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Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship

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CHALLENGING LAW, ESTABLISHING DIFFERENCES: THE FUTURE OF FEMINIST LEGAL SCHOLARSHIP

*Martha L. Fineman**

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I. INTRODUCTION

This essay concerns the complex, difficult, and perhaps impossible goal of introducing feminist theory into legal discourse. In it I analyze existing and emerging themes that dominate contemporary feminist legal discourse and that concern me because of their limited usefulness in developing a theory of women's experience within law and legal institutions.

On the broadest level feminist legal thought seems unanchored. It drifts between the extremes of "grand theory," which is totalizing in its scope and ambitions,[1] and personal narratives, which begin and end with the presentation of one individual's unique experience.[2] Neither of these extremes does much to further the discussion of feminist issues because they obscure more than they illuminate. Be-

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1. Grand theory, for example, while valued in academic institutions, relies on abstractions not grounded in women's gendered life experiences. Its application to women's lives, therefore, is usually irrelevant and occasionally detrimental.

2. The personal narratives are more difficult to critique and involve an intersection of two other themes in contemporary feminist legal discourse — the fetish about difference that impedes the development of viable theoretical underpinnings for strategies and what I term the "ideal of representation." *See infra* part IV.

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tween these extremes, in that space between something so exclusively personal as to be beyond generalization or political content, and something so general and abstract as to be removed from the everyday realities of women's lives, lies fertile ground for feminist methodology.

In my efforts to assess the future of feminist legal scholarship, I am not concerned with discussions that focus merely on including women in the legal profession, nor with those directed at ensuring that, once included, women in law share power and positions equally with men. Women's presence in the legal profession has not caused feminist theory to follow. In fact, all too often in order to be successful, women have adopted assimilation as their intellectual strategy and equal treatment as their substantive principle.

My version of feminist theory is decidedly antiassimilationist. It does not adopt existing legal norms and merely require equal entitlement for women to the benefits and burdens distributed throughout our system of legal regulations. Rather, my version of feminist theory questions both the asserted universal "ideal" of equality espoused in dominant legal thought and the existing distributions of power and economic benefits held in place by the structure and nature of law. It goes beyond considerations of gender and addresses questions of value (what we deem worthwhile) and knowledge (how we construct truth).

I begin with my version of the ideally antagonistic interaction of feminist theory with the law.[3] I locate my discussion between the extremes of grand theory and unique experience. I consider the central, pressing task of feminist theory to be challenging existing law and legal doctrines through the articulation and establishment of a theory of difference. In this essay I divide my discussion of the theory of difference into two sections. The first section concerns the theoretical and political necessity of establishing the differences between men and women. Articulation of the extent of this manifestation of difference illustrates that the law primarily represents and reflects male experiences and norms. Critiquing the law from a feminist perspective requires understanding how women's perceptions and experiences differ from men's and how such differences are relevant to the development and implementation of legal doctrines and theories.

The second theoretical consideration involved in developing a theory of difference is the realization that important differences exist among women.[4] Feminists must overcome these differences in both

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3. *See infra* text accompanying notes 6-28.
4. *See infra* text accompanying notes 46-47.

practice and theory because the existence of these differences is misused to divide women. The task of feminist theory in this regard is to encourage women to work together, across differences, so that the similar, shared gendered aspects of our lives do not continue to be invisible and unspoken in law.

Finally, I will address questions about the notion of "representation."[5] I focus on the concept of representation as a legitimating selection criterion that affects our acceptance of an individual possessing an identified characteristic as "typical" of a class or group. Representation implies that an individual can typify a group or class merely by possessing a shared characteristic that serves the functions of both distinguishing him or her from the whole and unifying him or her with an identifiable subgroup. In this regard, representation is a totalizing concept even though its premise initially lies in the recognition of difference. Representation depends upon identifying and privileging one characteristic from among the many that an individual may possess. The characteristic thus serves to identify the individual as well as the group that the individual represents. The characteristic, so designated, publicly becomes the most politically, and perhaps socially, salient feature that the individual possesses. The theme of representation is integrally related to and is an outgrowth of my earlier considerations of differences.

