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A Survey of Feminist Jurisprudence

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"Feminist scholarship makes sense only in the context of an overwhelmingly sexist science."

Margit Eichler
The Double Standard: A Feminist Critique of Feminist Social Science (1980)

One of the earliest recorded uses of "feminist jurisprudence" was at a 1978 Harvard Law School celebration commemorating the twenty-fifth anniversary of the institution's first women graduates.[1] A panel of judges, lawyers, and legal educators at that event debated the most basic of questions regarding the enterprise: Was there in existence or should there be developed a feminist jurisprudence? Apparently the consensus reply to both queries was then no, perhaps in part because the label invoked images of political cries for special legal treatment for women.[2]

In spite of that early rejection of the project's "packaging" and imperative, a feminist jurisprudence—both movement and dis-

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1. Carol Smart asserts that feminist jurisprudence originated in the nineteenth century, even though such a concept was not recognized by the feminists of that era. Women's movements then had their grounding in the liberal philosophy of equal rights, protesting material restrictions upon women such as bars to educational and political opportunities. *See* Carol Smart, *Feminist Jurisprudence, in* SUPPLEMENTARY JUSTICE (Peter Fitzpatrick ed., 1990) [hereinafter Smart, *Feminist Jurisprudence*].

2. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 193 (1989) [hereinafter Cain, *Grounding the Theories*] (attributing to Professor Ann Scales, then a Harvard law student, who moderated the debate); Ann C. Scales, *Towards a New Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) [hereinafter Scales, *New Feminist Jurisprudence*]. *See also* Kathleen A. Lahey, . . . *Until Women Themselves Have Told All They Have to Tell* . . . , 23 OSGOODE HALL L.J. 519, 520, 524 (1985) [hereinafter Lahey, *Until Women Themselves*] (quoting MARGIT EICHLER, THE DOUBLE STANDARD: A FEMINIST CRITIQUE OF FEMINIST SOCIAL SCIENCE (1980) (noting the argument against feminist legal theory that it is not really scholarship because it is too overtly political to be anything other than polemic).

Although I am uncertain about all the reasons why this particular panel at

cipline in one—has emerged.[3] It is at once a critique within legal scholarship and education and a challenge to the structure of those institutions.[4] To call it a movement is to acknowledge that it adopts an admitted and self-consciously critical stance toward orthodox jurisprudence and is focused upon the common goals of raising the law's awareness and understanding of, as well as its responsiveness to, women as women.

To label it as a discipline, however, is not to imply that it is organized around a single theory.[5] Consistent with feminist goals in other contexts, much feminist jurisprudence avoids "theory" altogether, choosing instead to focus upon the practical reality of women's experiences and concerns. In fact, one of the only remaining unifying themes of feminist jurisprudence—yet still one about which different strands vary as to its centrality and importance—is that women's experience must be revealed and communicated.[6] The women's "truths"[7] revealed in turn provide a stance from which one

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Harvard rejected the need for a feminist jurisprudence, British sociologist Carol Smart has articulated her own reason for rejecting the concept. She asserts that any search for feminist vision that can help reform the law is idealized, noting that only when the "central role of law as an organizing principle of everyday life is . . . challenged" can we rebut the assumed need for some form of jurisprudence. *See* Smart, *Feminist Jurisprudence, supra* note 1, at 17.

3. Interestingly, as recently as two or three years ago, some denied that a feminist jurisprudence had yet developed, preferring to refer to it as "feminist legal theory." *See, e.g.*, Cain, *Grounding the Theories, supra* note 2, at 194 n.12; Adrian Howe, *'Social Injury' Revisited: Towards a Feminist Theory of Social Justice*, 15 INT'L J. OF SOC. OF LAW 423, 428 (1987) [hereinafter Howe, *'Social Injury' Revisited*]; Christine A. Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1 (1987) [hereinafter Littleton, *Search*]; Jenny Morgan, *Feminist Theory as Legal Theory*, 16 MELB. U. L. REV. 743 (1988) [hereinafter Morgan, *Feminist Theory as Legal Theory*]. Other less recent admissions of the struggle to develop this area include Catharine MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National Conference on Women and Law, Washington, D.C. (April 9, 1983), *quoted in* Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1986) [hereinafter Wishik, *To Question Everything*]; Scales, *New Feminist Jurisprudence, supra* note 2.

4. Littleton, *Search, supra* note 3, at 2.

5. *See generally* John Shotter & Josephine Logan, *The Pervasiveness of Patriarchy: On Finding a Different Voice, in* FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE (Mary McCanney Gergen ed., 1988) (questioning whether a distinctly feminist practice or comprehensive mode of thought can exist in our patriarchal culture).

Although feminist jurisprudence generally is not centered on one theory, some individual strands of it represent meta-narrative, such as MacKinnon's brand of radical feminism. *See infra* text accompanying notes 75-93.

6. *See infra* notes 102-15 and accompanying text (discussing methodology and epistemology); *accord* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 621 (1990) [hereinafter Rhode, *Critical Theories*].

7. It is important to note that many feminist legal theorists reject the potentiality

can, and a basis upon which one may, critique the method, procedure, and substance of the law, offering both supplementation and correction. Feminist legal scholars frequently write in reformist terms—"of challenging, subverting, or transforming legal relations at their core."[8] They question vested interests, uproot familiar and comfortable perspectives, and defy the status quo.[9] They are suspect of the highly structured nature of legal method, the form and patterns of legal inquiry and decision-making, and legal "ways of knowing."[10]

As feminist jurisprudence has developed in the last decade, the label has continued to be somewhat problematic. It has been referred to as an "oxymoron"[11] and a "conceptual anomaly"[12] and likened to "a modern quest for the Holy Grail."[13] The common theme of these commentators—most of whom are not hostile to the movement/discipline—is that the traditional, dominant jurisprudence is so masculine that any feminist perspective on it is inaccurate or, at best, strictly marginalized in the current patriarchal society.[14] Some carry

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of discovering any single unifying "women's" truth, although they believe that each individual woman may discover her own truth through methods such as consciousness-raising. *See infra* notes 103-07 and accompanying text.

One of the paradoxes of feminist jurisprudence is reflected here: the conflict of individuality of experience among women with the search for a unifying experience from which we can formulate an agenda for legal change.

8. Littleton, *Search, supra* note 3, at 2.

9. *See generally* Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WIS. WOMEN'S L.J. 147 (1987) [hereinafter Mossman, *Feminism and Legal Method*] (quoting A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES (E. Langland and W. Gove eds., 1981)).

10. *See id.* at 149, 167; *see generally* Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) [hereinafter Bartlett, *Feminist Legal Methods*]; Cain, *Grounding the Theories, supra* note 2; Lahey, *Until Women Themselves, supra* note 2, at 527; Dennis Patterson, *Postmodernism/Feminism Law*, 77 CORNELL L. REV. 254 (1992) [hereinafter Patterson, *Postmodernism/Feminism*]; A. W. Phinney III, *Feminism, Epistemology and the Rhetoric of Law: Reading* Bowen v. Gilliard, 12 HARV. WOMEN'S L.J. 151 (1989).

11. Ann C. Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

12. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) [hereinafter West, *Jurisprudence and Gender*].

13. Smart, *Feminist Jurisprudence, supra* note 1, at 17 (citing CAROL SMART, FEMINISM AND THE POWER OF LAW (1989)). As Moira Gatens has written in a theoretical context, "there cannot be an unadulterated feminist theory which would announce our arrival at a place where we could say we are 'beyond' patriarchal theory and patriarchal experience." Moira Gatens, *Feminism, Philosophy and Riddles Without Answers, in* FEMINIST CHALLENGES 26 (C. Pateman & E. Gross eds., 1986).

