles we are assigned, expectations and responsibilities placed upon us, barriers we face, ways we have been treated and taught to treat others, our methods of negotiating the world, and our perceptions of interests and needs. Discovery of commonalities in perspectives, concerns, and experiences enables us to forge a feminist solidarity. To posit that women as a category share commonalities or common characteristics does not essentialize the category of women. It does not make those similarities innate, natural, ahistorical or the same for every woman; it merely recognizes a reality of the world in which women find ourselves situated. Correspondingly, an assertion that patriarchy—hierarchy and male dominance—governs gender relations does not mean that gender relations are always the same or always will be. To read sameness into the claims of male dominance or women's experiences is to misinterpret them. Rather, the difference theory claim seems to be that we cannot ignore the power dynamics and social construction of gender, and so long as gender persists as an or-

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71. Linda Alcoff has explained:

When the concept 'woman' is defined not by a particular set of attributes but by a particular position, the internal characteristics of the person thus identified are not denoted so much as the external context within which that person is situated. . . . The positional definition, on the other hand [as opposed to the essentialist definition of woman], makes her identity relative to a constantly shifting context, to a situation that includes a network of elements involving others, the objective economic conditions, cultural and political institutions and ideologies, and so on. If it is possible to identify women by their position within this network of relations, then it becomes possible to ground a feminist argument for women, not on a claim that their innate capacities are being stunted, but that their position within the network lacks power and mobility and requires radical change. The position of women is relative and not innate, and yet neither is it "undecidable." Through social critique and analysis we can identify women via their position relative to an existing cultural and social network.

Alcoff, *supra* note 3, at 433-34.

ganizing concept, we cannot expect our personal identities and social relations to be unaffected by it. Since gender shapes us and our relationships, difference theories examine how we are different and try to utilize discovered gender differences to improve the lives of women and refashion our society.

It seems to me that when we examine women's experiences, we are building records of what it means to be labelled and treated as women. These records serve as resources for addressing certain questions: Are there aspects of being a woman, or characteristics that are attributed to women, that affect the lives of people so labelled, whether or not those people buy into the stereotypical models? Are there commonalities in the ways that women are treated? Mistreated? Made invisible or subordinated? Dismissed or discounted? Stereotyped or objectified? Acculturated? Can sharing these experiences help us understand gender oppression? Can we form political bonds and solidarity out of experiences of gender relations, and thus empower one another to end sexist oppression? I believe, as I understand bell hooks to propose, that women have enough common concerns and interests that we can combine our efforts through a feminist solidarity, rather than feigned sameness, to further feminist projects for improving the lives of *all* women.<sup>72</sup> This is not essentialism—it is neither sameness nor universalism. This is survival.

#### IV. RECLAIMING GENDER DIFFERENCE THEORY FOR FEMINIST SOLIDARITY

For the most part, gender is assigned, not freely chosen.<sup>73</sup> No

72. bell hooks has written that:

Women do not need to eradicate difference to feel solidarity. We do not need to share common oppression to fight equally to end oppression. We do not need anti-male sentiments to bond us together, so great is the wealth of experience, culture, and ideas we have to share with one another. We can be sisters united by shared interests and beliefs, united in our appreciation for diversity, united in our struggle to end sexist oppression, united in political solidarity.

b. hooks, *Sisterhood*, *supra* note 10, at 65. See also Alcoff, *supra* note 3; Haraway, *supra* note 14.

73. "On the one hand, of course, feminism is right to identify women and men as classes in opposition at this moment in history. Everywhere in the world we find these two classes, and virtually everywhere the men subjugate the women in one way or another. . . . Gender, like race and class, is not a voluntarily disposable individual characteristic." Sandra Harding, *The Instability of the Analytical Categories of Feminist Theory*, 11 *SIGNS* 645, 658 (1986).

matter how else we might want it to be, people undeniably classify one another into one of two genders—woman or man.<sup>74</sup> Feminist gender theories understand gender as two concurrent, interwoven phenomena—difference and dominance.<sup>75</sup> As Catharine MacKinnon has explained most eloquently, and as I attempted to explain earlier, gender is a social relation of domination in which man is the privileged position and woman is the subordinated position.<sup>76</sup> Gender relations of domination manifest themselves differently depending upon the settings and people involved, as gender synergistically interacts with other relations of power and domination. Feminist difference theories can respect the multiplicity and diversity of women, while acknowledging that gender differences emerge from the consistent phenomenon of male domination with its material consequences in women's lives. Difference theorists maintain that the tenacity of dualistic gender constructions and their consequences in our lives make gender an important and useful analytic tool. As Linda Alcoff explains:

Gender is not a point to start from in the sense of being a given thing but is, instead, a posit or construct, formalizable in a nonarbitrary way through a matrix of habits, practices, and discourses. Further, it is an interpretation of our history within a particular discursive constellation, a history in which we are both subjects of and subjected to social constructions.<sup>77</sup>