II. Feminist Theory and Law

Recently, the interest in feminist scholarship has increased. Law has been an area relatively untouched by the postmodern currents that have washed through other disciplines, but it now appears to be caught within tides of critical methodologies and conclusions that threaten its very roots. An examination of the concept of feminist legal theory reveals both a subject and a methodology that are still in the process of being born. There are no "right" paths, clearly defined. The scholarship, however, can be described as sharing the objective of raising questions about women's relationships to law and legal institutions.

A. *Theory and Practice*

Given the newness of the inquiry, many "practitioners" of feminist legal theory may prefer to describe their work as examples of feminist "methodology" rather than as expositions of "theory." In fact, in regard

5. *See infra* part IV.

to feminist scholarship, it is appropriate to conclude that method *is* theory in its most relevant form.

My approach has been to reject the resort to abstractions and to concentrate on understanding why little relation exists between women's lives and material circumstances and the specific doctrinal representations of those lives and circumstances.[6] My choice has been to "do" feminist theory as an exercise in the concrete, both by focusing on a specific area of law and by using empirical information and stories of specific lives. This emphasis on specifics relates to my understanding of the insights feminist methodology has produced for scholars. The real distinction between feminist theory (legal and otherwise) and more traditional legal theory is this belief in the desirability of the concrete. Such an emphasis also has had rather honorable nonfeminist adherents. For example, Robert Merton coined the term "theory of the middle range" to describe work that mediated between "stories" and "grand theory."[7] He described such scholarship as being superior to mere storytelling or mindless empiricism, as well as superior to vague references to the relationships between ill-defined abstractions.[8] Clifford Geertz[9] and James Boyd White,[10] among others, have noted that language or rhetoric itself is specific and tied to given material concerns. White has stated,

> Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation,

6. *See, e.g.*, M. FINEMAN, THE ILLUSION OF EQUALITY: RHETORIC AND REALITY IN DIVORCE REFORM (forthcoming 1991); Fineman, *Implementing Equality, Ideology Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

7. R. MERTON, *On Sociological Theories of the Middle Range*, in ON THEORETICAL SOCIOLOGY: FIVE ESSAYS, OLD AND NEW 39, 68 (1967).

8. *Id.* at 68.

9. Geertz stated in regard to grand anthropological concepts:

> If anthropological interpretation is constructing a reading of what happens, then to divorce it from what happens — from what, in this time or that place, specific people say, what they do, what is done to them, from the whole vast business of the world — is to divorce it from its applications and render it vacant. A good interpretation of anything — a poem, a person, a history, a ritual, an institution, a society — takes us into the heart of that of which it is the interpretation.

C. GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 18 (1973).

10. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

> about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials. One cannot idealize rhetoric and say, "Here is how it should go on in general". . . . [R]hetoric is always specific to its material.[11]

At least in nonlaw areas, feminist scholarship has tended to focus on specifics.[12] Feminist legal scholarship, however, seems to be drifting toward abstract grand-theory presentations. Carol Smart recently warned that feminist legal theorists are in danger of creating the impression that one specific form of feminist jurisprudence represents the "superior" (or true) version as opposed to various other feminist legal theories. Smart labeled this totalizing tendency, evident in the work of many of the most well-known North American legal feminists, the construction of a "scientific feminism" and was explicitly critical of such grand theorizing.[13]

While I agree with Smart's assertion, I am aware that the tenure, hiring, and promotion committees, in addition to the law reviews of elite American law schools, often prefer grand theory over middle-level theory:[14] the grander the feminist theory, the more it resembles mainstream scholarly format and content. Grand theorizing represents the creation of a new form of positivism in a search for universal truth discoverable within the methodology of critical legal analysis. In contrast, middle-range theory mediates between the material circumstances of women's lives and the grand realizations that law is gendered, that law is a manifestation of power, and that law works to the detriment of women. These realizations previously have been hidden or ignored in considerations of the laws that regulate women's

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11. *Id.* at 695.

