FEMINIST THEORY IN LAW: THE DIFFERENCE IT MAKES

*Martha Albertson Fineman**

INTRODUCTION

This essay is a consideration of the feminist project in law and two contemporary legal feminist approaches to the historical construction of women as "different"—a characterization that has had implications in regard to the way in which women are understood as objects and subjects of law. These competing feminist responses are based on similar conclusions about women's uneasy relationship to law as well as to other institutions of power in our society. They differ, however, in their analyses of the nature and extent of the difference between women and men and the conceptual and theoretical implications of differences.

Until fairly recently, legal feminism was primarily an equality-based strategy, which assumed no legally relevant differences between men and women. This emphasis was perhaps determined by the many ways in which the law historically both facilitated and condoned women's exclusion from the public (therefore, overtly powerful) aspects of society. Difference was the rationale and the justification for this exclusion which was based on the belief that women's unique biological role demanded their protection from the rigors of public life. It was no surprise, therefore, that when significant numbers of women began to make inroads into public institutions such as the law, they sought to dismantle the ideology which had excluded them—assimilation became the goal and equality the articulated standard.

Recently, some feminists have called attention to the fact that "equality" tends to be translated as "sameness of treatment" in American legal culture and, for that reason, actually operates as a conceptual obstacle to the formulation and implementation of solutions to the unique economic and

* Martha Albertson Fineman is the Maurice T. Moore Professor of Law at Columbia University in the City of New York. She is a 1975 graduate of the University of Chicago Law School. In 1984 she developed the Feminism and Legal Theory Project at the University of Wisconsin Law School. The project is now located at Columbia Law School and is devoted to fostering interdisciplinary feminist work on law and legal institutions.

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societal problems women encounter.[1] These "post-egalitarian feminists" urge a reconsideration and reconstruction of differences—this time from a feminist perspective. Those feminists who now want to move beyond equality and establish affirmative theories of difference recognize that initial adherence to an equality concept was necessary in taking the first steps to change the law and legal institutions. The lesson some of us have learned from the results of the past several decades of equality feminism, however, is that a theory of difference is necessary in order to do more than merely open the doors to institutions designed with men in mind. Arguing for a theory of difference questions the presumed neutrality of institutions, calling into question their legitimacy because they are reflective of primarily male experiences and concerns. In that way, a theory of difference has the potential to empower women.

This essay begins with a consideration of the development of the current debate over differences which continues to characterize much of legal feminist writing. I attempt to address some of the limitations I think feminists encounter when law is the subject about which they write. In the latter half of this essay I expand on a notion of "gendered life" which I first began to develop in an earlier article.[2] I am developing this concept in order to facilitate a discussion of differences that is both grounded in concrete and empirical experiences of significant numbers of women as well as reflective of the dominant ideological presentation of women as constructions of our culture and its institutions.

The idea of a gendered life is *not* the same as asserting the notion of "essential" femaleness. The concept of a gendered life is based on the belief that most differences between the sexes are socially manufactured, not inherent. This realization, however, should not obscure the overwhelming nature of the task faced by feminists seeking change in social and cultural representations of women. Changing society is not an easy task. In fact, in some ways it might be *easier* were differences the result of nature or biology. In that instance technology might prove of assistance.[3] Culture and

[1] See, e.g., Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (1991); Diana Majury, Strategizing in Equality, in At the Boundaries of Law: Feminism and Legal Theory 320 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); Isabel Marcus, Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York, 42 U. Miami L. Rev. 55 (1987).

[2] Martha L. Fineman, Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship, 42 Fla. L. Rev. 25 (1990).

[3] Altering the biological capacities of men so that they could carry a fetus might be the only way to evoke significant change in other areas. Many people reflect on the fact that American men are assuming more responsibilities for children. How

male interest in children is expressed, however, may reinforce rather than dismantle existing power relationships. I believe this is illustrated by three clippings I occasionally distribute to my family law classes. These clippings represent to me three competing models of the "new father."

The first clipping is a letter to Ann Landers in which an expectant mother confessed that while she considered herself "lucky" in comparison to the women who complained about their husbands not paying much attention to their newborns, she was "concerned." The soon-to-be Mom wrote: "Larry doesn't want me to breast-feed our child because he wants to play a significant part in the care of our newborn. He recently read that if the father isn't involved in the feeding of the infant, bonding won't take place. I've always believed that breast is best, but I certainly don't want to deny my husband the opportunity to bond with our baby." Ann responded: "It's wonderful that your husband is so eager to be part of the baby's early life. But a breast-fed child has a decided advantage . . . [y]our husband can hold the child after he feeds. He can burp, cradle, coo and establish bonding in this way." Ann Landers, Wisconsin State Journal, Feb. 18, 1988, § 3, at 6.

The second clipping announces the development of something called "Dr. Goldson's Baby Bonder." The device is described by Barbara Roessner thus: "[A man's] chest is cloaked in a biblike garment with breast-shaped protuberances into which ordinary baby bottles have been inserted." She quotes from the advertisement: "Something new for the mouths of babes . . . . Now, nursing can be done by anyone for just $19.95. . . . Breast-feeding isn't just women's work anymore." Barbara Roessner, Device to Let Fathers 'Breast-Feed' May Be the Latest Sign of the Times, The Capital Times (Madison, Wis.), Mar. 15, 1988, at 8.

The most radical (and technology-dependent) vision of the new father, however, was offered by the British magazine *New Society*. The magazine reported scientists as saying that "the technology exists to enable men to give birth." The Associated Press followed up on this story with interviews and reported:

> Male pregnancy would involve fertilizing a donated egg with sperm outside the body. The embryo would be implanted into the bowel area, where it could attach itself to a major organ. The baby would be delivered by Caesarean section. . . .
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> The embryo creates the placenta, so theoretically the baby would receive sufficient nourishment.