Because gender is a relation of dominance, gender differences are hierarchies of power, responsibility, and opportunity. One way to eliminate these hierarchies is to imagine a world where gender differences do not matter or do not exist. Such a vision assumes

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74. The gender binary is criticized for replicating a false dualism that epitomizes humanist, Enlightenment thinking. While I would agree that dualistic or dichotomous interpretations of our culture and material world are characteristic of Enlightenment thought and rightly subject to post-structuralist critique, I would also argue that a theoretical deconstruction of gender categories does not make them less part of our lived, material experiences in this culture. We must simultaneously confront the falsity of the dichotomies and work within them to get out of them. We cannot fully escape them or step outside of them by naming their falsity. Our thinking and culture is located within them. Even though we can argue convincingly that there are multiple genders and multiple gender positions, the dominant ideology insists on two. Until this ideology is changed, we must realize that gender dualism constructs our identities, experiences, relationships, and our laws.

75. See *supra* Sections I & II.

76. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 27; C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 7.

77. Alcoff, *supra* note 3, at 431.

that ignoring gender differences would be a prerequisite to achieving meaningful equality.<sup>78</sup> Yet we live each day of our lives in a gendered world and ignoring gender differences seems impossible. Our experiences from as early as we can remember contain constructions of gender. Our relationships with one another and our self images are laced with gender. We can pretend to spurn gender by using gender-neutral laws or gender-inclusive language, but we cannot make gender disappear that simply, if at all.<sup>79</sup> Traces of gender and gender differences will inevitably bleed through a whitewash of gender neutrality.

An alternative way to eliminate gender hierarchies is to fight against power differences that privilege one group over another, rather than fight against gender differences. Feminist theories reveal the role of gender in our social relations and work to rout out power differences that overtly, or under the guise of neutrality, subordinate women and other social classes. Perhaps someday, in an imagined future, gender difference will be like eye color difference and not make a difference.<sup>80</sup> But so long as gender differences exist in the context of our twentieth century power hierarchies, the question is what do we do about them now, today, as we develop our theories and praxis.

Gender difference theorists choose to acknowledge gender differences and to use them to create a transformative practice. They attempt to grasp the substance or content of gender differences<sup>81</sup> and to illuminate the consequences of having confused gender-neu-

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78. We could debate whether the elimination of gender difference is a good or bad thing and whether equality only works with concepts of sameness and not difference. Would a world without gender difference (if gender difference did not mean power difference) be less interesting? Is what we want a broader range of possible gender differences rather than no gender difference? Is the elimination of gender difference even possible?

79. As Justice Sandra Day O'Connor recently observed in a case about workplace gender discrimination, "[r]ace and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and may comment on in a perfectly neutral and nondiscriminatory fashion." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1805 (1989) (O'Connor, J., concurring in judgment). I would challenge her assumption that these categories, race and gender, can ever be neutral, but I agree that they persist in our interpretation of people.

80. Richard Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586 (1977). It is arguable whether or not even eye color makes a difference in our society. Historically there has been an advertising and popular culture preference for blonde hair and blue eyes in the United States.

81. N. CHODOROW, *MOTHERING*, *supra* note 3; C. GILLIGAN, *supra* note 1; S. HARDING, *supra* note 3.

trality or gender-inclusion with the gender male.<sup>82</sup> Difference theorists also explore the benefits of reconstructing our society in a way that equally values the participation of both (all?) gender constructions and does not permit gender-based domination. Gender continues, but power is not distributed based on gender.

Many feminists balk at the open acknowledgement and celebration of gender difference.<sup>83</sup> They fear that a valorization of women's differences sweeps issues of power and domination under the carpet, and that female or feminine stereotypes will be perpetuated in ways that continue to disempower, confine, and marginalize women. Feminist critics of difference theories also worry that traits attributed to the gender "woman" (e.g., nurturance, caring, moral virtue) have been romanticized or idealized in a way that appeals to conservative factions. These are real concerns for difference theorists. If difference theories were only about gender differences, then the sting of these critiques would be more potent. But in the twentieth century gender differences cannot be divorced from gender power hierarchies. An effective gender difference analysis must include an understanding of power dynamics and how male difference has been privileged.<sup>84</sup> It is erroneous to separate difference theory from dominance theory, when it comes to their understandings of gender *relations*. The strongest differences be-

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82. One of my favorite statements of this phenomenon is by Jane Flax:

In a wide variety of cultures and discourses, men tend to be seen as free from or as not determined by gender relations. Thus, for example, academics do not explicitly study the psychology of men or men's history. Male academics do not worry about how being men may distort their intellectual work, while women who study gender relations are considered suspect (of triviality, if not bias). Only recently have scholars begun to consider the possibility that there may be at least three histories in every culture—his, hers, and ours. *His* and *ours* are generally assumed to be equivalents, although in contemporary work there might be some recognition of the existence of that deviant—woman (e.g., women's history). However, it is still rare for scholars to search for the pervasive effects of gender relations on all aspects of a culture in the way that they feel obligated to investigate the impact of relations of power or the organization of production.

Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, in *FEMINISM/POSTMODERNISM*, *supra* note 10, at 45 (emphasis in original).

83. See *supra* notes 5-11.

84. See, e.g., Linda Gordon, *What's New in Women's History*, in *FEMINIST STUDIES/CRITICAL STUDIES* 20, 25-28 (Teresa de Lauretis ed. 1986) (arguing that difference without an analysis of power will become a "lazy substitute[] for opposition"); Ruth Colker, *The Anti-Subordination Principle: Application*, 3 *WIS. WOMEN'S L.J.* 59 (1987) (arguing for an anti-subordination principle which acknowledges both difference and power); Scales, *supra* note 2 (arguing against use of difference alone because of its likelihood of being co-opted).

tween these theories center on choices of appropriate political and legal strategies, rather than on the meaning of gender or the existence of gender differences.<sup>85</sup>

We have only begun to study gender differences and the meaning of gender in our legal and political systems. Women must learn more about ourselves as gendered people. Women need to continue to share stories in efforts to explore our differences and similarities in perspectives, harms, and knowledges. We need to consolidate and integrate our knowledges and ask how our experiences of gender relate to our experiences of race, class, sexual preference, age, physical ability, ethnicity, and combinations thereof. Feminist methods encourage our collaborative work (whether on individual projects or in cumulative theorizing) to explore how gender roles, responsibilities, expectations, and relationships have affected all of us, and how we can benefit from our lessons and insights. We cannot do this work without forming coalitions and building solidarity as women. We must learn how we are linked, so we can use that link to empower all of us.

We do not have to erase or overlook differences to advance our practices and discourse of gender difference. As a matter of fact, any attempt to disregard other differences would be counterproductive and would contravene a feminist assumption that we benefit from diversity. Dialogue and debate help us create more reliable knowledges. The combination of our experiences as women and feminist methodological premises—of inclusion, collectively-formed knowledge, cooperation and mutual interdependence, listening with care, respect for difference—can form the heart of a feminist solidarity. Together we can strategize about how to redistribute power and wealth fairly among women, and between women and men. It is helpful that we differ on appropriate political strategies and lifestyle choices. Those differences enrich our theorizing and improve our practices. It might be necessary to simultaneously pursue divergent political, legal, and social strategies to achieve the feminist end of improving the quality of all women's lives. If we can agree on that end and some basic feminist methodological premises, and if we are vigilant and self-conscious about

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85. Feminist theories differ. I do not mean to imply that all feminist theories are actually the same. Instead I am suggesting that there probably is more agreement among feminist theorists than often is acknowledged. That agreement does not lessen the importance of feminist theories that reject difference analysis entirely or that focus solely on biological differences without a social construction analysis.

not undermining other women in their efforts to improve the quality of their own lives (even if they attempt to do so through different means than we would choose),<sup>86</sup> we can create a feminist solidarity that will endure through the 1990's and beyond.

#### V. GILLIGAN'S CARE ANALYSIS, OR TAKING WOMEN'S PERSPECTIVES SERIOUSLY

After a circuitous voyage, I am back to the main point of my essay—the usefulness of a gender-based care/responsibility analysis to transform our thinking in law. Gilligan's articulation of a care perspective<sup>87</sup> leads to two sets of questions for those of us who work in law. The first set asks about the value of locating an ethic of care in a rhetoric of gender differences. The second set relates to the potential effects a care ethic might have on law. The crux of my argument is that Gilligan's work offers valuable tools to use in rebuilding the house of the law<sup>88</sup>—altering its structure, content, and practice. In using these tools, we must not forget—in fact, we ought to celebrate—their basis in gender differences and women's gender culture. The benefits we can gain from applying gender difference analysis to law have barely been explored. We would err grievously to discard these potential insights and to ignore their source in women's culture. It is from their source in gender difference that we learn the most about how to proceed in our reconstruction of law.

At the outset, I will briefly outline some basic tenets of Gilligan's care analysis. I will then respond to criticisms that care analysis perpetuates gender stereotypes and that a gender-based care perspective is no more than a manifestation of women's subordination. Finally, I will suggest ways to think about the uses of care and relational theory in law.

Gilligan noted two distinct, although not mutually exclusive, perspectives in her analysis of people's orientations in solving moral dilemmas. One perspective, which she denominated an ethic

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86. Without belaboring the point, I am hoping we can avert other disasters like the *Sears* case. See *supra* note 8.

87. Other feminists have articulated similar care and responsibility analyses. See, e.g., S. RUDDICK, *MATERNAL THINKING*, *supra* note 3, at 127-35.