12. Grand theory represents a belief that an existing "truth" waits to be discovered and rejects the idea that theory is constantly in process. *See* C. WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 11 (1987) (defining her feminist project as "hold[ing] on to feminism as a politics" and "mobiliz[ing] theory in order to develop strategies for change on behalf of feminist interests," rather than coming up with a "definitive feminist theory — a totalizing theory of patriarchy").

13. C. SMART, FEMINISM AND THE POWER OF LAW 70-71 (1989); *see also* West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (the need for a more experience-based jurisprudence). *But cf.* Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1166-77 (1989) (a defense of grand theorizing in the context of reviewing the work of Catharine MacKinnon).

14. Academia has created a set of relatively well-defined scholarly norms which, to a certain extent, feminist theory seeks to expose and ultimately erode. *See, e.g.*, Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS: J. WOMEN IN CULTURE & SOC'Y 621 (1987).

lives.[15] They are best exposed by referencing and emphasizing those lives.

Increasingly, I have become aware of the difficulty of trying to use middle-range feminist methodology within the confines of legal theory. Not only does the pull toward grand theory categorize less grand scholarship as nontheoretical, but I fear that feminist sensibilities become lost or absorbed into the morass of legal concepts and words. I have lost faith. Feminism, it seems, has not transformed, and perhaps cannot transform the law. Rather, the law, when it becomes the battleground, threatens to transform feminism. This result stems from the obvious power of the law as a "dominant discourse" — one which is self-contained (though incomplete and imperfect), self-congratulatory (though not introspective or self-reflective), and self-fulfilling (though not inevitable nor infallible).

The transformative potential of feminist thought is blunted because in order to be incorporated into and considered compatible with legal theory, feminist thought must adapt, even if it does not totally conform, to the words and concepts of legal discourse. Feminism may enter as the challenger, but the tools inevitably employed are those of the androphile master. And the character of the tools largely determines the shape and design of the resulting construction. Therefore, the task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the totalizing nature of grand legal theory. Such a feminist strategy would set its middle-range theory in opposition to law — outside of formal legal categories.

B. *Feminist Methodologies*

In my opinion, there are several characteristics that, in various permutations and combinations, provide the ingredients for feminist legal analyses that effectively can challenge existing legal theory and paradigms. First, feminist methodology should be critical. This critical

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15. For example, family law regulates intimacy, employment law regulates market activity, and constitutional law regulates sexuality and reproduction.

16. I have written extensively on the problems associated with the gender neutrality paradigm within the context of family law. *See, e.g.*, M. FINEMAN, *supra* note 6; Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) [hereinafter Fineman, *Dominant Discourse*]; Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781 [hereinafter Fineman, *Illusive Equality*]; Fineman, *supra* note 6; Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107.

stance is developed by adopting an explicitly woman-focused perspective, a perspective informed by women's experiences. Feminist theory cannot be "gender neutral" and often will be explicitly critical of that paradigm as historically having excluded the woman's perspective from legal thought.[16] "Gender-sensitive" feminism, however, cannot be viewed as lacking legitimacy because of an inappropriate bias. Rather, it is premised on the need to expose and correct an *existing* bias. "Gender-sensitive" feminism seeks to correct the imbalance and unfairness in the legal system that result from implementing perspectives that exclude attention to the circumstances of women's gendered lives, even on issues that intimately affect those lives.[17]