14. For example, Catharine MacKinnon has asserted that the female cannot articulate her own definitions, goals or thoughts "because *his* foot is on *her* throat." Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Con-*

the argument a step further, asserting that the establishment or endorsement of any form of jurisprudence is antithetical to feminism and that feminists should be challenging the "central role of law as an organizing principle in everyday life."[15]

My[16] discomfort with (but not outright rejection of) the "feminist jurisprudence" label stems from somewhat different concerns. In essence, I believe it may no longer accurately reflect the nature of the project—or at least what I believe the project should be and do. First, it evokes images of an "us-them" mentality, which contributes to the misunderstanding and defeat of the enterprise, as well as to the continued isolation of women. Just as it defines, it also marginalizes. Secondly, I agree with Katharine Bartlett, who has asserted that use of the "feminist" label provokes assumptions of a standard woman; it is a "fixed, exclusionary, homogenizing, and oppositional" term—one embracing an essentialism that feminists

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versation, 34 BUFF. L. REV. 11, 74 (1985) [hereinafter DuBois et al., *Feminist Discourse, A Conversation*] (emphasis added). *See also* Mossman, *Feminism and Legal Method, supra* note 9, at 148-49 (questioning the extent to which feminist theory can impact the structure of legal inquiry); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 84 (1980) (noting that because law plays a "primary and significant role in social order" it is powerful as both a "symbol and vehicle for male authority"); West, *Jurisprudence and Gender, supra* note 12, at 4 (explaining that feminists take women's humanity seriously, but jurisprudence and law do not, and until this changes "feminist jurisprudence" is a political impossibility). *But see* Cain, *Grounding the Theories, supra* note 2, at 193-94 (asserting that women who have at some point rebelled against patriarchy have experienced at least "glimpses" of their own authenticity).

15. *See* Smart, *Feminist Jurisprudence, supra* note 1, at 17. Smart also criticizes the point at which "feminist jurisprudence becomes almost a messianic movement and [where] notions of the limits of the ability of law (whether feminist or not) to transform social reality are forgotten." Smart, *Feminist Jurisprudence, supra* note 1, at 19.

Most recently, commentators have begun to state this critique in political philosophy parlance: Feminists must bypass the modernist perspective of law—a system employing concepts of objectivity, truth, and reason—and embrace the post-modern perspective, with its themes of practice, critique, and localism. *See* Patterson, *Postmodernism/Feminism, supra* note 10.

16. My use of the first person throughout this article is purposeful. One important aspect of the feminist critique of law (as well as of the Critical Legal Studies movement) has been the expressed doubt of law's purported objectivity and an emphasis on feminist methodology. Such methodology admits the subjective, personal perspective. *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886-87 (1989) [hereinafter Finley, *Gendered Nature of Legal Reasoning*]. Kathleen Lahey has commented on dominant ideology's "condemnation of feminist 'subjectivity' or 'polemic'," noting that its "privileged stance of (universalist) male scholars gives them the authority to declare other scholars to be deficient in some crucial quality." Lahey, *Until Women Themselves, supra* note 2, at 526.

have criticized in dominant jurisprudence.[17] Women of color, for example, have objected vigorously to such essentialism, decrying white, middle-class feminism's attempt to set a single standard, to state a single description of, and agenda for, all women.[18]

Moreover, because much of the current feminist jurisprudence posits a gender-oriented rather than sex-oriented analysis, it tends to perpetuate stereotypes—sometimes harmful ones—about the nature of women. This reinforces identification of women, or at least of the "feminine," with certain characteristics and traits, an identification that, even if currently an accurate description, in the long run limits choices and possibilities for both women and men. Some scholars, perhaps sharing early reservations about embracing the "feminist" label, have begun to speak simply of gender and gendered analyses.[19] I, however, am doubtful that this alternate label truly resolves the problem. While it is more politically palatable to many, it still implicitly adopts gender rather than sex, which (usually) determines gender, as the primary (and sometimes essential) category for analysis. It plays off of a feminine-masculine dichotomy, thereby representing the very sort of dualism rejected by many feminist scholars.[20]

The substance of the project is, at any rate, at least as important

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17. Bartlett, *Feminist Legal Methods, supra* note 10, at 834; Patterson, *Postmodernism/Feminism, supra* note 10.

18. *See generally* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anarchist Politics, in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 57 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory, in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 235 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); *see also* DEBORAH L. RHODE, JUSTICE AND GENDER (1989); Rhode, *Critical Theories, supra* note 6.

19. *See generally, e.g.*, RHODE, JUSTICE AND GENDER, *supra* note 18; West, *Jurisprudence and Gender, supra* note 12; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

20. *See* Patterson, *Postmodernism/Feminism, supra* note 10.

Labelling may, at the outset, seem an insignificant issue. Leslie Bender has opined, however, that labels are divisive and cause ideas to "become fixed instead of remaining fluid and growing." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 5 n.5 (1988); *see also* Patterson, *Postmodernism/Feminism, supra* note 10. At this stage, however, they seem helpful, perhaps still necessary. And if feminist jurisprudence is able to achieve its goals, the issue will have been resolved, as the discipline/movement will have integrated and compromised traditional (patriarchal) jurisprudence so that it no longer needs a distinguishing signifier.

as the name, and I now turn to a brief historical overview of feminist jurisprudence. Following that, I discuss briefly some of the more prominent analyses within feminist jurisprudence, seeking to be particularly critical nor to provide novel insights, but rather to provide the feminist jurisprudence novice some rudimentary information. I also attempt to reveal some of the paradoxes within and among these strains in order to help formulate an agenda about feminist jurisprudence might best go forward.

I. A Brief History of Feminist Jurisprudence

Feminist jurisprudence began with an attempt to cure women's obscurity and even invisibility in the law. This was reflected in the "women *and* the law"[21] approach of the 1970s, a strategy that soon demanded a shift in methodology as it became evident that to "add women and stir" was inadequate.[22] These attempts were nevertheless helpful initially, as they drew attention to women and put some of women's concerns on the political agenda, being particularly instrumental in the early development of discrimination doctrine.[23] Carried to its logical conclusions, however, the approach often proved problematic because as the sameness versus difference and special treatment versus equal treatment debates evolved, women (along with what had been labeled "feminine" values) were usually evaluated by both male (biologically speaking) and masculine (socially speaking) standards.[24]

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21. *See generally, e.g.*, Susan Atkins and Brenda Hoggett, Women and the Law (1984); Karen Offen, *Feminism and Sexual Difference in Historical Perspective*, *in* Theoretical Perspective on Sexual Difference (Deborah Rhode ed., 1990); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984).

22. *See, e.g.*, Wishik, *To Question Everything*, *supra* note 3, at 67-68 (arguing that mere inclusion is not the goal of feminist jurisprudence).

23. *See generally* Rhode, Justice and Gender, *supra* note 18, at 81-107.

24. This dilemma is well reflected in the debate surrounding the quest for ratification of the Equal Rights Amendment to the U.S. Constitution. From 1972, when the U.S. Senate and House of Representatives passed the amendment, until the 1982 state ratification deadline, the campaigns for and against ratification often focused upon gender difference rather than upon gender disadvantage/hierarchy, conferring more importance upon formal rights than upon cultural context. *See generally* Rhode, Justice and Gender, *supra* note 18, at 63-80, 306-07.

See also, e.g., Elizabeth Wolgast, Equality and the Rights of Women (1980); Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. Sch. L. Rev. 309 (1990); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913 (1983); Catharine MacKinnon,

The next wave of feminist analyses sought to overcome these limitations by shifting epistemological and methodological focus. Feminists found themselves unable to ignore methodology, having learned that challenging existing power structures with the same methods that defined those structures risked recreation of different, but equally illegitimate frameworks.[25] Included in these second-stage approaches have been relational or cultural feminism's "celebration of difference,"[26] radical feminism's gendered hierarchy/dominance framework,[27] and the public-private (market-family) dichotomy.[28] Other less prominent analyses have included variations on and even com-

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Excerpts from MacKinnon/Schlafly Debate, 1 LAW & INEQ. J. 341-42 (1983); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 634-35 (1986) [hereinafter Schneider, *Dialectic of Rights and Politics*]; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

25. *See* Bartlett, *Feminist Legal Methods*, *supra* note 10.