88. Although Gilligan may have made some of the same kinds of errors of exclusion that earlier male theorists made, Gilligan's tools are still not those of the master. See Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110 (1984).

of justice,<sup>89</sup> closely parallels the dominant rationality and methodology of Anglo-American law. This justice ethic is based on a rights model, where problem-solving consists of the application of abstract, generalized principles to arbitrate rights disputes between separate individuals (conflicting rights-holders) and to privilege one right over another. The justice-oriented problem-solver seeks a distanced stance from which to make objective decisions by applying formal rules of equality and other general principles of justice. Traditionally, this perspective was deemed the highest stage of moral development,<sup>90</sup> and it has monopolized legal reasoning.

Gilligan observed, however, that some people solve moral dilemmas using a different, but equally adequate, methodology. This second distinctive perspective, which Gilligan called an ethic of care, focuses attention on the unique context of the dispute and the parties' on-going relationships and interdependencies. The care-oriented problem-solver examines the connections between and among people, looking at their interpersonal responsibilities and needs. Preventing hurt, preserving relationships, and developing cooperative solutions rooted in the concrete particulars of the conflict are objectives of a care-oriented ethical analysis. A care-based problem-solver often "questions the hypothetical" to gather more relevant information in order to better understand the full scope of the problem and the practical, material consequences of any decision.<sup>91</sup> By considering the specific needs of all the parties, as articulated from those parties' own perspectives, and by attending to particularized contexts rather than abstract rights and universalizable rules, care-oriented problem-solvers frequently design creative, alternative solutions that may never occur to their justice-oriented counterparts.

Gilligan's thesis is that care concerns are a largely unacknowledged or unprivileged way of analyzing moral dilemmas, and that while they are used by both men and women, women focus on care and relationships considerably more than men do.<sup>92</sup> Because of

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89. Actually, I object to this perspective being called an ethic of justice in counterpoint to an ethic of care. Both ethics seek justice, but the label seems to indicate that the "justice" perspective somehow gets us closer to it than the care perspective, a conclusion which I ardently resist.

90. See generally, Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* (T. Lickona ed. 1976).

91. Menkel-Meadow, *Portia*, *supra* note 2.

92. Gilligan & Attanucci, *supra* note 40; Lyons, *supra* note 40; Carol Gilligan & Grant

gender bias in prior studies, the voice of care was silenced, ignored, undervalued, and lost from discussions in the moral domain. In Gilligan's studies, care-focus analyses were more prevalent in women's narrations than men's, although combined or "bifocal" care-justice orientations were equally distributed.<sup>93</sup> Gilligan explains that even though both men and women are capable of using either focus, once one approach to problem-solving is begun, that approach eclipses the other.<sup>94</sup> Moral maturity probably requires the use of both perspectives, even though they are often in conflict. The hallmark of mature judgment in the justice perspective (detachment) is *the* moral problem to the care perspective (failure to attend to need). In contrast, the justice perspective considers the mark of mature judgment in the care perspective (attention to the particular circumstances and needs of the party) as *the* paradigmatic moral failing (treating people unequally).<sup>95</sup>

Although her original experiments used relatively homogenous subjects, Gilligan and her associates are attempting to correct this deficiency by studying more diverse samples.<sup>96</sup> These newer studies have refined, but not undermined, her initial conclusions. Despite differences in her subjects' ages, education levels, races, and classes, Gilligan continues to find that women as a group have a distinctive ethical outlook.<sup>97</sup> An ethic of care, with its underlying precepts about cooperation, relationships, and responsiveness to needs, is consistently more apparent in women than men. Its presence and dominant usage seem to correlate strongly with gender. If Gilligan is correct about gender differences including alternative ethical perspectives, women's historical absence from the legal profession and from authority for law-making would mean that women's care orientation is probably absent from the law.

The first set of challenges to the use of Gilligan's work has to

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Wiggins, *The Origins of Morality in Early Childhood Relationships*, in MAPPING THE MORAL DOMAIN, *supra* note 40, at 111.

93. Gilligan & Attanucci, *supra* note 40, at 82-83.

94. *Id.* at 82.

95. *Id.*

96. See generally, MAPPING THE MORAL DOMAIN, *supra* note 40.

97. Gilligan's studies are not without flaws. They ought not be accepted unquestioningly or read without a critical eye. I imagine her work will improve as she incorporates what she learns from recent critiques. Regardless of its flaws, however, I do believe that her insight into gender differences in reasoning and moral orientation leads to increased knowledge of ourselves and our social relations and reflects a "truth" of today's gender cultures that cannot be ignored.

do with the problems of presenting her care ethic as gender-linked. Many people have indicated that it would be much more palatable to speak about care and the law, if care did not carry the political baggage of feminism or gender difference. Divorced from ideas of gender difference, the care ethic would be more saleable to liberal feminists who do not want to recognize gender differences, to radical feminists who believe that gender differences are only a function of subordination, to postmodern feminists who believe that talk of gender difference is essentializing, and most of all, to nonfeminists who are put off by any references to gender issues at all. I am sure these advisers are correct in asserting that any discussion of care and law will be more pleasing or acceptable if there is no mention of gender difference, because it is such an emotionally charged and politically laden subject. I am equally certain that obscuring gender issues in order to placate an audience does not eliminate gender dynamics and their effects from our lives and laws; nor does it promote understanding, validate or take seriously women's experiences and perspectives, or empower women to overcome our subordination.