Feminist analysis, if recognized at all, often is seen as marginal to legal thought.[18] Traditional legal scholarship tends to view the status quo as unbiased or neutral.[19] This belief in the possibility of a neutral stance is the logical place for feminist analysis to begin: as an explicit challenge to the use of the concept of bias, as contrasted with the concepts of perspective and position, when introducing previously excluded voices into legal discourse and analysis. Feminist theory can demonstrate that the status quo is *not* neutral; that it is as "biased" as, and certainly no more "correct" than, that which challenges it. And there can be no refuge in the status quo. Law has developed in

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17. For a development of the term "gendered lives," see *infra* text accompanying notes 41-45. Recent changes in the family law illustrate measures denying the existence of women's gendered lives. In property reform, for example, measures promoted in the 1970s sought to impose a 50-50 distribution scheme. This distribution was consistent with the partnership metaphor that liberal feminists had chosen to characterize marriage. Liberal feminists adopted this metaphor because of their uncritical acceptance of the need to establish "equality" through sameness of treatment. However, in light of the social and economic inequalities women experience, one half of the accumulated assets seldom suffice to provide adequately for divorced women and their children. *See* L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 70-109 (1985). I have criticized these "rule equality" reforms elsewhere. *See* Fineman, *supra* note 6, at 833-42; *see also* Fineman, *Illusive Equality*, *supra* note 16, at 781. Similarly, in child custody disputes, courts have retreated from the historic preference accorded women under the "tender years" doctrine (an evidentiary presumption under which women, unless "unfit," received custody of their young children) in favor of equality based custody norms like joint custody. *See* Fineman & Opie, *supra* note 16, at 107, 112; *see also* Fineman, *Dominant Discourse*, *supra* note 16, at 727.

18. Few law schools offer courses in feminist legal theory, and it seldom is included in courses on jurisprudence. Other forms of themed analysis, such as law and economics and critical legal studies, also are excluded.

19. One aspect of feminist scholarship has been uncovering and exposing male-infused, male-dominated thinking masquerading as neutral, objective theory. *See, e.g.*, N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); E. REED, SEXISM AND SCIENCE (1978); Fineman & Opie, *supra* note 16.

the context of theories and institutions which are controlled by men and reflect their concerns. Historically, law has been a "public" arena, and its focus has been on public concerns. Traditionally, women have belonged to the "private" recesses of society: in families, in relationships controlled and defined by men, and in silence.

In addition to exposing the inevitability of bias, feminist analysis critically evaluates not only outcomes but also fundamental concepts, values, and assumptions embedded in legal thought.[20] Results or outcomes in cases decided under existing legal doctrines are relevant to this inquiry, but criticizing them is only a starting point. Too many legal scholars end their inquiry with a critique of results and recommendations for "tinkering"-type reforms without considering how the conceptual structure of legal thought condemns such reforms merely to replicating injustices.[21] When, as is often the case, the basic tenets of legal ideology clash with women's gendered lives, reforms based on those tenets will do little more than the original rules did to validate and accommodate women's experiences.

From this perspective, feminism is a political theory concerned with issues of power. It challenges the conceptual bases of the status quo by assessing the ways that power controls the production of values and standards against which specific results and rules are measured. Law represents both a discourse and a process of power. Norms created by and enshrined in law are manifestations of power relationships. These norms are applied coercively and are justified in part by the perception that they are "neutral" and "objective." Appreciating this phenomenon, many feminist scholars have focused their attention on the legislative and political processes rather than on the judiciary.[22] The recognition that law is power also has led many feminists to concentrate on social and cultural perceptions and manifestations of law and legality rather than to focus narrowly on formal legal doctrinal developments.[23]

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20. *See* MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory?*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 534-36 (1982) (discussing the political implications of method); *see also* Fineman & Opie, *supra* note 16, at 107.

21. For a further discussion and critique of this tendency, see Fineman, *Illusive Equality*, *supra* note 16, at 781.

22. *See, e.g.*, AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (1990) [hereinafter BOUNDARIES].