The question of whether or not there would be a market for this technology is an interesting one. It was dismissed by one fertility researcher with the comment "Nobody has tried it—and why would they? . . . It's bizarre and fanciful." Others, however, saw the potential for a limited market: "[C]andidates for male pregnancy might be homosexuals, transsexuals or men whose wives are infertile." Mr. Mom: Scientists Say Men Could Give Birth, Wisconsin State Journal, May 9, 1986, § 1, at 2.

These three stories represent three possible male adaptations to the existence of a biologically based difference between men and women that actually favors women in regard to the establishment of a claim to children. In the first story the male response is to force the woman to deny the implications of difference, even at the possible cost of harm to the child. She is coerced into conforming her conduct to the male's physical limitations so that she does not garner any advantage.

society are not easily manipulated and change occurs slowly if at all. Even what appears to be progress is often the superficial adjustment of institutions undertaken only to maintain old hierarchies in the face of challenges.[4]

Finally, I suggest that the concept of a "gendered life" can be helpful in urging cooperation among women across our differences in areas where social and cultural definitions of "Woman" operate to potentially oppress us all. The notion of women's experiences is problematic when consideration is given to the differences among women. This aspect of the debates about difference is currently of particular interest to the legal feminist community. This last section of the essay is ultimately a plea that the feminists who are engaged in writing theory about law not "unique" ourselves out of existence as an analytic category—as "women."[5] My argument is based on the assumption that as feminist women we have an

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The second story, in my opinion, represents an even more insidious response, however. The male merely makes a superficial adjustment—dons an obviously artificial imitation (almost a caricature) of maternity while not altering the reality of his physical situation. Such subversion disguises the fact that a move from breast to bottle has occurred at the same time that it asserts on an ideological level the erroneous notion that breast-feeding is nothing special—an activity that can be duplicated by some wire, material, strings, and a great deal of smoke and mirrors. This example of resort to gimmicks in order to assume away any significance inherent in a biological difference may be tempting to advocates of equality. It has the potential to backfire, however. What may occur is the devaluation and minimization of an important biological, social, and cultural event (breast-feeding) in order for us to pretend that fathers can "breast-feed."

The third story illustrates my point that technology can in some circumstances eliminate differences. While it is true that this story involves gestation, not breast-feeding, the hope is that once this step is accomplished the subsequent nurturing may be expedited. Surely for the advocate of equality, the direction—elimination of differences—is the right one. The goal is assimilation, although this time it is the conformity of the male to the female norm in regard to procreation. As the comments quoted above indicate, however, even if the technology exists, the cultural and societal arrangements make it unlikely that anyone other than those who have no woman to do their bearing for them will ever use it.

[4] For an explication of this in the context of family law rules, see, e.g., Fineman, supra note 1.

[5] The term "uniqueing" was used by eminent Native American scholar Rennard Strickland to describe the factionalization of the Native American community among tribal lines that prohibited their working together for common aims and purposes against the common foe. Conversation with Rennard Strickland (Dec. 8, 1991). Feminist writing in law is increasingly fractionalized in style, with sweeping generalizations and characterizations of "other" groups of women as the guarantee of entry and audience in the debate. Such condemnations serve a variety of functions. At the outset, they establish a need for the specific views advanced by the writer through the process of labeling the "other" group (usually

important and unrepresented perspective with which to assess and critique the law. It is further based on the assertion that as privileged women we have the obligation to help other women who suffer in their gendered lives in our culture but have no access to legal institutions and discourse.

THE FEMINIST PROJECT IN LAW

The answer to the question "What is the feminist project in law?" changes over time as either the law or circumstances change or as perceptions of the problems alter. At any one time there are many feminist projects in law. The designation of what are the most pressing feminist projects varies with the feminists consulted; some are concerned primarily with issues of legal knowledge and the production of doctrine, others with women's opportunities within the profession. In my own work I have been interested in the impact of law on women's lives—the role of law in the construction and perpetuation of a gendered social existence.

It is important to emphasize that when *law* is the object of analysis, there are somewhat unique methodological and conceptual constraints that operate upon feminist endeavors. The feminist project in law, of course, is defined in the first instance by the characteristics of law and legal institutions. Feminist responses to law are shaped by our perceptions about law and its role and function in society.[6] In particular, because I view law as a system of allocation of power and believe that legal discourse both reflects and constitutes the consequences of power in our society, my attention has been directed to the processes whereby explicitly coercive rules are generated and implemented. I have specifically focused on family law. This choice was prompted in part by my belief that the family is the most gendered institution in our society, and therefore, one that should receive serious feminist scrutiny.

My consideration of family law has given me pause because it is apparent that the generation and implementation of legal rules quite often

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those who have been writing in the area) as unrepresentative—as really little better than the dominant group in society. The condemnations also create distance between the "other" women and the writer (and the group that the writer claims to represent based on a shared characteristic). The distance lessens the scholarly necessity for the writer to credit or even acknowledge the contributions and/or accomplishments of the other women. Furthermore, the process of condemnation enables the writer to assert herself as an authority for the faction of women identified in this process.

[6] This means, of course, that the differences among various legal systems will be of significance in the development of feminist legal theory(ies) and limit the nature of a comparative perspective.

proceed in haste, without adequate reflection. Rules typically are made in response to political and social pressures—adopted for their symbolic rather than their pragmatic characteristics and contents. Even the best intentioned legal actors will find themselves with imperfect and incomplete information, yet required to make decisions which will have significant, immediate impacts on people's lives.

There are also limitations on theorizing that one must acknowledge when law is the object of study. Most significantly for a feminist is the explicit reliance in law on the process of classification.[7] The law is a system of rules and/or norms, many of which are designed to have universal application, all of which have potential application beyond any specific set of circumstances. Therefore, the process of lawmaking relies on the generation of broad generalizations about groups or classes of things and people at the legislative level. On the individual case level, law is also a process of classification—courts make decisions using analogies and distinctions within the context of precedent and stare decisis, tying "like things" together in a web of consistent and coherent doctrine.