26. *See generally, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) [hereinafter GILLIGAN, DIFFERENT VOICE]; 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 in a Different Voice*]; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); West, *Jurisprudence and Gender*, *supra* note 12.

27. *See generally, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST STATE] (constructing a theory of gender hierarchy and dominance); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; RHODE, JUSTICE AND GENDER, *supra* note 18, at 1-6, 81-86, 305-21 (specifically preferring the term "gender disadvantage" to MacKinnon's "gender dominance"). *See also* Marie Ashe, *Mind's Opportunity: Birthing a Post-structuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987) [hereinafter Ashe, *Mind's Opportunity*].

28. *See generally, e.g.*, KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN LAW (1985); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY (1989) [hereinafter OKIN, GENDER AND FAMILY]; Nadine Taub and Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (David Kairys ed., 1982); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Nancy E. 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) [hereinafter Dowd, *Work and Family*]; Elizabeth FOX-GENOVESE, *The Legal Status of Families*, 77 CORNELL L. REV. 992 (1992); Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997 (1992); Francis Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *Family and Market*].

See also SUSAN ATKINS AND BRENDA HOGGETT, WOMEN AND THE LAW 101-23 (1984); MARILYN WARING, IF WOMEN COUNTED (1988); Regina Graycar, *Hoovering as a Hobby: The Common Law's Approach to Work in the Home*, 28 REFRACTORY GIRL 22 (1985); Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

binations of these.[29] A few merit independent mention, such as Tove Stang Dahl's "women's law," which incorporates what she calls realist, experiential method and social science.[30] Others include a social injury approach,[31] and a standpoint/positionality approach, the latter generally advocating consciousness raising and legal narrative or story-telling as method, and focusing on women's experience to inform solutions.[32] The categories are not static, and the doctrinal combinations are seldom simple.[33]

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29. One exception might be that stated by Robin West, who asserts that both radical feminists and cultural feminists implicitly embrace some version of what she calls a "connection thesis." This thesis is that "[w]omen are actually or potentially materially connected to other human life [while m]en aren't." West, *Jurisprudence and Gender, supra* note 12, at 14. West identifies this in cultural feminism's emphasis upon women's subjectivity, their value of intimacy, and their capacity for nurturing and care of "others" to whom they are connected. She identifies this in radical feminism's focus upon invasion and intrusion of the female body. West, *Jurisprudence and Gender, supra* note 12 at 15.

Furthermore, some commentators have found merit in both systems of thought, finding them not necessarily to be mutually exclusive. Jenny Morgan has written that both Gilligan and MacKinnon are correct—the former because theory about women's different approaches to problem solving validates the feelings many women have had about legal education and practice, and the latter because Morgan doubts that women are inherently different in their approaches to decision making and is skeptical that women would embrace such an ethic of caring if they really had a choice. *See* Morgan, *Feminist Theory as Legal Theory, supra* note 3.

30. *See generally* TOVE STANG DAHL, WOMEN'S LAW—AN INTRODUCTION TO FEMINIST JURISPRUDENCE (R.L. Craig trans., 1987) [hereinafter DAHL, WOMEN'S LAW]; Tove Stang Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. OF SOC. OF LAW 239 (1986) [hereinafter *Dahl, Taking Women as a Starting Point*] (addressing feminist perspectives within the tradition of black letter law). *See also* Agnete Weis Bentzon, *Comments on Women's Law in Scandinavia*, 14 INT'L J. OF SOC. OF LAW 249 (1986); Smart, *Feminist Jurisprudence, supra* note 1, at 1 (commenting upon Dahl's work).

31. *See generally* Howe, *'Social Injury' Revisited, supra* note 3; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter Matsuda, *Considering the Victim's Story*].

32. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); Bartlett, *Feminist Legal Methods, supra* note 10; Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1987); Patterson, *Postmodernism/Feminism, supra* note 10.

33. An example of the complimentary nature of these various theories and analyses can be seen in Catharine MacKinnon's work. Although I categorize her as a radical feminist (as she herself does), she claims consciousness-raising as her methodological and epistemological approach, *see infra* notes 102-09, and she discusses the import of the public-private dichotomy's functioning in law, *see infra* notes 94-101. MACKINNON, FEMINIST STATE, *supra* note 27, at 182-94 (discussing abortion).

II. WOMEN AND THE LAW

Most early (c. pre-1980) writing about law's treatment of and attitudes toward women falls loosely within this category. Such writings usually addressed matters traditionally considered "women's issues," including rape, reproductive rights, and workplace discrimination. By this time, most "formal" barriers to women's political and professional participation had been dismantled, but situations unique to women—most related to their biological nature—still appealed for legal understanding and action. The U.S. Supreme Court had not, and still *has* not, accepted gender as a "suspect classification," thus failing to accord women the same degree of protection against discrimination that it has provided other groups that are vulnerable on the basis of their race, religion or national origin.[34] As women continued to experience harassment, disparate treatment, and unequal opportunities in different contexts—discrimination in forms for which the law provided no redress—they began to look for new solutions. Once again, an early strategy was to raise women's visibility,[35] to draw attention to their situations which, all too frequently, evinced their economic, social and even physical plight.

These activists did enjoy some successes. For example, even though *Roe v. Wade*,[36] the 1973 abortion rights decision of the U.S. Supreme Court, spoke in terms of the right of privacy rather than recognizing women's reproductive freedom, it was nevertheless a victory for women. Other achievements came in the area of rape law reform. Marital immunity from rape prosecution was abolished in some states,[37] and rape shield laws were adopted to suppress the salacious and irrelevant innuendo in rape trials.[38]

Also contributing to the debate in the United States was the 1972 U.S. Senate and House of Representatives passage of the Equal Rights Amendment and the ensuing ratification contests in the individual states. Discussion and campaigns ultimately focused on

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34. *See generally* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, 713-31 (2d ed. 1983).

35. The phrase "once again" is appropriate here because this task had already been accomplished, if only temporarily and partially, during the suffrage movement of the early twentieth century. *See generally* RHODE, JUSTICE AND GENDER, *supra* note 18, at 12-28.

36. 410 U.S. 113 (1973).

37. *See generally* SUSAN ESTRICH, REAL RAPE, 72-79 (1987) [hereinafter ESTRICH, REAL RAPE]; DIANNA RUSSELL, RAPE IN MARRIAGE, ch. 2 (2d ed. 1990) [hereinafter RUSSELL, RAPE IN MARRIAGE].

38. *See generally* ESTRICH, REAL RAPE, *supra* note 37, at 57, 88.

whether a formal prohibition against gender classifications would in fact improve women's legal status and lives. With these issues high on the political agenda and dominant in the media through the 1970s, it was not surprising that some legal scholars continued to seek legal solutions to women's problems. Nor was it surprising that the preferential-versus-equal treatment and sameness-versus-difference debates soon dominated the discussion.[39]

III. CULTURAL/RELATIONAL FEMINISM

The same decade that saw the political activism of liberal feminists advocating equality within the law also, paradoxically, saw feminist academics in other disciplines rediscover and focus upon the differences between men and women.[40] The germinal work grounding what has become known as relational or cultural feminism is Carol Gilligan's 1982 book, *In a Different Voice*. Based on her research in developmental psychology, Gilligan posited that, contrary to previous studies, females are not inferior to males with regard to development of their moral decision-making faculties.[41] In the "feminine" decision-making process, Gilligan identified a "different voice"—a voice grounded in a "standard of relationship, an ethic of nurturance, responsibility, and care."[42] According to Gilligan, this standard of responsibility manifests itself in a different moral imperative for women.[43] In the final analysis, she defines the masculine voice as a rights-based ethic of justice and the feminine as a relational-oriented ethic of caring. In a sense, Gilligan's work reflects a "separate but equal" idea; she has not so much advocated changing or adapting what she labels the "feminine," as she has a greater appreciation of its value in our society.