Some feminist theorists reject Gilligan's gender-linked analysis of ethical orientations because they fear that it will reinscribe women with characteristics that are a consequence of, or have been the fodder for, gender domination. This is a very serious concern. Carol Gilligan's work has been critiqued for burdening women with continuing tasks of caregiving, pleasing others, and self-sacrifice. Catharine MacKinnon and others argue (and I acknowledge the soundness of their arguments) that women have been socialized into being caregivers and responders to others' needs as part of our subordinated roles in society, and therefore, we ought not praise women for being caregivers, when it is the only way we have had to survive.<sup>98</sup> When we perpetuate the connection between women and caregiving, the argument continues, we ultimately perpetuate our subordination.

A second, related criticism of Gilligan's ethic of care is that caregiving itself is draining and self-sacrificing. If women are expected to maintain our caregiving work, particularly in our workplaces, we will not have time and energy left to fulfill our own needs, to care for our families, or to promote our personal and political advancement. This is especially true, since women are still

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98. *Feminist Discourse*, *supra* note 2 (Catharine MacKinnon).

responsible for the majority of housekeeping, caregiving, and emotional work in the home.<sup>99</sup> If we advertise ourselves as caregivers, we will be forced to continue our extra work at home and in the workplace.

Finally, there is an equally strong criticism that these caregiving traits do not apply to all women, that many women do not exhibit them, and that many women do not even want to be associated with them. The truth of this last criticism is self-evident. All of the above critiques are searing, and each has a strong ring of truth. Those of us who advocate that gender differences be acknowledged need to worry about them.

For these reasons, some who have been attracted by the advantages of an ethic of care have argued that it has non-gender-based sources and could be adopted as a "humanist" approach to law, that is, one that promotes the value of caring apart from any language of gender relations.<sup>100</sup> Frankly, while I am sympathetic to feminists who make this argument, I believe it is politically, theoretically, and factually unsound to move women from center stage in this proposed reconstruction of legal and ethical discourse based on an ethic of care. Interpersonal caregiving is something that women have specialized in for years. We have special knowledges and insights to offer. After many, many years of being submerged, we have finally come above the surface and caught our long-awaited breath. The air tastes good. A change to "humanism," I fear, will ultimately press us under water again. While we clearly must be very cautious about perpetuating disempowering or disadvantageous stereotypes,<sup>101</sup> the move from "women" to "human" seems to dupe us into an even worse co-optation of being reabsorbed, resiled, and resubmerged into a newly invisible system of male dominance. Consequently, I reject critiques of a gender-based ethic of care that locate the ethic of care in a humanist approach.

Acknowledging the possible link between care and gender, MacKinnon and others suggest that care is a voice of oppression or

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99. See generally, ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

100. E.g., Tronto, *supra* note 7; Williams, *Deconstructing*, *supra* note 2.

101. I am especially attracted to Deborah Rhode's theoretical approach which analyzes gender differences by asking whether they disadvantage or enable women. See, e.g., Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); RHODE, *JUSTICE AND GENDER*, *supra* note 2; *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (D. Rhode ed. 1990).

subordination.<sup>102</sup> If that is how this ethic of care and responsibility is created, she argues, we should not celebrate its link to women. I agree that women's oppression and its consequences ought not be celebrated. But caregiving, cooperation, and an interpersonal responsibility ethic are worthy values, in and of themselves. When we celebrate their worth and their connection to women's culture, what we are celebrating is a long overdue recognition of women's special knowledges and experiences—women's expertise—that can help us restructure our laws in accordance with these values and aspirations for a good society. Surely we can imagine a society in which caregiving, cooperation, and an ethic of interpersonal responsibility are essential parts of justice, but have no correlation with oppression.

Whether an ethic of care, with its relational approach, cooperative attitude, and focus on responsibility and connectedness is learned from experiences of subordination, from experiences of caregiving, or from gendered socializations and stereotypes, it is decidedly more characteristic of women than men. Even when it correlates with other statuses beside womanhood, it still is present within the women of that status (*e.g.*, class, race) and arguably to a greater extent or in a more complex way than in the men. That the origins of an ethic of care are in part suspect advises especial caution, but not necessarily rejection. Caring and cooperation are quintessential values and should be promoted and nurtured in our society, even if historically their work has been unduly, unfairly, and disproportionately foisted upon women. Rather than reject caring as lesser because of its association with women and women's work, or its correlation with oppressed statuses, we can decide that care, cooperation and interpersonal responsibility are so vital to human progress and happiness that they ought to be done by everyone. If we truly value caregiving, we should reward the people

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102. *Feminist Discourse*, *supra* note 2. Carol Stack's research also concludes that an ethic of care develops out of oppression. Carol Stack, *The Culture of Gender: Women and Men of Color*, 11 *SIGNS* 321 (1986) (noting that for poor black migrant workers in the rural South, care was the moral orientation of both oppressed men and women). Patricia Hill Collins suggests that an ethic of care and responsibility is an Afrocentric or perhaps Afrocentric-feminist ethos. Patricia Hill Collins, *The Social Construction of Black Feminist Thought*, 14 *SIGNS* 745, 765-68 (1989).