Classification, inevitable though it might be, is nonetheless a process that is susceptible to criticism because it invariably will both include inappropriate cases and exclude appropriate ones.[8] As classification involves

[7] Classification is the process applied to facts whereby they are given legal meaning. Claims under the Equal Protection Clause of the Fourteenth Amendment provide a familiar example of this classification process. State action, which itself distinguishes between groups of actors, is analyzed at a level of scrutiny dependent upon the classification of the state action in question. Where a law classifies people according to their race, "such classifications are subject to the most exacting scrutiny." Palmore v. Sidoti, 466 U.S. 429, 432 (1984). Where the distinction is based on gender, however, the law is given an intermediate level of scrutiny. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Race and gender are separate bases for classification.

The extent to which the process of classification pervades all legal analysis is evident in the very research tools that are used by lawyers, judges, and other legal scholars. Classification is the process whereby the diverse and broad range of factual circumstances that might become the subjects of legal scrutiny are channeled into discrete categories, ultimately susceptible to the application of rules and norms operating on such categories of facts—rules and norms which can be referenced in key word indices and treatises on specific subject matter.

[8] However, the creation of fixed categories with concrete legal implications has often been a feminist (and other) objective in law reform. Classification in this regard is seen as an alternative to more amorphous processes such as "balancing," "weighing," or other devices to implement judicial discretion—fixed rules are seen as preferable to unrestrained judicial bias. See Fineman, supra note 1, ch. 3, for a discussion of this phenomenon in the context of rules governing the distribution of property at divorce.

line drawing and assessments of similarity and difference, it seems clear that both as a process and in terms of fashioning responses, classification should be understood to be of a political nature. It will generate controversy. Murray Edelman has noted:

> The character, causes, and consequences of any phenomenon become radically different as changes are made in what is prominently displayed, what is repressed, and especially in how observations are classified. Far from being stable, the social world is therefore a chameleon, or, to suggest a better metaphor, a kaleidoscope of potential realities, any of which can be readily evoked by altering the ways in which observations are framed and categorized. Because alternative categorizations win support for specific political beliefs and policies, classification schemes are central to political maneuver and political persuasion.[9]

In addition to the problems inherent in classification, and whatever its institutional manifestations, problems exist because law must operate in a "practical" or pragmatic manner. Decisions must be made even if the processes are imperfect and the results unpopular. Given the demands made upon it and its limitations, one might conclude that the legal system works pretty well. But from a feminist perspective, focused on the material and legal position of women in our society, the nature and operation of the coercive power of law is cause for concern. Our critiques have an air of urgency (perhaps desperation) because the power of the system is so explicitly and immediately threatening to women.

The fact that the law relies so heavily on classification has meant that some part of the feminist project in law historically and contemporarily has been focused on the question of "differences." The assertion of differences has always been a basis for distinctions in legal treatment. The negative aspects of difference occupied feminist legal theorists' attention until fairly recently. Increasingly, however, and I would argue with evolving sophistication and complexity, feminist legal theorists are considering differences from an affirmative and creative perspective. Differences can be empowering—providing opportunity, not stigma. This assertion is made without the intent to obscure the fact that a focus on differences holds potential dangers for women. I do, however, believe the problems are not the same as they were even ten years ago. Our way of thinking about differences and the value we attach to them has evolved over time, and the feminist project in law should respond to these changes.

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[9] Murray Edelman, Category Mistakes and Public Opinion 1 (1992) (unpublished manuscript, on file with author).

The Initial Project—Women Into Law

At the turn of the century, the early feminist project in law was fairly clearly defined by the explicit nature of doctrinal assumptions about differences. Because of their perceived biological or "natural" attributes, women were considered appropriately excluded from the practice of law and other positions of public power. They were relegated to the private or family "sphere." In his much quoted concurring opinion in *Bradwell v. Illinois*, the Supreme Court case which upheld an Illinois prohibition on women practicing law, Justice Bradley explained that the civil law

> as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[10]

In the rhetoric of the *Bradwell* case as well as in other "protective" doctrines, women's perceived differences from men operated to exclude women from the "public" or market sphere—to set them apart, outside of the main avenues to power and economic independence.

These exclusionary consequences of differences led many feminist legal scholars and practitioners who finally did make it into the profession to argue for equality in terms of sameness of treatment as a matter of moral and legal right.[11] Assimilation was the goal, and difference was

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[10] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

[11] In a classic article on the subject, Wendy Williams expresses the concerns of those advocating for an equality model. While noting the "instinct to treat pregnancy as a special case," Williams warns:

> [T]he same doctrinal approach that permits pregnancy to be treated *worse* than other disabilities is the same one that will allow the state constitutional freedom to create special *benefits* for pregnant women. The equality approach to pregnancy . . . necessarily creates not only the desired floor under the pregnant woman's rights but also the ceiling . . . . If we can't have it both ways, we need to think carefully about which way we want to have it.
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> My own feeling is that, for all its problems, the equality approach is the better one. The special treatment model has great costs.
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> . . . At this point we need to think as deeply as we can about what we want the future of women and men to be. Do we want equality of the

suspect as easily translated into a basis for discrimination. Any arguments for consideration of differences were assailed as harboring the inevitable potential for exclusion and differentiation that harmed women. Feminist reformers attacked existing classifications and categories based on gender and favored a gender-neutral paradigm of equality that linguistically assumed and asserted sameness between men and women. The most ambitious of such symbolic reforms was the movement for the Equal Rights Amendment[12] to the Federal Constitution that, although it ultimately failed on a national level, mothered changes in some state constitutions forbidding distinctions based on sex.[13] The momentum for gender neutrality also produced other results, generating significant statutory and case law alterations in family law as well as in other doctrinal areas.[14] In general, it was clear to legal feminists in the 1960s and 1970s that the best way to ensure that perceived differences between men and women were not used to disadvantage women was to refuse to recognize any differences as legally relevant.

Differences and Perspectives

Contemporary circumstances suggest there may be significant problems with a continued overarching feminist denial of relevant differences between men and women.[15] Increasingly, there is recognition that a neu-

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sexes—or do we want justice for two kinds of human beings who are fundamentally different?

Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 Women's Rts. L. Rep. 175, 196, 200 (1982).

[12] H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972).

[13] Eighteen states and territories have constitutional amendments which specifically mandate sexual equality under the law. Alaska Const. art. I, § 3; Colo. Const. art. II, § 29; Conn. Const. art. I, § 20; Haw. Const. art. I, § 3; Ill. Const. art. I, § 18; La. Const. art. I, § 3; Md. Const. Decl. of Rts. art. 46; Mass. Const. pt. 1, art. I; Mont. Const. art. II, § 4; N.H. Const. pt. 1, art. II; N.M. Const. art. II, § 18; Pa. Const. art. I, § 28; P.R. Const. art. II, § 1; R.I. Const. art. I, § 2; Tex. Const. art. I, § 3a; Utah Const. art. IV, § 1; Va. Const. art. I, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. I, § 3, art. VI, § 1.

[14] See, e.g., Fineman, supra note 1; Marcus, supra note 1.

[15] For example, the rhetoric surrounding the equality debate has raised questions in the context of adoptions. Unmarried fathers are employing equality models to attack the rules that treat them differently than the child's mother in terms of due process and substantive rights when a child is to be placed for adoption. See Caban v. Mohammed, 441 U.S. 380 (1979) (single father who had lived with his children for five years may block adoption of children by withholding consent); Quilloin v. Walcott, 434 U.S. 246 (1978) (natural father who had never exercised custody over or legitimated the child could not object to adoption). See

tral equality model serves as an artificial limit on the feminist project in law, which is increasingly defined as the affirmative use of law to address the social inequities women experience in our society as the result of their gendered roles as wives and mothers. It has proved difficult to suggest remedies for unequal circumstances within an equality paradigm which emphasizes sameness of treatment and is suspicious of accommodation of differences. This revelation has been prompted in part by the recent evolution of feminist "perspective" scholarship.

The term "perspective scholarship"[16] encompasses an ever-growing body of work connected by the fact that it challenges the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions. In some regards, perspective scholarship is merely the most recent expression of a critical scholarly movement known as "legal realism," which during the 1920s and 1930s called into question the prevailing idea of law as an autonomous system of rules and principles. The early legal realists stressed the factual context of cases, not abstracted legal principles.[17] They urged the use of extra-legal material—such as that produced by social scientists—to aid in resolving the social and political issues that found their way into courtrooms and legislatures.[18]

Perspective scholars begin with the same initial skepticism about the objectivity and neutrality of law and legal institutions as the legal realists.

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also Lehr v. Robertson, 463 U.S. 248 (1983), (refusing to strike as unconstitutional a law that provided different procedures and rights to fathers of nonmarital children up for adoption than to mothers). In *Lehr* the Court found it significant that the father had not maintained a relationship with the child since her birth, quoting with approval Justice Stewart's dissent in *Caban*: "'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. . . . In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.'" Id. at 260 n.16 (quoting Caban, 441 U.S. at 397 (Stewart, J., dissenting)).

[16] Kimberle Crenshaw traces the ideal (and unreal) concept of "perspectivelessness" (an analytic stance that law has no specific cultural, political, or class characteristics) and the growing challenges to the ideal in the context of arguments for a race-conscious approach to specific legal issues. Kimberle Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1 (1989).

[17] See, e.g., Laura Kalman, Legal Realism at Yale 9–10 (1986).

[18] Id. at 17–18.

They also look to the social, cultural, and political, in addition to the legal, to provide a context for understanding the operation and impact of law in our society. The perspective scholar's definition of "law" is broad, and law is to be discovered in actions as well as in words—in the interpretation and implementation of rules as well as in their formal doctrinal expression. Law is not only something "out there"—an independent body of principles—but a product of society, acted upon and responsive to political and cultural forces. For this reason, it is as essential to understand societal and cultural forces as it is to decipher doctrine in order to understand "the law."

Perspective scholarship adds the explicit consideration of diverse perspectives to the realist, law-in-society tradition. Perspective scholarship is based on the premise that certain groups historically have been unrepresented in law and their exclusion has led to biases—an incompleteness or deficit in contemporary legal analysis and legal institutions. Furthermore, perspective scholars argue the corresponding contention that historically excluded groups have different, perhaps unique, views and experiences that are relevant to the issues and circumstances regulated and controlled by law. Perspective scholarship adds nuance to the traditionally rather monotone canvas of law. It adds the possibility of color and texture to the legal palette by introducing diverse and often divergent viewpoints based on the social and cultural experiences of race, gender, class, religion, and sexual orientation, for example. It makes more complete and more complex our consideration of the questions "what is law?" and "what are the roles and functions of law in our society?"

Questioning Neutrality

Indeed, the lessons learned from perspective scholarship have led some feminist legal scholars to assert that gender neutrality may ultimately be as oppressive to the interests of women as was the creation of differences exemplified by the *Bradwell* opinion.[19] In family law in particular this is clear, since women, as members of the gendered categories of wives and mothers, have borne the burdens of intimacy in our society. The presence of children creates dependency not only because the children are themselves dependent, but also because the person who assumes primary care for them is dependent on social and other institutions for accommodations so that such care can be delivered. However, institutions in our society do not facilitate the care of children, and sacrifices are expected in career plans and other goals if one is to have children. The same is true in regard to caring for the elderly or any dependent adult with whom one is

[19] See supra text accompanying note 10.

intimate and therefore feels responsibility. Typically it is women who bear the costs of the expectations associated with such intimate relations in our society. Women are not compensated for bearing these costs, and in the make-believe world of equality they are, in fact, penalized.

Neutral treatment in a gendered world or within a gendered institution does not operate in a neutral manner. There are more and more empirical studies that indicate that women's relative positions have worsened in our new ungendered doctrinal world.[20] Ignoring differences in favor of assimilation has not made the differences in gender expectations disappear. They operate to disadvantage women as the material implications of motherhood, for example, are realized in the context of career development and opportunity. Furthermore, even for women choosing to forgo gendered roles and to accept the male worker standard as the norm, entry into previously male-dominated institutions does not guarantee equality. Many such women encounter incremental obstacles to their advancement as glass ceilings and other impediments appear.