While the relational/cultural feminist analysis inspired by Giligan's work has lent itself more easily to many of the family, workplace, and discrimination issues, it has provided little insight about other issues including sexual violence against women. And, while it might have been considered prescriptive with regard to those issues where it found direct application, the prescription was usually that women could, and perhaps should, find happiness and satis-

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39. *See, e.g.*, Bartlett, *Feminist Legal Methods, supra* note 10; Wishik, *To Question Everything, supra* note 3.

40. *See, e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING (1978); DOROTHY DINNERSTEIN, THE ROCKING OF THE CRADLE (1978); GILLIGAN, DIFFERENT VOICE, *supra* note 26.

41. *See* GILLIGAN, DIFFERENT VOICE, *supra* note 26, at 18-22, 25-40 (referring to Lawrence Kohlberg's 1958, 1973 and 1981 studies, which had determined girls inferior to boys in regard to the development of their capacity for moral reasoning and decision-making).

42. GILLIGAN, DIFFERENT VOICE, *supra* note 26, at 159-60.

43. GILLIGAN, DIFFERENT VOICE, *supra* note 26, at 100.

faction in their present nurturing roles and, essentially, that they should celebrate their difference, their own accomplishments, and be content.[44] Society, in turn, should attribute greater value to these characteristics and roles.

Others adopted Gilligan's view of gender difference and began to utilize this "feminine" motif as critique of the dominant ideology. A significant corpus of literature affirming and applying her theory proliferated in the 1980s, with her masculine-feminine dichotomy[45] finding application in numerous legal contexts. These have included legal education[46] and practice,[47] children's rights,[48] employment discrimination,[49] sexual harassment,[50] mediation,[51] legal reasoning,[52] and even corporate,[53] tort,[54] and contract law[55] doctrines.

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44. For an excellent critique of Gilligan, see Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); *see also* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1565-72 (1991) [hereinafter Williams, *Selfless Women*] (discussing Gilligan's description of selflessness, which is valorized in women).

45. I use "masculine-feminine" here to indicate socialized gender, although Gilligan's work actually seems to border on biological determinism, which would be more accurately reflected in "male-female dichotomy."

46. *See* Christine M. Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice,"* 74 MARQ. L. REV. 325 (1991); DuBois et al., *Feminist Discourse, A Conversation, supra* note 14, at 49-57.

47. Menkel-Meadow, *Portia in a Different Voice, supra* note 26; Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); *see also* Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L. J. 853 (1992).

48. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 (1986).

49. Paul Spiegelman, *Court-Ordered Hiring Quotas after* Stotts: *A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

50. *See, e.g.*, Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992) (discussing the "reasonable woman" standard in sexual harassment law and men's and women's differing perceptions of situations).

51. Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984).

52. Finley, *Gendered Nature of Legal Reasoning, supra* note 16, at 886.

53. Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985).

54. Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. L. & FEMINISM 41 (1989).

55. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991).

Gilligan's starting point is with where women are, and she does not specifically address how they got there. Her discussion of female children's development of an identity that is continuous with their mothers', as primary caretaker, however, comes very close to endorsing biological determinism as the genesis of this different voice.[56]

Others have gone a clear step beyond Gilligan, explicitly drawing the connection between the caring ethic or sense of connectedness that women experience and their biological sex. Probably the most influential of these recently has been Robin West, whose "connection thesis" holds that "women [but not men] are [actually or potentially materially] connected to other human life."[57] West bases her thesis on four points at which, she asserts, women experience actual or potential connection but men do not: pregnancy, nursing, heterosexual intercourse, and menstruation.[58] From this connection, according to West, women's defferent voice develops.

In Gilligan's favor, I acknowledge that she articulated an appealing—and for many women historically affirming—challenge to male norms. Joan Williams has written that Gilligan's work should be understood as simply a status report on female gender ideology,[59] but others have been highly critical of Gilligan's work. Catharine MacKinnon is among these critics, noting Gilligan's failure to explain *why* women develop this different voice. MacKinnon also fears women will identify with Gilligan's positively valued feminine stereotype not because it is the "real" her, but because society has attributed it to her.[60] As another commentator put it, what cultural and other branches of "difference" feminism celebrate as women's culture concurrently "encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."[61]

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56. GILLIGAN, DIFFERENT VOICE, *supra* note 26, at 151-74.

57. West, *Jurisprudence and Gender, supra* note 12, at 18.

58. West, *Jurisprudence and Gender, supra* note 12, at 2-3. West prefers the label "material explanation," rather than biological determinism, for her connection thesis. West, *Jurisprudence and Gender, supra* note 12, at 21 (noting that some French cultural feminists support her thesis). She explains the general American feminist rejection of material explanations on several grounds: (1) material explanations require willingness to engage in speculative inquiry, a willingness to consider phenomenological explanations, which academics tend to lack; (2) for strategic reasons, as American feminists have realized that most disadvantages imposed on women in the work-force and elsewhere derive from the central reality of women's pregnancy potential. West, *Jurisprudence and Gender, supra* note 12, at 21-22.

59. Williams, *Selfless Women, supra* note 44, at 1565-66.

60. *See DuBois et al., Feminist Discourse, A Conversation, supra* note 14, at 74-75.

61. Williams, *Deconstructing Gender, supra* note 19, at 801.

These latter comments and others similar to them have been rebutted, to a certain degree, by Carol Smart, another non-lawyer, who notes that "[a]ll 'knowledge' can be put to reactionary use and Gilligan's work does not carry a special responsibility in this respect."[62] Smart sees value in Gilligan's identification of an "hierarchy of moral reasoning" as well as in her recognition of "subjugated modes" that may be used to challenge the existing dominant ideology.[63] Whatever the merits or empirical sustainability of Gilligan's study,[64] the feminine voice she portrays is significant for the normative value that relational feminists have ascribed to it. Feminists have been attracted by its contextualized reasoning and personalized fact-finding, believing that these promote greater tolerance for diversity and greater respect for the "perspectives of the powerless."[65]

Smart has recognized that the qualities and characteristics that are labeled as "male" or "masculine" by Gilligan have elsewhere been described as "Western, imperialist, or 'white' thinking."[66] Similarly, Joan Williams has argued Gilligan's appropriation of the critique of "possessive individualism" as well as of the critique of traditional Western epistemology.[67] Finally, Martha Minow has identified the parallel between male and Western cultural perceptions of knowledge.[68]

What, then, should be made of Gilligan's seemingly excessive generalizations about women's characteristics and traits? Not only did she fail to acknowledge differences that may exist across race, class, sexuality, and ethnicity bases,[69] but as MacKinnon and others have noted, she failed to address the economic, cultural, and social

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62. Smart, *Feminist Jurisprudence, supra* note 1, at 14.

63. Smart, *Feminist Jurisprudence, supra* note 1, at 14.

64. A number of studies have shown results contrary to Gilligan's, and several scholars in her own discipline, developmental psychology, have criticized her method and conclusions. *See* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 625 (1990) (citing RHODE, JUSTICE AND GENDER, *supra* note 18, at 311-12); *see also* 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) (arguing Gilligan's exaggeration of the masculine-feminine duality in moral development).

65. Bartlett, *Feminist Legal Methods, supra* note 10, at 849.

66. Bartlett, *Feminist Legal Methods, supra* note 10, at 849 (citing SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986)).

67. Williams, *Deconstructing Gender, supra* note 19, at 799-800, 806-09.

68. *See* Martha Minow, *Beyond Universality*, U. CHI. LEGAL F. 115, 131 (1989).