23. For two excellent illustrations of works analyzing the interplay between formal legal developments and their application in practice, see Girdner, *Child Custody Determination: Ideological Dimensions of a Social Problem*, in REDEFINING SOCIAL PROBLEMS 165 (1986); McCann, *Battered Women and the Law: The Limits of the Legislation*, in WOMEN IN LAW: EXPLORATIONS IN LAW, FAMILY & SEXUALITY 71 (1985) [hereinafter WOMEN IN LAW].

Implicit in my assertion that feminism must be a politically rather than a legally focused theory is my belief about the relative powerlessness of law, as compared to other ideological institutions within our culture, to transform society. While law can reflect, and even facilitate, social change, law can seldom, if ever, initiate it. Regardless of the formal legal articulation, legal rules will tend to track and reflect the dominant conclusions of the majority culture. Thus, while law perhaps highlights the social and political aspects it reflects, it is more a mirror than a catalyst in regard to enduring social change.[24]

An additional characteristic of feminist legal methodology is that it seeks to present alternatives to the existing order.[25] The construction of alternatives may be, of course, a natural outgrowth of other characteristics of feminist legal thought, particularly that feminist legal thought is critical and political. I place the construction of alternatives as a separate characteristic, however, because an independent goal of much of feminist work is to present oppositional values.[26] Feminist analysis often is radically nonassimilationist, and it resists the mere inclusion in dominant social institutions as the solution to the problems in women's gendered lives. In fact, the larger social value of feminist methodology may lie in its ability to make explicit oppositional stances vis-á-vis the existing culture. The task of the moment for feminism may be to transform society by challenging dominant values and defiantly refusing to assimilate into the status quo. The point of making women's experiences and perspectives central factors in developing social theory is to change "things," not merely to change women's perspectives on their positions within existing power relationships. To many feminist scholars, therefore, assimilation is failure, while opposition is essential for feminist methodology applied to law.[27]

It seems to me important to emphasize that feminist theory that effectively challenges existing paradigms will be characteristically evolutionary in nature. Feminist legal theory, therefore, will not represent doctrine carved in stone or even printed in statute books. Feminist methodology at its best generates contributions to what is recognized as a series of ongoing debates that start with the premises

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24. No-fault divorce reform illustrates this phenomenon. Prior to these statutes, lawyers often would counsel clients on how to "create" divorce grounds. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 438-40 (1973). Thus, rather than representing any legal "change," no-fault reforms actually mirrored existing practice.

25. *See* West, *supra* note 13, at 72 (discussing the construction of present goals in light of a feminist utopian vision).

26. *See, e.g.*, BOUNDARIES, *supra* note 22.

27. In the context of family law, for example, many scholars refuse to accept the dictates of formal rule-equality. *See* M. FINEMAN, *supra* note 6.

that "truth" changes over time as circumstances change and that gains and losses, along with recorded wisdom, are mutable parts of an evolving story. As feminist legal theory references women's lives, it must define and undertake the "tasks of the moment." The tasks of the future cannot yet be defined, and each piece of feminist legal scholarship is only one step in the long journey feminist legal scholars have begun.

Feminist legal thought contains explicit criticism as well as implicit disagreements about the wisdom of pragmatic uses of law, the effectiveness of law as an instrument of social change and, most broadly, the importance of law as a focus for feminist study. Some feminist scholarship reveals antagonistic, even violent, disagreement with other feminist works.[28] Disagreements aside, however, feminist legal theory has lessons for all of society, not just for women or legal scholars. Ultimately, the members of our audience will judge the effectiveness and genuineness of our individual and collective voices.

Our scholarship is critical, political, and controversial; it is concerned with the processes that comprise law. The best feminist legal scholarship is about law in its broadest form, as a manifestation of power in society, and recognizes no division between law and power. Law is not found only in courts and cases, and legislatures and statutes, but in implementing institutions, such as social work and law enforcement, as well. Law is found in the discourse used in everyday life. Law is evident in the beliefs and assumptions we hold about the world in which we live and in the norms and values we cherish.