In the context of considering the limitations of assimilation as a goal, it is also important to remember that law is a conservative discipline, resistant to change. This is relevant given that the issue in the *Bradwell* case itself was the exclusion of women from the practice of law. This historic exclusion signals that there are significant problems for women's adherence to an equality or neutrality model. Law as an institution—its procedures, structures, dominant concepts, and norms—was constructed at a time when women were systematically excluded from participation. Insofar as women's lives and experiences were the subjects of law, they were of necessity translated into law by men. Even social or cultural institutions that women occupy exclusively, such as "motherhood," as legally significant categories initially were what I call "colonized categories"—defined, controlled, and given legal content by men. Male norms and male understandings fashioned legal definitions of what constituted a family, who had claims and access to jobs and education, and, ultimately, how legal institutions functioned to give or deny redress for alleged (and defined) harms. Existing concepts and categories have not been easily dismantled.

Women were, of course, politically active during the *Bradwell* era, and some sought to implement their views into law. Florence Kelley and

[20] This is true economically, as demonstrated by recent statistics. See, e.g., Victor R. Fuchs, Women's Quest for Economic Equality (1988). It is also true when legal results such as awards of custody in contested cases are considered. See Fineman, supra note 1, at 90 & n.35. For the latest statistics regarding divorce and the poverty of children, see Jason DeParle, Child Poverty Twice as Likely After Family Split, Study Says, N.Y. Times, Mar. 2, 1991, § 1, at 8.

others from the National Consumer's League, for example, attempted to introduce a "female standard" into employment law.[21] These early women reformers believed that the only way to achieve equality was through the legal recognition and accommodation of women's differences. Unfortunately, they had to rely on men to be the translators and transmitters of their views. This was a process fraught with peril; male legal actors such as Felix Frankfurter, comfortable with and in control of "Law," shaped and reshaped their feminist clients' ideas until they were no longer recognizable as such.[22] Difference was ultimately translated as inferiority, resulting in stigma and exclusion.

The desire to establish that there is a feminist or difference perspective that merits positive accommodation in law has not abated. Increasingly there is feminist resistance to the assimilation model which was the dominant approach after the *Bradwell* era. Contemporary attention to differences is grounded in the notion that law must take into account that there are significant differences between men and women in the ways in which they experience the world and that modification of specific doctrine is necessary to remedy power imbalances and to correct existing biases in laws that reflect only male norms and experiences.

An important distinction between our own era and that of *Bradwell* is, of course, that feminists are no longer dependent upon the Frankfurters of the world for the translation of our ideas. Women now occupy professorships, are members of the bar, and make up almost half of law classes. A few of us are even legislators and judges.[23] While the full integration of the profession is far from complete (especially at the most powerful levels), feminist women can at least give our own legal voice to our ideas. The current debate about differences is an example of what can happen when such voices are heard.

DIFFERENCES INTO LAW: THE CURRENT DEBATES

Any contemporary consideration of differences must first address the question of what are the legally relevant differences between men and

[21] For a documentation of this process in regard to the litigation involving industrial equality, see Sybil Lipshultz, Social Feminism and Legal Discourse, 1908–1923, in At the Boundaries of Law: Feminism and Legal Theory, supra note 1, at 209.

[22] Id.

[23] As of 1988 approximately 42% of those enrolled in law school were women. A Review of Legal Education in the United States, Fall 1988, 1988 A.B.A. Sec. Legal Educ. & Admission to B. 65. The Census Bureau reports that as of 1989, 22.3% of all lawyers and judges were women. U.S. Bureau of the Census, Statistical Abstract of the United States 395 (1991).

women. It is now generally, though not universally, conceded that narrowly defined reproductive roles represent a "significant" difference worthy of some legal accommodation, but there are questions as to whether anything else should be considered relevant.

The whole question of differences between men and women has generated a lot of debate in general outside of law, and unanswerable questions have arisen concerning causation and the respective roles of "nature" and "nurture." In other disciplines some feminists are concerned with definitively establishing that it is society and culture that construct gender roles and that there are no fundamental biological distinctions that produce differences between women and men.[24] I do not consider these debates to be of central importance to the feminist *legal* project—I believe engaging in them will only syphon energy needed for more immediate concerns. Law has a concrete, immediate impact on women's lives and legal feminists do not have the luxury of indulging in esoteric debates about the location of differences. My own position, if pushed, has been that, regardless of how fashioned, differences matter.[25] Upon the respective reproductive roles of the sexes are built social and cultural assumptions and expectations. These social and cultural constructs have significant material consequences that cry out for legal redress and remedy. Differences in this regard are "real." They are manifest, and are harmful to women.

The realization that differences exist, however, does not resolve much for a legal audience—in fact, it generates further questions. For example, what legal significance should any differences between men and women have—should, or must, they be accommodated? In law this is a question of remedies. A second set of legal questions concerns the possibility of law

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[24] For a discussion of the feminist debate over social construction of gender versus female essentialism, see Linda Alcoff, Cultural Feminism Versus Poststructuralism: The Identity Crisis in Feminist Theory, 13 Signs 405 (1988).

[25] Even if differences are considered to be socially rather than biologically constituted, nothing is resolved. Feminists who dawdle over this point seem to assume that social construction is easier to handle or alter than biological differences. I disagree. In fact, if it were merely biology, technology and medical innovations might be enlisted in the construction of an androgynous future. See supra note 3. Society is not easily manipulated. To state that something is socially constructed, in my opinion, is to concede that it is powerful and resistant to change. We all, even those of us who are critically inclined, must operate within our culture. None of us may totally escape it—to some extent it defines us all. The point is that differences, however constructed, have real material effects on women, and, for me, this means that the task of feminist legal theorists is to consider in what ways the law can remedy inequities that have occurred and that continue to operate to disadvantage women.

as a tool of reconstruction—can the law be used to eliminate some of the constructed differences, to assist in the project of fashioning an egalitarian, genderless world? Many legal feminists find themselves occupied in answering these questions. Increasingly more of us are concluding that the unequal and inequitable position of women can only be remedied through pervasive legal accommodation of difference.[26] Thus, for many American feminist legal scholars, there has been a move away from equality as one of *the* organizing principles of legal thought.