69. Apparently, she subsequently conducted a similar study with factors such as race and class constituting the variables. *See* DuBois et al., *Feminist Discourse, A Conversation, supra* note 14, at 76.

factors that have created the different voice. Perhaps the most productive response to Gilligan's work is to recognize it for what she intended it to be: an empirical study documenting the fact that women may use different criteria and modes of reasoning to make moral decisions than do men, but that this does not necessarily make women inferior to men in any way. It is only when Gilligan's work is projected into a restricting theory that assigns to the "feminine" certain characteristics and to the "masculine" certain other characteristics that it reinforces potentially unhealthy stereotypes for both gender categories. Even if one assumes that the caring ethic has traditionally been womens forte, nothing guarantees that it will or should continue to be. The use to which some legal scholars have put Gilligan's theories in the name of feminism may have accurately claimed a limited historical basis. While a critique of law that stems from a relational and caring orientation is valid, continuing to equate that critique with the "feminine" is not only increasingly outdated, it is also an imprudent and restrictive course for those concerned with improving the lot of women.

IV. RADICAL FEMINISM

One of the primary distinctions between radical feminists and relational feminists is that the former are more aware of power disparities between the sexes. In fact, radical feminists generally articulate their theories in terms of gendered hierarchies of power and dominance[70] or gender disadvantage,[71] consistently eschewing any pure sameness-difference discussion as unproductive. As Deborah Rhode has suggested, "[t]he critical issue should not be difference, but the difference difference makes."[72] While some writers within the radical feminist school are more obviously radical (in the typical sense of the word) than others, the movement itself is radical in the sense that it consistently rejects the orthodoxy of traditional jurisprudence on all levels and also because its stance is more overtly political.[73]

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70. *See generally* MACKINNON, FEMINIST STATE, *supra* note 27, at 126-54; MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 32-45; *see also* CAROLE PATEMAN, THE SEXUAL CONTRACT, ch. 1 (1988) (similarly espousing a grand theory based on sexuality; down-playing the differences between women as less significant than the fact they are *women*).

71. *See* RHODE, JUSTICE AND GENDER, *supra* note 18, at 111, 319.

72. RHODE, JUSTICE AND GENDER, *supra* note 18, at 313.

73. Perhaps this is because radical feminism within jurisprudence/law is grounded in the writings and theories of the 1960s and 1970s radical feminists outside law. *See, e.g.*, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX (1970); KATE MILLETT,

Catharine MacKinnon, radical feminism's best-known proponent, has called radical feminism the only true feminism—feminism unmodified.[74] MacKinnon constructs a grand theory, or meta-narrative, that identifies sex as the core of women's oppression and of men's power. In her early classic statement analogizing marxism to feminism, MacKinnon opined that "[s]exuality is to feminism what work is to marxism: that which is most one's own, yet most taken away."[75] As for the relation of biological sex to socialized gender, MacKinnon sees the former as primary. Gender is essentially the social construction of sexuality.[76]

Although MacKinnon advocates consciousness raising[77] as the appropriate method by which women can grasp the "reality of women's condition from within the perspective of that experience, not from outside it,"[78] she assumes the collective—that is, that all women have shared the same basic experience. Unlike many other feminists,

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SEXUAL POLITICS (1970). Such radical work, mostly outside the legal discipline, has been carried on in the 1980s by writers such as Andrea Dworkin. *See, e.g.*, ANDREA DWORKIN, LETTERS FROM A WAR ZONE: WRITINGS 1976-1987 (1988); ANDREA DWORKIN, INTERCOURSE (1987). *See generally* RADICAL VOICES (Renate Klein & Deborah Steinberg eds., 1989); HESTER EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT (1984); POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow, et al. eds., 1983); TAKE BACK THE NIGHT (Laura Lederer ed., 1980).

Although she was almost certainly not the first to posit such, Kate Millett wrote in 1970 that "a disinterested examination of our system of sexual relationship must point out that the situation between the sexes now, and throughout history, is . . . a relationship of *dominance and subordinance*." KATE MILLETT, SEXUAL POLITICS 24-25 (1970) (emphasis added).

74. *See* MACKINNON, FEMINIST STATE, *supra* note 27, at 117; MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 15-16.

75. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 515 (1982) [hereinafter MacKinnon, *Agenda for Theory*]. This was subsequently modified somewhat, with the following analogy in MacKinnon's 1989 book:

> As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman.

MACKINNON, FEMINIST STATE, *supra* note 27, at 3.

76. MACKINNON, FEMINIST STATE, *supra* note 27, at 111, 113.

77. Consciousness raising has elsewhere been defined as "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative . . . ." Bartlett, *Feminist Legal Methods, supra* note 10, at 831.

78. MACKINNON, FEMINIST STATE, *supra* note 27, at 121; *see also* MacKinnon, *Agenda for Theory, supra* note 75, at 543.

MacKinnon, in her search for a comprehensive explanation for women's oppression, risks articulating a false consciousness. She maintains that those who disagree with her identification of sex as the situs of oppression do not know "Truth" because they have been unable to discover it within patriarchal society.[79] Accordingly, although she purports to recognize the significance of other factors, such as race, class and ethnicity,[80] her analysis subordinates these factors, as they are trumped by her sex-based theory of gender oppression.

MacKinnon argues that law's purported objectivity is male.[81] Furthermore, she asserts, "[O]bjectivity is the methodological stance of which objectification is the social process."[82] In turn, sexual objectification subordinates women. MacKinnon's theory is most easily and directly applicable in legal contexts such as obscenity, rape, and reproductive freedom.[83] However, in presenting her work as a metanarrative, MacKinnon also suggests its role in explaining women's inequality in any and all contexts. She explains the big picture thus:

> Inequality because of sex defines and situates women *as women*. If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, consent to sex could be commonly real, and sexually violated women would be believed. If the sexes were equal, women would not be economically subjected, their desperation and marginality cultivated, their enforced dependency exploited sexually or economically. Women would have speech, privacy, authority, respect and more resources than they have now.[84]

Finally, she asserts that women's equality to men will not be scientifically provable until such proof is no longer necessary.[85]

Beyond the initial step of identifying inequality as a matter of dominance and subordination, rather than of sameness and difference, MacKinnon advocates constant mindfulness of this reality so that it

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79. *See* MACKINNON, FEMINIST STATE, *supra* note 27, at 115-17.

80. MACKINNON, FEMINIST STATE, *supra* note 27, at 47-59.

81. Furthermore, she defines "male" as "a social and political concept, not a biological attribute, having nothing whatever to do with inherency, preexistence, nature, essence, inevitability, or body as such." MACKINNON, FEMINIST STATE, *supra* note 27, at 114.

82. MACKINNON, FEMINIST STATE, *supra* note 27, at 124.

83. *See generally* MACKINNON, FEMINIST STATE, *supra* note 27, at 171-83, 195-214.

84. MACKINNON, FEMINIST STATE, *supra* note 27, at 215 (emphasis added).

85. MACKINNON, FEMINIST STATE, *supra* note 27, at 117.

may eventually be translated into new doctrinal and jurisprudential concepts may be achieved.[86] Once women's concrete reality has been declared, MacKinnon says the next step must be to recognize male forms of power as they are embodied in legal rights for individuals. This would apply differently in various legal contexts, but the ultimate goal would be to "qualify or eliminate . . . powers of men . . . [to] use, access, possess, and traffic women and children."[87]

MacKinnon's acknowledgement that advancement for women plays out differently in different contexts is similar to the agenda for research and change of another "disadvantage" feminist, Deborah Rhode. Rhode tends to speak in more moderate terms than does MacKinnon,[88] and she does not embrace MacKinnon's grand theory. Indeed, she eschews such products, calling for "theory without Theory . . . fewer universal frameworks and more contextual analysis."[89] On the related matter of women's experience, Rhode also departs from MacKinnon in that she recognizes a greater variety of women's lived realities.[90]

Like MacKinnon, however, Rhode rejects the sameness-difference analysis, opting instead for a realistic assessment of how women's differences may be used against them in legal analysis. Her agenda for reform resembles MacKinnon's in the sense that she encourages going beyond declarations of women's equality to look at strategies for securing women's treatment as equals.[91] "[A]nalysis should turn on whether legal recognition of gender distinctions is likely to reduce or reinforce gender disparities in power, status, and economic security."[92]

V. The Public-Private Dichotomy

Some commentators have found it useful to analyze the law's relation to women in terms of the public and private spheres of life.