Yet, Gilligan's later research with both medical students and urban youth indicates that a care focus is tied more with gender than minority status. Gilligan & Attanucci, *supra* note 40, at 83; Betty Bardige, Janie Victoria Ward, Carol Gilligan, Jill McLean Taylor & Gina Cohen, *Moral Concerns and Considerations of Urban Youth*, in *MAPPING THE MORAL DOMAIN*, *supra* note 40, at 159.

who do it with our society's traditional indicia of respect—prestige and economic advantages. Society's positive reinforcement of its important values encourages more people to excel at those tasks, master those skills, and adopt those orientations.

Caregiving, cooperation and an orientation toward interpersonal responsibility can be socially and legally promoted as easily as economic efficiency, competitive hierarchies, and self-interest have been. If, in fact, these traits do correlate with being men or women, they are not sex-linked, but gender-linked. Because gender is a process of socialization, men can be socialized to be caregivers and to assume an orientation of interpersonal responsibility and cooperation, just as easily as women have been. Certainly some men are already extremely competent caregivers. Cooperation, caregiving, and interpersonal responsibility orientations need not be taught through subordination, exclusion, marginalization, and fear. If an ethic of care is an orientation that we want reproduced and promoted in everyone, we need to discover ways to inculcate it without oppression.

It is probably true that much of the ethic of care—responsiveness to and anticipation of others' needs, attempts to please and accommodate, a desire to maintain relationships, self-sacrifice, careful listening, the privileging of or sensitivity to other perspectives and feelings—has arisen out of socialized gender roles that advantage patriarchy and perpetuate male dominance. However, it is equally plausible that an ethic of care is a part of being human that was inappropriately suppressed in men, rather than inappropriately encouraged in women. The problem is not that women give care and focus on needs in interpersonal relationships, but that women do it more often than men, are more socialized to do it, and that many men are not socialized to give care reciprocally in this way. If interpersonal caregiving were equally shared between men and women, and if sensitivity to others' needs were the norm for men and women, we would all benefit. We probably would not fear that women would be disadvantaged by assuming certain caring responsibilities, if we could trust that caregiving would be fairly shared and socially valued. The problem, then, lies not in the source or nature of caring, but in its disproportionate allocation to women and its significant absence from dominant legal and ethical norms.

Whatever its "cause" and regardless of whether we are pleased about the correlation of ethical orientations with gender, care per-

spectives strongly correlate with women. My own experiences conform to Gilligan's findings. Most of the women I know or have known focus more on caregiving, more on relationships, and more on responding to needs than most of the men I know. That does not mean all of the women do; nor does it mean all of the men don't.<sup>103</sup> I just mean that something about Gilligan's thesis mimics my experiences. I am convinced by my own experiences, as well as my observations of other people and their relationships, that women *generally* are different from men in significant ways, and men *generally* are different from women. Part of this difference could be biologically based, but I tend to think it is more likely a consequence of the ways in which we are socialized or acculturated as we grow up. My point is that different gender cultures, one male and one female, construct us as people and are reproduced in us. They are parts of our lived experiences and our social and psychological make-ups. Our being gendered affects who we are, how we think, and how we interrelate, as well as how we are treated. I am not claiming that gender is the sole, primary, or determinative factor in our socialization, but that it is important and identifiable, and that women's gender cultures differ from men's.

Now the question is, what to do with all of this? We could choose to follow the suggestions of gender difference theory critics and ignore gender differences, because they tend to replicate stereotypes that have been used to subordinate women. We could suppress gender differences, re-silence them, or pretend that they are not true, even if we suspect or know otherwise, in order to achieve political ends. In the alternative, we could acknowledge that gender differences exist today, but struggle not to reproduce them as gender differences in our children and their children. Or, as I prefer, we could work to use insights from and about gender cultures to improve the quality of our lives and law. If we believe that the voice of care and responsibility is an integral part of justice and being human, then we must reconstruct our legal analyses to include, value, and respond to needs for interpersonal caregiving. Women's gender cultures can be our guide.