The Concept of a Gendered Life

In an earlier work I argued for the concept of "gendered lives" in order to legitimate differences based on the idea of a women's perspective rooted in the shared potential for a variety of experiences that are gendered in our culture.[27] In a world in which gender is more than semantics, feminist legal theory *cannot* be gender-neutral, nor can it have as its goal equality in the traditional, formal legal sense of that word. Feminist theory *must* be woman-centered, gendered by its very nature because it takes as its raw building material women's experiences. Since women live gendered lives in our culture, any analysis that begins with their experiences *must* of necessity be gendered analysis.[28] Addressing the real material consequences of women's gendered life experiences cannot be accomplished by a system that refuses to recognize gender as a relevant perspective, imposing "neutral" conclusions on women's circumstances.

In this earlier work I argued that this concept of gendered life begins with the observation that women's existences are constituted by a variety of experiences—material, psychological, physical, social, and cultural, some of which may be described as biologically based, while others seem more rooted in culture and custom. The actual *or* potential experiences of rape, sexual harassment, pornography, and other sexualized violence women may suffer in our culture shape individual experiences. So, too, the potential for reproductive events such as pregnancy, breast-feeding, and abortion have an impact on women's constructions of their gendered lives. I addressed the question of superficial similarities with the concession that while some gendered experiences are events that are shared with

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[26] See supra text accompanying notes 19–23.

[27] Fineman, supra note 2, at 37.

[28] See Catharine A. MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 Signs 515, 530–41 (1982) (discussing human sexuality as a gendered experience), 535 (discussing feminism as "the theory of women's point of view") (1982).

men, there is often a unique way in which these events are generally or typically lived or experienced by women as contrasted with men in our culture. I used the example of aging as a life event falling in this category, stating that "while both men and women age, the implications of aging from both a social and economic perspective are different for the genders in our culture."[29]

This concept of gendered life is my attempt to create a way to argue that a concept of differences is necessary to remedy socially and culturally imposed harms to women. Notice that the formulation of the differences debate is distinguishable from that of Justice Bradley's opinion in the *Bradwell* decision. In *Bradwell* differences were based on biology, nature, and, ultimately, on God, and they operated as an exclusionary device to limit women's participation. The contemporary difference argument by contrast is grounded in empirical realizations, in experiences, and in society and culture, and is an affirmative position, arguing for remedies, for differentiated treatment to rectify existing pervasive social and legal inequality.

An example of this type of sensitivity to differences is found in a recent employment discrimination case.[30] In that case, Judge Beezer (a Reagan appointee on the Ninth Circuit) adopted a "reasonable woman" standard for the assessment of allegations of sexual harassment:

> [W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common . . . .

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[29] Fineman, supra note 2, at 37. On the economics of aging for women, see Paul E. Zopf, American Women in Poverty 109–11 (1989).

[30] Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). However, the particular aspect of protectiveness evidenced in *Bradwell* may still be detected in court cases. See, e.g., International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), where the court sitting *en banc* upheld a company policy which banned women of child-bearing years from occupying particular positions of employment because of evidence that the exposure to lead incident in those positions would cause severe birth defects if a woman were to become pregnant. While this was later overruled by the Supreme Court, International Union, UAW v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991), the Court did not reject the basic premise of the lower court—that is, that all women should be viewed as potential mothers—but instead emphasized the woman's right to make choices regarding childbearing and pregnancy.

. . . .

> . . . [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[31]

The majority opinion adopted a reasonable woman standard in the recognition of the fact that women experience at least some aspects of the world differently than men. Judge Beezer was opposed to a purely subjective test and indicated that the "objective" reasonable woman standard was fashioned "[i]n order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee."[32] He noted that the court found it necessary to "adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[33] The court reversed the trial judge's finding that the woman, who had received "love letters" from a male colleague that she found frightening, had failed to state a prima facie case of hostile environment sexual harassment.

On a very significant level, the opinion in this case is a victory for feminist legal theorists who emphasize the different ways in which men and women in our culture experience events. Feminist legal writers' works are found in the text of the opinion.[34] Even more important, certain relevant aspects of women's gendered lives were not systematically ignored and male experiences were not adopted as the norm. In referencing the "real" world context of sexual violence toward women, Judge Beezer recognized that such reality can shape an individual woman's reception of amorous and insistent unwanted declarations of affection.

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[31] Ellison, 924 F.2d at 878–79 (citations omitted).

[32] Id. at 879.

[33] Id.

[34] Judge Beezer cites the following feminist writing in the area of sexual harassment:

> Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 Yale L.J. 1177, 1207–1208 (1990) (men tend to view some forms of sexual harassment as "harmless social interaction to which only over-sensitive women would object"); Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203 (1989) (the characteristically male view depicts sexual harassment as comparatively harmless amusement).

Id. at 878–79.

But, before feminists do too much celebrating,[35] we should be aware that the opinion also reflects an aspect of the difference debate with which feminist legal scholarship continues to struggle on a basic conceptual level. At the same time that Judge Beezer affirms that there are relevant legal differences between the social and cultural experiences of men and women, he assumes that a reasonable woman standard can be applied in the context of the fact-finding process. The opinion does make note of the

[35] Winning the battle is not winning the war. Compare *Ellison* with Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986), in which the court found that repeated propositions by a supervisor, slapped buttocks, and sexual comments from coworkers did not poison the work environment, and Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), in which a majority held that sexually explicit and derogatory remarks about women and pin-ups in the office did not seriously affect the female plaintiff's psychological well-being.