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86. MacKinnon, Feminist State, *supra* note 27, at 243.

87. MacKinnon, Feminist State, *supra* note 27, at 245.

88. *See generally* Rhode, Justice and Gender, *supra* note 18.

89. Rhode, Justice and Gender, *supra* note 18, at 316; *see also* Rhode, *Critical Theories, supra* note 6, at 619.

90. Rhode, Justice and Gender, *supra* note 18, at 318; Patterson, *Postmodernism/Feminism, supra* note 10; Rhode, *Critical Theories, supra* note 6, at 621-23; *see generally* Zillah Eisenstein, The Female Body and the Law (1988); Martha Minow, Making All the Difference (1990).

91. Rhode, Justice and Gender, *supra* note 18, at 319.

92. Rhode, *Critical Theories, supra* note 6, at 625; *compare* MacKinnon, Feminist State, *supra* note 27.

Katherine O'Donovan, a leading exponent of this analysis, uses "public" and "private" to refer to distinctions between the aspects of life that are regulated by law and those that are not.[93] While observing that the boundary between these spheres shifts over time, she argues that the presence of the distinction is significant because it long has been imbued in legal philosophy and informed legal policy.[94] O'Donovan speculates that the distinction between the two, while not totally static, is unlikely to collapse completely. Nevertheless, she advocates a union of the two spheres, visualizing such a synthesis as a move that would free both men and women from having to choose between them.[95]

Others have taken a different tack arguing that the public-private dichotomy is best seen as reflective of the family-market split and is perfectly synonymous with neither the male-female nor the state-society dichotomies, even though there is significant overlap among them in Western culture.[96] Accordingly, even if male-female analysis were no longer associated with the market-family dichotomy, the latter would continue to exist. This is very troubling for those feminist legal scholars who object to all dichotomous thinking and who would rather see these categories transcended. These writers, like O'Donovan, advocate greater market-family and public-private interrelation, noting that the structure of each part of the current dichotomy exacerbates the conflict between them, revealing a paradox of sorts when attempts are made to resolve that conflict.[97] Nancy Dowd reveals that paradox, stating that "[r]esolution [of the conflict] depends upon attacking the socially and culturally constructed gender roles that infuse the highly gendered work-family structure. Confronting gender issues is essential . . . . But it is not enough."[98]

Dowd advocates elimination of the division of work and family responsibilities on the basis of sex, but she recognizes that the social and cultural constructs of employment and parenting roles that rest upon the gender division would not necessarily change the relation

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93. O'DONOVAN, *supra* note 28, at 3 (acknowledging and discussing other legal definitions of public and private).

94. O'DONOVAN, *supra* note 28, at 8.

95. O'DONOVAN, *supra* note 28, at 180; *see also* Williams, *Selfless Women, supra* note 44, at 1565 n.22.

96. *See* Dowd, *Work and Family, supra* note 28, at 111-12, 118-19; Olsen, *Family and Market, supra* note 28, at 1499.

97. *See* Dowd, *Work and Family, supra* note 28, at 110-12; Olsen, *Family and Market, supra* note 28, at 1578; *see also* PATEMAN, *supra* note 28, at 10-13.

98. Dowd, *Work and Family, supra* note 28, at 111.

between work and family. Nor would they necessarily alter the content of parenting or employment roles. This is because, as Dowd notes, workplace structure is not solely a consequence of gender but also reflects hierarchies of class and race, the economic and organizational consequences of a post-industrialist advanced capitalist system, and fundamental concepts of the individual, family and community, and their interrelationship with respect to children. Dowd wisely observes that if we stop at gender, we will merely reconstruct gender and reallocate roles, rather than questioning the content of the roles and the structure within which they operate.[99] Dowd concludes that society should prioritize neither work nor family, public nor private, but rather should work to restructure the relation between the two.[100]

So, while gender is a primary determinant, it is not the sole determinant of the existing public-private dichotomy within law. Beyond that, however, because the public-private division in law is not strictly a gender issue, an adequate solution to the problems facing women requires that additional issues be addressed in each of these spheres, and that leaves us not far beyond the starting point. Still, the public-private doctrine is useful at the point where some theorists conclude that the distinction between the two spheres should be obliterated so that strategies capable of empowering women and of transforming the domestic and public lives of both women and men can be formulated and, eventually, render these concepts unrepresentative or, ultimately, redundant.[101]

VI. STANDPOINT/POSITIONAL EPISTEMOLOGY

Several of the methodologies previously discussed have touched upon epistemological issues, implicitly or explicitly expressing doubt about the purported objectivity of traditional jurisprudence. This is reflected in the style of consciousness raising advocated by MacKinnon,[102] as well as in Gilligan's thesis that men and women view

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99. Dowd, *Work and Family, supra* note 28, at 111-12.

100. Dowd, *Work and Family, supra* note 28, at 111-12.

101. *See* Morgan, *supra* note 3, at 751 (discussing Olsen, *Family and Market, supra* note 28, at 1566-67); Dowd, *Work and Family, supra* note 28, at 99-100, 110-12, 171-72.

102. As Catharine MacKinnon has written about the importance of epistemology in her search for a feminist theory of the state,

> Epistemology and politics emerged as two mutually enforcing sides of the same unequal coin. A theory of the state which was at once social and discrete, conceptual and applied, became possible as the state was seen to participate in the sexual politics of male dominance by enforcing its epistemology through law.

MACKINNON, FEMINIST STATE, *supra* note 27, at xi. *See supra* notes 82-87 and accompanying text.

the world around them differently. Not all scholars have relegated epistemology to a secondary issue. Some have focused almost exclusively upon the matter of how knowledge is acquired within legal frameworks and upon the import of this issue when admittedly seeking to compel the law's responsiveness to women's needs and problems.

Generally speaking, a feminist epistemology is pro-experience and anti-abstraction; it embraces subjectivity while rejecting dominant ideology's claims to objectivity and universality. Among those feminist legal scholars who have taken up the epistemological torch are Kathleen Lahey, who also embraces consciousness raising as a means of producing feminist theory.[103] Lahey has stated that feminist scholarship is about "who may speak for other people and how the appropriation of experience can be legitimated in the process of constructing knowledge."[104] She sees consciousness raising as a way in which women can generate "moments-of-'knowing' " when the unconscious structures of the mind are exposed to conscious structures.[105] However, Lahey sees the process as an ongoing struggle, not one capable of producing a "static state of precisely describable and perfectly communicable knowledge."[106] She advocates an open-ended agenda, developed on a small scale with constant referral to women's actual experiences. Lahey acknowledges the ambiguities and uncertainties that characterize the project, but still prefers a modest scale to MacKinnon's "Grand Theory" approach, which, at some stage, risks abandonment of women's lived experience and opts for abstraction.[107]

Others, in the MacKinnon mold, have been more dogmatic about their belief in consciousness raising as *the* method of feminism. These writers have claimed consciousness raising as the badge that lends validity to feminism because it allows women to take their personal experiences to a political level.[108]

Ann Scales has also championed consciousness raising, though her expectations of it are less ambitious. She has taken up the issue of legal objectivity and the role that it plays in denying the reality of women's experience. Similar to MacKinnon, Scales sees objectivity