III. FEMINIST METHODOLOGY AND ISSUES OF DIFFERENCES

Not surprisingly, much of feminist legal methodology considers the issue of "differences."[29] This examination is not an easy task. In fact, much of the rather antagonistic interaction among legal feminists has arisen from disagreement about the fundamental question of whether or not there are cognizable differences between men and women.[30] The early, "founding mother" members of a broadly defined legal feminist community would disagree with the exploration of such differences and would deny their existence or significance.[31] More recently,

28. *See, e.g.*, Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

29. For a collection of essays organized around the differences theme, see 3 WIS. WOMEN'S L.J. (1987), a compilation of papers presented at the 1986 Feminism and Legal Theory Conference held in Madison, Wisconsin.

30. *See* Williams, *supra* note 28, at 175.

31. *See* McElroy, *The Roots of Individualist Feminism in 19th-Century America*, in FREEDOM, FEMINISM, AND THE STATE 3-26 (W. McElroy ed. 1982).

some feminist scholarship has emphasized that there are differences *among* women,[32] and the question arises whether these differences should be considered legally, as well as theoretically, significant.

Focusing on differences is particularly difficult for women trained in the law because any recognition of differences challenges dominant legal equality theory and its accompanying paradigms, such as sameness of treatment.[33] The initial approach of early contemporary legal feminists trying to break the barriers of the profession, therefore, was to develop the existing rhetoric of equality and to seek laws that were gender neutral.[34] Equality in the market and in the home were their articulated goals, and, as a strategy, early feminist theoreticians and lawyers minimized or denied the existence of significant differences between men and women.[35]

Recently, the representation of equality embodied in the "gender-neutrality" paradigm has undergone sustained attacks. Gender neutrality as a universal concept has been recognized as an objective that accepts the terms and structures of the status quo, the dominant culture.[36] To argue that gender neutrality is or should be the goal of feminist reformist law is to further legitimate the underlying institutions constructed and maintained in the context of patriarchy and dominance as neutral, objective, and value-free.

Strong voices within the feminist legal community are joining in a chorus to celebrate the liberating realization that anything we legitimately can call *"feminist"* legal theory must begin with a conceptual statement about differences because, by its very definition, *feminist* theory must be a gendered theory. Feminist theory is woman centered and is, therefore, gendered by its very nature. It takes as its raw building materials women's experiences. Because women live gendered lives in our culture, any analysis that begins with their experiences necessarily must be a gendered analysis.[37] It cannot be a gender-neutral theory, nor can it have as its goal equality in the traditional, formal legal sense of the word.

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32. *See infra* text accompanying note 47.

33. *See* Smart & Brophy, *Locating Law: A Discussion of the Place of Law in Feminist Politics*, in WOMEN IN LAW, *supra* note 23, at 1 (discussing the historic and contemporary conflict between strict, or "rule equality," and special treatment, or "result equality," in British feminist thought); *see also* M. FINEMAN, *supra* note 6.

34. Fineman, *supra* note 6, at 789-96, 811-34, 845, 851-52 (discussing this conflict within the context of American feminism).

35. Williams, *supra* note 28.

36. *Cf.* MacKinnon, *supra* note 20, at 535-41 (discussing human sexuality as a gendered experience).

37. *Id.* at 535 (discussing feminism as "the theory of women's point of view" and of different ways of knowing).