Another ominous note in regard to the progress being made in the sexual harassment area was the treatment that Professor Anita Hill received in her appearances before the Senate Judiciary Committee in conjunction with her allegations against Supreme Court nominee Clarence Thomas. Whether one believes that Hill was sexually harassed or not, it is clear that the manner in which her credibility was assessed reflected male bias and an ignorance of women's experiences even though the experience of sexual harassment is essentially a gendered event.

Throughout the Hill/Thomas hearings the nation watched (and overwhelmingly nodded agreement) as a woman was judged by an all-male panel and a predominantly male media who repeatedly raised questions as to why she would continue her employment with Thomas in the first instance and maintain contact with him after she left the Justice Department if she had in fact been sexually harassed. Senator Orrin Hatch, in particular, seemed to feel it was unbelievable that Hill did not do something drastic if things were as she reported.

I find it incredible that these men could think Hill's inaction was of any significance. Even if they choose to ignore the argument that many women in this position fail to act, their own experiences with (nonsexual) harassment from superiors who had power over them should have provided some insight into the dilemma someone in Hill's position would face. No doubt in their professional lives—as law students, as young associates in law firms or junior governmental officials—they have suffered humiliation, indignities, or insults at the hands of powerful supervisors, yet continued their employment and actively fostered continued contact for the future references and opportunities the person in the explicit position of power would supply.

The Senators and the male media did not place Hill's experience of sexual harassment in the context of "normal" power hierarchical relationships with which they might have had some basis for identification and empathy, however. Instead, and perhaps because the indignities and humiliation she suffered were sexual in nature, what transpired was the application of the tired, old, traditional, patriarchal male vision of female virtue and how it should be expressed—"death before dishonor."

possibility of relevant differences among women, but banishes any doubt that generates in the interests of protecting the employers from the "idiosyncratic concerns of the rare hyper-sensitive employee." Any potential differences among female perspectives are not the occasion for withholding a gender-specific new standard given the need that, the court concludes, exists for "[a] gender-conscious examination of sexual harassment [that] enables women to participate in the workplace on an equal footing with men."[36] While the distinction may be considered welcome and even necessary, the question arises whether recognition of this aspect of difference alone is enough. What about the "dilemma" presented by the recognition that there are relevant differences among women?[37]

Differences Among Women

The thorny theoretical question of what are the relevant differences among women and how they should be recognized and accommodated in feminist discourse has been one of the most hotly debated recent issues in the difference debates.[38] While I think feminists in general are to be commended for their concern with differences among women and their desire not to indulge in essentialism, I am concerned that recent developments seem to have paralyzed many—silencing or restricting voices as women determine that they cannot speak for anyone other than those women with whom they share major non-gender characteristics, such as class, sexual preference, or race.

Some writers have even gone so far in accommodating differences among women that they assert that there is no category of "woman" upon which we can build theory and/or assign social, cultural, or political considerations or consequences.[39] Others question whether we can speak even for ourselves—challenging the concept of "self," and asserting there are no unitary beings that exist over time, in space, to whom one can

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[36] Ellison, 924 F.2d at 879.

[37] Martha Minow develops the various aspects of the "dilemma," which she describes as "[t]he risk of recreating difference by either noticing it or ignoring it," in her new book. Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 40 (1990).

[38] See, e.g., Fineman, supra note 2; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990); Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617 (1990); Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989).

[39] For a further exposition of this view, see Patricia A. Cain, Feminism and the Limits of Equality, 24 Ga. L. Rev. 803, 838–41 (1990).

pretend to give coherent voice.[40] We are, thus—either in a group, a cluster, or as an individual—deconstructed.[41] I have a lot of problems with the politics and implications of these discourses.

It is important to remember in the context of *legal* feminism that as the questioning of "categories" (in fact, the questioning of the whole process of categorization) goes on, society has generated, and continues to recreate and act upon, universalized, totalizing cultural representations of women and women's experiences. Even those critical of cultural constructions of essentialist images of women must recognize the force these images hold. None of us completely escapes the dominant images of the society within which we operate. Interpretation of life events, the processes whereby events are given meaning, is not an atomistic, individualistic procedure. Social action and interaction, as well as dominant cultural images, significantly contribute to individual interpretation of and reaction to events. Furthermore, the law utilizes and facilitates the construction of these totalizing social and cultural images.

Consider the institution of motherhood, for example. I have argued elsewhere that *all* women must care about social and legal constructions of motherhood, because, although we may make individual choices not to become a mother, social construction and its legal ramifications operate independent of individual choice.[42] As is demonstrated by a case like *Johnson Controls*,[43] women will be treated as mothers (or potential mothers) because "Woman" as a cultural and legal category inevitably encompasses and incorporates socially constructed notions of motherhood in its definition.[44] In addition, it is important to note that although the social and legal construction of motherhood occurs in a variety of different contexts, there is a common image of "mother" which emerges. A comparison of images of single motherhood which emerge in both poverty and in divorce discourses, for example, demonstrates that concepts and totalizing

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[40] See id. at 806–10.

[41] Robin West has voiced a powerful critique of this deconstruction fetish as manifested in law. See Robin West, Feminism, Critical Social Theory and Law, 1989 U. Chi. Legal F. 59, 84–89. See also Drucilla Cornell, The Doubly-Prized World: Myth, Allegory and the Feminine, 75 Cornell L. Rev. 644 (1990).

[42] Martha L. Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J. 274, 276–77.

[43] International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), rev'd, 111 S. Ct. 1196 (1991).

[44] See Martha Albertson Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, 23 Conn. L. Rev. 955 (1991), for a discussion of how law uses the "natural family" as its ideological paradigm, thus incorporating socially constructed ideals of family.