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103. Lahey, *Until Women Themselves, supra* note 2, at 532.
104. Lahey, *Until Women Themsleves, supra* note 2, at 525.
105. Lahey, *Until Women Themselves, supra* note 2, at 532.
106. Lahey, *Until Women Themselves, supra* note 2, at 533.
107. Lahey, *Until Women Themselves, supra* note 2, at 536.
108. *See, e.g.*, Wishik, *To Question Everything, supra* note 3, at 69 (hence the feminist "motto" that "the personal is political").

as a methodological stance that is conducive to objectification of women. Also tracking MacKinnon, Scales advocates consciousness-raising as methodology, insisting that experience is the most accurate expression of truth and that it can provide law with "dramatic eye-witness testimony."[109] However, it is on Gilligan's theories that Scales builds when she argues that objectification is part of the masculine consciousness. As a psychological phenomenon, it is therefore more powerful than mere objectivity in the cultural sense because it celebrates the masculine existence and consciousness.[110] Still, Scales does not equate the rejection of objectivity with the rejection of standards and "truths." In order to discern appropriate standards and truths, she advocates continuous evaluation of results and continuous self-critique of feminist jurisprudence, along with the current critique of traditional jurisprudence. She rejects *a priori* abstract concepts that prevail regardless of actual results.

Scales' result-orientation, however, lulls her into a familiar feminist pitfall: the failure to account for heterogeneity of women. Her theory presumes that certain "truths" are obtainable and that feminists can reach consensus about what a good standard or "truth" is.

Katharine Bartlett has articulated an interesting modification of the sort of "standpoint epistemology" represented by consciousness-raising.[111] She advocates a method, which she calls positionality, that admits its point of view but is not static and does not state gender as the essential category of analysis. Bartlett's positionality concept retains some of the knowledge-based-upon-experience approach. It rejects, however, the dominant view of truth as external and objective, opting instead for a "situated and partial" view of truth that emerges from one's involvements and relationships.[112] We must seek to expand our limited perspectives as individuals and to expand sources of identity so that we avoid imposition of our (feminism's) point of view upon the world and avoid making gender analysis essential. Bartlett believes that from the critical process, certain increasingly final and fixed truths will emerge. We must, however, be cautious not to try to identify too many "truths," not to be too lax in our criticism of the substance of such "truths," and not to defend them too dogmatically.[113]

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109. Ann C. Scales, *Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1402 (1986).

110. *Id.* at 1380-84.

111. *See generally* Bartlett, *Feminist Legal Methods, supra* note 10.

112. Bartlett, *Feminist Legal Methods, supra* note 10, at 880.

113. Bartlett, *Feminist Legal Methods, supra* note 10, at 883-84.

She summarizes the method:

> Positionality is a stance from which a number of apparently inconsistent feminist "truths" make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision.[114]

Bartlett seems to be trying to overcome one of the recurring paradoxes of feminist jurisprudence and methodology: The conflict between an epistemology that seeks to accommodate, validate, and affirm every *individual* woman's experience while also seeking some *common* ground—some common "truths"—upon which to construct a new jurisprudence that accounts for their experience(s). She evidently believes that a positional methodology can reconcile the apparent contradiction between the value in recognizing diversity and the need to attempt a transcension of that diversity.[115] In this sense, I believe Bartlett's work signals a more mature feminist jurisprudence. Gone are the essentialism, dogmatism, and absolutism of some earlier works, perhaps to be replaced by a method that recognizes the importance of gender, while also acknowledging that its significance may vary from one legal context to another and also may shift over time and from one legal system to another. The test of Bartlett's methodology may now be whether law as a discipline is capable of sufficient flexibility and responsiveness to appreciate and integrate such complex and transient viewpoints.

VII. Realism, Society and Law

The proponent of a different methodology, which she has labeled "women's law," is Norwegian lawyer and academician, Tove Stang Dahl.[116] Although her analysis is not generated from the context of law or the state and does not address issues of power, Stang Dahl speaks in terms of a women's justice that will evolve, eventually permeating law at the levels where she perceives law operating in women's lives—primarily in the administrative and regulatory spheres. She argues that the way to modify the existing law is to focus upon

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114. Bartlett, *Feminist Legal Methods, supra* note 10, at 880.

115. *See* Bartlett, *Feminist Legal Methods, supra* note 10, at 885.

116. *See generally* Dahl, Women's Law, *supra* note 30; Dahl, *Taking Women as a Starting Point, supra* note 30.

legislation and legal practice, bringing to bear methods of social science in their formulation.[117]

This approach to feminist jurisprudence, like the method of consciousness-raising discussed above, is realist in methodology and nature, presuming that the basis of the critique must be women's lived experience. However, unlike those frameworks for analysis focused on consciousness-raising as a means of formulating a feminist agenda, this approach commences at the point where women are not necessarily where feminists are. It is content with women's consciousness. From this starting point, Stang Dahl argues that women's concerns and needs should inform the development of new areas of law or at least the reclassification of existing categories, including birth law, paid-work law, housewives' law, and money law.[118] Stang Dahl assumes the existence of a consensus that supports her moral stance, one that focuses upon freedom, equality, dignity, integrity, self-determination, and self-realization for women.[119]

Stang Dahl only cursorily addresses the meaning of such terms as "women" and "experience," seeming thereby to ignore their complexity. She assumes that some unifying women's experience can be discovered and that "women" is a concrete, knowable category. Implicitly, then, she ignores the heterogeneity of the group.

Stang Dahl offers no apology for the presence of women-centered policy considerations at the heart of women's law. In fact, she recognizes the value of exchange between the feminist political stance and women's studies as a science, as the former informs the direction of the latter. Unlike most other feminist jurisprudential thinkers, however, she expresses faith in a true distinction between the two, stating that science's primary mission is to seek knowledge and understanding, which in turn influences the women's polemic.

VIII. Social Injury/Harm Approach

Several feminist legal writers—including MacKinnon,[120] Wishik,[121]

117. Dahl, *Taking Women as a Starting Point, supra* note 30, at 240-41.
118. Dahl, *Taking Women as a Starting Point, supra* note 30, at 242.
119. Dahl, *Taking Women as a Starting Point, supra* note 30, at 244-45.
120. *See* MacKinnon, Feminist State, *supra* note 27, at 195-214 (in pornography context).
121. *See generally* Wishik, *To Question Everything, supra* note 3.

West,[122] and Matsuda[123]—have touched on or utilized the social injury or harm approach in their work. Working to some extent within orthodox legal concepts, this method still challenges the primacy of legal liberalism's rights-based analysis, shifting the emphasis to social injury or harms which may occur when some members of society exercise their "rights." One example of this analysis may be seen in MacKinnon's work on sexual harassment, activity that is now recognized as a harm within the U.S. civil rights laws.[124] This strategy is increasingly applied in the context of free speech, as women and other groups seek to establish and have legally recognized the harm that may be caused to women when someone exercises his or her constitutional right to free speech.[125]

Professor Adrian Howe has also focused on the social injury approach, articulating a theory of social injury originating in that concept's use in criminology; but Howe has excised the theory from that context and developed it into one that illustrates its relevance to women.[126] Howe suggests an analytical privilege for the "concept of social injury—in particular, the concept of gender-specific injury—within feminist legal theory and, ultimately, legal discourse."[127] As Howe notes, once we have decided that the law is an appropriate arena for change, we need to speak in legally cognizable, legally

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122. West has argued that the law generally recognizes harms to women only when they are analogous to harms which deprive a right that is comprehensible to masculine liberal jurisprudence. *See* West, *Jurisprudence and Gender, supra* note 12, at 58-59.

123. *See* Matsuda, *Considering the Victim's Story, supra* note 31; Mari Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1988) [hereinafter Matsuda, *Language as Violence*].