Creating new theoretical and ethical paradigms that radiate from an appreciation of values and traits of caring, interpersonal

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103. I know some men who clearly understand the world relationally and are caregiving. I also know some women who are not constructed by values of care and relationships at all. No doubt you have the same experiences.

responsibility, and cooperation, while failing to attribute them to women's cultures, devalues women's contributions once again. Law has excluded women and women's cultural differences for too long. Now that women have finally become active participants in the shaping of law, and now that legal theorists are challenging us to alter the structure of law in consideration of, or in conjunction with women's values, movements are afoot to sever these insights from their roots in women's gender cultures. Many of the transformative contributions that women have made and can make are at risk of being snatched from us. I hope that feminists will not allow fears that currently existing gender characteristics will be used as subordinating stereotypes to make us forego deserved recognition of the contributions our gender cultures will make to the enrichment of our legal system.

If stereotypes are going to be used against us, as they have been in the past, they will be so used regardless of what we say or do. Those who want to exercise their power by disadvantaging women based on stereotypes did so long before we celebrated women's cultures and will do so long after, no matter which strategy we select in our struggle for justice for women. Those who use disadvantaging stereotypes do not obtain their power by appropriating the language that we use to describe ourselves. Use of stereotypes to disadvantage groups is a matter of pre-existing power, not the triumphant, persuasive or rhetorical force of alternative discourses. We ought not let others' temporary control of the dominant discourse disempower us from speaking honestly and openly about ourselves, about how we think and know, how we love and interrelate, how we care or what we care about, how we understand justice, and how we can bring about a better life for all. Our political effectivity comes from our willingness to speak our truths as we see them; not our fear of succumbing to other-imposed stereotypes. If there are things about the gendered construction of women, things that have shaped our lived experiences, our relationships, and our views of the world, things that we consider good, valuable, and essential to peace, equality, and justice, then we should share them and require that they be used in reconstructing our laws. Yet, we should not be convinced to surrender them freely and without strings to the dominant powers, because they will call them "human," discount women's contributions, and possibly distort them by partial and limited understandings. If the legal powers-that-be can decide that they know as much about "humanism," "care" and "responsibility" as anyone, they can also decide that

women's presence, perspectives, understandings, and experiences will not be needed to reconceptualize law with these values. We must be an integral part of this reconstruction, because our knowledges and perceptions, which we developed as gendered women, are critical to this transformative project.

Women have been students of care and caregiving, relationships and interpersonal responsibility, cooperation, and mutual dependence for a long time. Our apprenticeships give us special knowledge and insight. Careful study of women's ways of knowing and patterns of interrelating can be illustrative for all of us in reformulating law. Women have more concrete experiences than men of integrating care and caregiving into the multiple, daily ways in which we function, work, play, and relate. We are more skillful at listening empathetically, at attending to context, and adapting appropriate "rules" to the particularized circumstances. We tend to have better understandings of substantive equality, something that is desperately needed in law. Our gender-based perspectives and techniques must be used to shape legal culture and laws.

What does it mean to use a gendered ethic of care in law? Is it something that is already in the law in some form, as equity, as the exception, as part of "the fundamental contradiction" of our dominant liberal legal discourse? I think not.<sup>104</sup> I believe an ethic of care derived from women's cultures is a unique way to solve problems, work with people, locate truths, and foster justice that has been absent from our law.

There are so many questions to explore. Is an ethic of care just an aspect of personal morality conceived as justice, as Kohlberg has argued?<sup>105</sup> Does an ethic of care involve empathy,<sup>106</sup> compassion as sympathy, or compassion as co-feeling?<sup>107</sup> Is an ethic of care a perspective that can or should inform legal processes? What difference would this difference make?<sup>108</sup> Do we need rights, prin-

104. I have argued elsewhere that the care or use of power in equity is more a form of *noblesse oblige* than the care or power in women's culture. Bender, *Feminist Retorts*, *supra* note 2; Bender, *Changing the Values in Tort Law*, *supra* note 2. Robin West cogently explains her perception of the differences between women's culture and the "fundamental contradiction" in West, *Jurisprudence*, *supra* note 2.

105. LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT: ESSAYS ON MORAL DEVELOPMENT* 231-32 (1984).

106. Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

107. Gilligan & Wiggins, *supra* note 92, at 122.

108. Deborah Rhode, in writing about the "difference dilemma," suggests that "[t]he crucial issue becomes not difference, but the difference difference makes." Rhode, *Feminist*

principles, and generalizable rules for predictability and stability? Will a care perspective lead to chaos or relativism? If not, how should we understand its application and differing results in varied situations? Furthermore, are these perspectives of care and justice in too much tension to be fruitfully combined? If people learn to focus on one orientation *or* the other, as Gilligan's studies indicate, can we ever integrate them in our thinking or in our law? How can lawmakers, lawyers, judges, professors, and law students study, learn from, borrow from, and reconstitute law with a gender-based ethic of care and responsibility? Can we benefit from an ethic of care in law without limiting ourselves to either/or, dualistic thinking and dichotomous paradigms? Finally, are there only two dichotomous perspectives—care and justice—or are there multiple perspectives that intersect and combine in different ways at different times?