"ideals" tend to cross over.[45] The ideas (and ideals) forged in one context constrain and direct the debates in another.[46] Motherhood as a totalizing, culturally defined institution is applied across race and class lines. She is objectified—heterosexual, ideally married, chaste, self-sacrificing, etcetera—a rather statistically improbable and oppressive construct. This process of objectification is inevitable, although the form of the image may be up for reconstruction:

> It is the *expression* of ideas that makes it possible to hold them, think about them, react to them, and spread them to others. There must be an image, as articulated in art, in words, or in other symbols. The notion that an idea can somehow exist without objectification in an expression of any kind is an illusion, though the expression may take the form of a term or image in one's own mind: i.e., as a contemplated exchange with others.[47]

The assertion that there is a totalizing tendency represented in the social and legal construction of women as "Women" suggests there is a basis for women working together across their differences. This rather hopeful twist on the oppressive extent of gender stereotyping is premised on its utility for unifying different groups of women. Using the concept of gendered lives that I earlier developed to distinguish women's from men's lived experiences in our culture, it is possible to see some unifying potential in the very extensiveness of the cultural stereotype. The existence of the social construction suggests that, while few could legitimately dispute that characteristics such as race, class, and sexuality are significant to one's experiences, it is an error for women to proceed as though these differences were *always* relevant. I earlier listed characteristics I considered relevant in addition to race, class, and sexual orientation. For example, I believe that

> age, physical characteristics (including "handicaps" *and* "beauty" or the lack thereof), religion, marital status, the level of male identification (which is independent of both marital status and sexual preference—what Gerda Lerner has referred to as "the man in our head"[48]), birth order, motherhood, grandmotherhood, intelligence,

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[45] See Fineman, supra note 42, at 275.

[46] Id. at 276.

[47] Edelman, supra note 9, at 11.

[48] From conversations between Gerda Lerner and the author. By the term "man in our head," reference is made to the masculinist culture and society that defines for us what is right and wrong, good and evil, male and female—a male voice of authority that is internalized and operates as a social control. For a general discussion of male hegemony over that which is defined socially as "universal truth," see Gerda Lerner, The Creation of Patriarchy 219–29 (1986).

> rural or urban existence, responsiveness to change or ability to accept ambivalence in one's personal life or in society, sources of income (self, spouse or state), degree of poverty or wealth, and substance dependency, among others[49]

shape existence in both how individual women experience the world and how others, particularly those in power, relate to them. Women also have characteristics or clusters of characteristics related to the gendered aspects of their lives that have social and legal significance and, therefore, give women a basis for cooperation and empathy across their differences.

CONCLUSION

Note that the concept of a gendered experience is an attempt simultaneously to open a space for women's perspective in law as distinct from men's, and to provide the occasion for unity among women over some specifics of their lives. Because gendered experiences focus us on specific experiences, hopefully they can avoid perpetrating an idealized, universal notion of "Woman." Attention to the force that an imposed (and in that sense, therefore, "common") socially constructed concept of gender exercises upon aspects of all women's lives also presents an opportunity for diverse women to participate in resisting that imposition. Women can coalesce across differences to work together on the project of defining for ourselves the implications and ramifications of the gendered aspects of our lives. In other words, I'm interested in exploring whether it is possible to have an *affirmative* politics of difference that defines groups and classifications tenuously, whereby group identification is recognized as politically necessary, but is also seen, in the words of Marion Young, as "ambiguous, relational, shifting," without "clear borders" that bind people in all circumstances for all time.[50] Women need not be considered to be inevitably either in opposition to or having little in common with other women

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[49] Fineman, supra note 2, at 39–40 (footnote omitted).

[50] I. Marion Young, Justice and the Politics of Difference 171 (1990). Young argues that in this way women of different races, classes, and sexual preferences can seize the power of naming their differences as women without being frozen into essentialist categories. Differences can be understood and accommodated in the context of specificity, variation, and heterogeneity. She defines this as "relational understanding" of difference. The relevance of differences depends on context and shift in the contexts.

because of non-gender group differences. Women will converge to organize around overlapping experiences.[51]

My hopes for a development of the concept of gendered lives as a creative way to address both distinct aspects of the differences debate may be too optimistic. I am convinced, on the other hand, that the renewed interest in difference in feminist legal theory that has occurred during the last decade is positive because it reaffirms that our struggle over content and meaning in law is inherently political and that perspectives count. I recognize that the focus on difference is fraught with potential pitfalls, particularly if used to divide women, diluting our collective potential as a group to challenge male defined and controlled gendered notions of law that systematically disadvantage women in a variety of contexts. I defend my attempt here by stating only that this paper is the beginning of my search for pragmatic ways for legal feminists to work with law, recognizing its gendered nature *and* the need for the contexts supplied by considerations of differences.

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[51] A gendered experience approach is also consistent with the philosophy underlying feminist methodology since it focuses on the concrete, not the abstractions of women's lives. In feminist theory, methodology is step-by-step a part of theory. For the most part, feminist methodology is about making theory more concrete, bringing in stories and other ways of identifying and describing women's experiences as they exist and as they have been left out of the legal system. Angela Harris refers to shifting methodology as a way to get around dangerous gender essentialism. See Harris, supra note 38. Deborah Rhode turns to it as a way to assure that critical theory does not become so abstract as to remove itself from women's experiences. See Rhode, supra note 38. Methodology, not always explicitly as such, includes literature (Adrienne Rich is as quoted as any legal scholar) and psychology (note the role of Carol Gilligan's book, In a Different Voice: Psychological Theory and Women's Development (1982)) as a way of bringing in women's experiences seemingly excluded from traditional legal rhetoric.

Katharine Bartlett argues that feminist method is feminist theory. Her recommended method of "positionality" suggests that truth shifts according to position but that feminists must try to posit this contingent truth—yet be willing to change. Bartlett says that asking the "woman question" is what starts feminist method; she then discusses the importance of "practical reasoning" and consciousness-raising. She criticizes both Robin West and Catharine MacKinnon for what she calls "standpoint epistemology" because it cannot adequately describe or follow feminist knowing. These epistemologies rely too heavily on essentialism to take account of real knowledge. She also criticizes postmodern—deconstructionist—method because it cannot move past its own sense of contingency to recommend reform. Bartlett says her argument for "positionality" recognizes the contingency of a truth but allows the feminist reformer to embrace a truth long enough to advance reform and explore experience. Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829 (1990).