124. *See generally* MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 103-16.

Mark Kelman, a well-known scholar within the American Critical Legal Studies movement, has commented upon the harm concept in this context.

> A woman may ultimately be just as abused and exploited by the sexual harasser as the rapist; the fact that the sexual harasser so closely resembles the boss in his ordinary mode . . . should ultimately be used by radicals to undermine the legitimacy of power, not to defend harassers as obviously noncriminal.

Mark Kelman, *Criminal Law: The Origins of Crime and Criminal Violence, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982).

125. *See generally* CATHARINE MACKINNON, ONLY WORDS (1993); *see also* MACKINNON, FEMINISM UNMODIFIED, *supra* note 27, at 127-213 (discussing harm in context of pornography); Matsuda, *Considering the Victim's Story, supra* note 31 (extremist/sexist speech context); Matsuda, *Language as Violence, supra* note 123 (group defamation context).

126. Howe, *'Social Injury' Revisited, supra* note 3.

127. Howe, *'Social Injury' Revisited, supra* note 3, at 432.

actionable terms.[128] Howe advocates the identification and politicization of "hidden injuries" that occur in our gender-ordered society[129] and concludes that redress for such gender-specific injuries must be provided in any valid jurisprudence of social justice.[130]

While Howe's work is helpful and pragmatic in its utilization of traditional legal concepts, this may also be one of its disadvantages. Howe's theory may go only part of the way in the feminist jurisprudence attempt to improve women's situation within law and by means of law. This is because identifying a social injury is not the same as establishing a legally cognizable one. Just because a harm is identified does not guarantee legal recognition of its causal link to the objectionable activities that feminists believe should be restricted or prohibited.[131] Furthermore, unless the law deems a harm or injury sufficiently serious, it is highly unlikely that exercise of the "right" from which the harm results will be circumscribed by law. *Man*-made law has typically attributed little import to women-specific harms, and unless a radical overhaul occurs in the judiciary and legislatures, this is unlikely to change.

Feminist work with the social-injury construct may, then, be useful with regard to some issues and at some stages of the project. As a strictly legal construct,[132] however, its usefulness is almost certainly limited.

IX. Conclusion

Each of the approaches to feminist jurisprudence discussed above has made valuable contributions to the development of a more sophisticated discipline than perhaps could have been envisioned a decade ago. While many commentators have focused on divisions among various factions of feminists, they often have failed to realize

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128. Howe, *'Social Injury' Revisited, supra* note 3, at 432.

129. Howe, *'Social Injury' Revisited, supra* note 3, at 433.

130. Howe, *'Social Injury' Revisited, supra* note 3, at 434.

131. *See generally* Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 Wash. & Lee L. Rev. 161 (1990); Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 Am. B. Found. Res. J. 737.

132. Some writers, most notably Carol Smart, have long questioned whether the law is the appropriate forum for change and would reject outright Howe's analysis. *See* Smart, *Feminist Jurisprudence, supra* note 1, at 17-18; Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 Int'l J. of Soc. of L. 109 (1986); *see also* Minow, *Law Turning Outward*, 73 Telos 79 (1986) (contemplating whether "law deserves a privileged place in resolving conflict and ordering society").

how the critique within feminism and feminist "theory" has generated a net positive result. As feminist jurisprudence has matured, new analyses have revealed not only the flaws in traditional jurisprudence, but also the flaws in preceding feminist theories. As a particular new analysis has rendered aspects of a previous one obsolete and revealed its ambiguities and contradictions, feminist jurisprudence has been refined and has thus gained strength as a critique of the dominant ideology.

Several transitions from one analysis to another are illustrative of this regenerative phenomenon. Although the "women and the law" approach with which the movement commenced has been much maligned, its import to the early development of feminist jurisprudence can hardly be overstated. Without this initial step to raise women's visibility and provoke discussion about equality issues, the dead-end of the sameness-difference debate would not have been so quickly exposed. Moreover, absent the frustration evoked by that debate, scholars such as MacKinnon and Rhode may not have developed their dominance/disadvantage theses. Just as a gendered analysis revealed the historical inappropriateness—and imminent obsolescence—of law's public-private dichotomy, recent commentators such as Joan Williams and Katharine Bartlett are foretelling the coming redundancy of a gendered analysis.[133] The critiques of minority and lesbian feminists have revealed the danger of establishing gender as the essential situs of oppression, while also illustrating the real need for inclusion.[134] Similarly, the false-consciousness difficulty with MacKinnon's meta-narrative is exposed by other feminists' recognition of women's heterogeneity and corresponding variety of lived experiences. On the other hand, what would unify women sufficiently to build any theory without MacKinnon's identification of and exposition about the common denominator that sex represents?

Thus, feminist jurisprudence has evolved through a series of

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133. *See supra* notes 111-15 and accompanying text (discussing standpoint epistemology and positionality).

134. *See generally, e.g.*, Regina Austin, *Sapphire Bound!*, WISC. WOMEN'S L. REV. 536 (1989); Cain, *Grounding the Theories, supra* note 2; Cherise COX, *Anything Less is Not Feminism: Racial Difference and the W.M.W.M.*, 1 LAW & CRITIQUE 237 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

transitions, justs as it should and will continue to do. A vigilantly self-critical stance should be maintained as the discipline enters its next phase. Feminist jurisprudence should remain the object of efforts to "reappraise, deconstruct, and transform,"[135] just as it makes traditional jurisprudence the object of its reappraisal, deconstruction, and transformation.

The gender issue is indeed important, and it has been ignored for too long. But, what will be the end result of developing a feminist jurisprudence that takes into account solely this factor? If knowledge from a feminist standpoint obscures or precludes knowledge from a working-class or racial minority standpoint,[136] how can we whole-heartedly embrace it as the new norm we have sought? Still, "feminists must use presently understandable categories, even while maintaining a critical posture toward their use," the dichotomies they represent,[137] and the potentiality of a counter-productive essentialism. While it is troubling to offer legal remedies based upon the very categories that have contributed to the harm being redressed, it would be imprudent wholly to reject such categories *now*, when we've come only so far.

Joan Williams has argued that our goal is not necessarily gender-neutrality. Rather, it is to de-institutionalize gender.[138] For if we advocate gender neutrality (*or* gender difference) across the board, we risk leaving women in a worse position than they previously experienced. Thus, the importance of contextual examination becomes apparent. Within contextual analysis, political and social conditions of place and time are necessary considerations,[139] for only through looking to the realities of women's lives at a given moment can we determine standards and truths and, in turn, formulate responsive rules. Even if these standards, truths, and rules are admittedly tentative and partial, we may feel some confidence in them as the best solution at that moment.

Perhaps it is the appropriate destiny of feminist jurisprudence to continue to function as critique rather than to form a new normative jurisprudence. As Deborah Rhode has written, "our anal-

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135. Bartlett, *Feminist Legal Methods, supra* note 10, at 887.

136. *See* Maureen Cain, *Realism, Feminism, Methodology, and Law*, 14 INT'L J. OF SOC. OF L. 255 (1986).

137. Bartlett, *Feminist Legal Methods, supra* note 10, at 835.

138. Williams, *Deconstructing Gender, supra* note 19, at 836-41 (citing Alison Jagger, *On Sexual Equality*, 84 ETHICS 275, 276 (1975)).

139. *See generally* Suzanne Gibson, *Continental Drift: The Question of Context in Feminist Jurisprudence*, 1 LAW & CRITIQUE 173 (1990) (discussing the extent to which feminist legal theories may be traded across jurisdictions).

ysis can become more self-critical about the partiality of our understandings and more explicit about the values underlying them."[140] For eventually, when women's views, concerns, and experiences have been recognized by and integrated into mainstream legal philosophy, the notion of a feminist jurisprudence will have been rendered redundant.

140. RHODE, JUSTICE AND GENDER, *supra* note 18, at 320.