Gender difference theory provides a rich source for transforming law. Feminist legal theories ought to do more than expose our legal system's warts. We must supply new vocabularies, perspectives, paradigms, methodologies, and practices. Insights from difference theories about gender bias, marginality and exclusion, relationships and difference, cooperation, values of care, listening, responsibility, and solidarity can inform legal practice and jurisprudence to move us toward goals of democracy, justice, and true equality. For example, our statutory and common law legal system can develop new categories of civil law analysis (rather than criminal or regulatory law) that recognize and value relationships, interpersonal responsibility, and human needs for safety, health, education, and security, rather than its traditional focus on money and commodities. Law can develop new methods of conflict resolution that are not premised on adversarial, competitive, win-or-lose models. An ethic of care and women's gender differences can teach us other, and perhaps better, ways to seek truth and understand justice. Law can redefine who counts as parties to controversies, reconsider what counts as relevant information, imagine new kinds of remedies to redress injuries, fulfill needs, and promote equality. Learning from feminist critiques, law can become more humble and self-critical. It can question its biases and exclusionary practices; and it can respond to what it learns by making concrete changes in perspectives, substance, and methods. Law can

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*Critical Theories*, *supra* note 101, at 625 (citing among others, Christine Littleton, Catharine MacKinnon, and Joan Wallach Scott for this articulation of the problem).

reformulate its understandings about power and privilege and restructure its role in eliminating hierarchy and domination. Feminist theories, and gender difference theories in particular, offer strategies and knowledges to guide this transformation of our legal system.

In my other writings I have tried to give concrete examples of how a gender-based ethic of care with its orientation toward interpersonal responsibility can be used right now to restructure important concepts in law, particularly tort law.<sup>109</sup> It seems inappropriate to reproduce those arguments here, since they are otherwise available. Suffice it to say that feminist understandings of power, exclusion and alternative values derived from understandings of women's gender cultures can be used to improve our existing laws and legal practices, without compromising their simultaneous use for larger transformative efforts to shift the underlying paradigms of our legal system.

#### CONCLUSION

Gender difference and gender identity can be a starting point for feminist solidarity. Through feminist solidarity, we can transform law from its current design as a tool to preserve existing distributions of power, forms of knowledge, and hierarchies of values into a tool to empower and enable all people. Since women differ from one another by race, class, age, ethnicity, sexual preference, and physical challenges, our work to improve *all* women's lives will necessarily improve the lives of all people oppressed because of these identities. Our potentials for success in achieving justice are inextricably linked. Justice has been portrayed as a woman in our cultural myths for centuries. It is time we use women's gender cultures to guide the law in its quest for justice.

Carol Gilligan's work helps us understand some ways in which women's perspectives and approaches differ from men's. Relying on her insights, some feminist legal theorists have been able to show how women's differences have been left out of law. Three things have happened with Gilligan's work. First, her writings have been used as a shorthand for the idea of gender difference and the necessity to rethink the exclusionary practices that have generated

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109. See, e.g., Bender, *Feminist Retorts*, *supra* note 2; Bender, *Changing the Values in Tort Law*, *supra* note 2; Bender, *Primer*, *supra* note 2; Bender, *Sex Discrimination or Gender Inequality*, *supra* note 50.

existing disciplinary models. Second, they have served as a symbol of the validation of women's differences (and sometimes of their privileging, as in, "care is better than justice" and "relationships are better than rights"). Finally, the values of care and relational theories have provided important methodological precepts for rethinking disciplines and institutions generally, and law, in particular. I find all three moves engaging. Despite the potent and important critiques that have been wielded against Gilligan's work and gender difference theories, I have argued in this essay for the continued use of gender difference analysis as a stepping stone to feminist solidarity. A gender-based ethic of care, cooperation, and interpersonal responsibility; contextualized legal and substantive equality analyses; and feminist insights about diversity, power, privilege and exclusion are invaluable to our efforts to create a new legal regime.

Our social constructions and laws have not progressed far enough in their eradication of gender bias that we can abandon the category of gender. Maybe someday, but certainly not yet. Despite the fact that gender is not fixed, static, or "essential," we still need an analysis of gender to help illustrate our flaws and reconstruct our analyses. Gender is not a less valuable or transformative concept because it is fluid and subject to change under altering conditions and contexts.<sup>110</sup> So long as gender power dynamics create women's cultures, gender matters for our analyses. In the 1990's, gender still matters in our social relations, and therefore must remain a central part of our dominant discourses and laws. When gender dynamics no longer teach us about power, knowledge, and values, and when gender analyses no longer offer an impetus for change, then and only then will gender be outmoded. I await the day, but I am not holding my breath. In the meantime, the law needs the transformative potential offered by gender difference analysis, and women need gender difference analysis to help build feminist solidarity. I can not refrain from acting and taking responsibility for needed changes in the law today, while waiting for us to successfully tear down the structures of gender domination. Ultimately, I believe that Gilligan's work helps us better understand gender differences and how we can improve law based on what we learn from women.

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110. That gender is subject to critique from within does not impair its value as a critique from without. The place from which the critique is launched is important.