Because the differences between men and women have been the source of women's past oppression, to recognize these differences as the basis of feminist theory is to risk being dismissed as naïve or being accused of advocating a position that will harm women.[38] Furthermore, advocates of difference recently have faced the possibility of being labeled "essentialists" — those who advocate a belief in an "essential womanhood" that exists outside of language and society, and who are insensitive to race, class, and other differences among women. The "essentialist" label is more significant and, therefore, more difficult to address. I recognize that there are some differences among women that may, in some instances, be more significant than are the gendered life differences between men and women.[39] However, in the aggregate, I believe women's shared or collective gendered experiences, both actual *and* potential, differ significantly from men's experiences in our society. These gendered experiences require adequate reflection and consideration in our legal system. These gendered experiences may be cultural and linguistic constructions, but they define the parameters of women's lives — even if only as constraints to resist. Incorporation of women's gendered life experiences is not accomplished by rules conceived in and constrained by a system that refuses to recognize gender as a relevant perspective, imposing "neutral" conclusions on women's circumstances.[40] Furthermore, the recognition that there are differences among women should not defeat the attempt to "gender" law.

The possibility that women's perspectives differ from men's is relevant because, given their perspective and positions, women often may make different observations, ask different questions, and consider different issues from similarly situated men. A difference in *perspective* often is reflected as a difference in *perception*. Women from different

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38. Equal treatment also has contributed to the oppression of women, particularly poor, nonprofessional women.

39. Rae identified three different types of equalities: "simple," "segmental," and "bloc." *See* D. RAE, EQUALITIES 20 (1981). "Simple equality" compares individuals, while "segmental equality" compares equality within a subclass. *Id.* at 20, 29. By contrast, "bloc equality" compares groups or blocs and thus "asks for something very different from simple or segmental equality." *Id.* at 35. Liberal feminist reform efforts tend to adopt a simple or individual model of equality. As a result, such efforts generally fail to assess seriously the implications of the total failure of women to achieve bloc equality with men in the economic sphere. Moreover, the differences among women present complicated segmental equality questions.

40. *See* West, *supra* note 13, at 70 (discussing need for a "true" description of women's experience and subjectivity in order to change masculine jurisprudence). For a critique of essentialism, see Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

cultures, classes, races, and economic circumstances might argue about conclusions, tactics, and values, but they also understand a common gendered-life reference point that unites them in interest and urgency around certain shared cultural and social experiences. Therefore, legal theory that is uninformed or uninfluenced by these different perspectives and perceptions is incomplete, inequitable, and indefensible.

A. *Differences Between Women and Men*

The assertion of a gendered existence is contested in our legal culture.[41] Even when accepted, the premise generates issues concerning how much significance should be attached to such a realization.[42] My exploration of these issues has led me to reach some tentative (and perhaps totally idiosyncratic) conclusions about the types of gender differences that might be significant in legal theory.

I believe that many women experience society in ways significantly different from the ways that men experience society. I believe certain real *or* potential experiences can be described as constituting the basis for a feminist development of the concept of "gendered life." These experiences lead many women to develop a perspective qualitatively different from what is reflected in dominant legal ideology. This is *not* to assert that all women think alike or have identical experiences. My position is based on experiential, not essential differences.[43]

Women's gendered existence is comprised of a variety of experiences — material, psychological, physical, social, and cultural. Some of these experiences 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 sexual violence that women may suffer in our culture shape individual experiences. So, too, the potential for reproductive events such as pregnancy, breast feeding, and abortion has an impact on women's constructions of their gendered lives. Further, some gendered experiences, such as aging, are events shared by men. But women often live or experience such events in unique ways. Thus, 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.[44]

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41. *See* Williams, *supra* note 28.

42. *See* Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39.

43. "Essentialist" also implies that the categories of gender, race, or class are inherently meaningful and, therefore, universal. Even if one is "sensitive" to race and class, one may still be essentialist by, for example, espousing a belief in an "essence of woman" that cuts across all differences.

44. *See* P. ZOPF, AMERICAN WOMEN IN POVERTY 109-11 (1989).

Human beings are the product of their experiences. As organisms, they have little or no independent "essence" distinct from their experiences. Of course, certain physical and chemical components or characteristics of human beings both provoke experiences and act as filters through which such experiences are processed. A person, therefore, is the sum of these physical attributes as acted upon, by, and through his or her social and cultural experiences. What we call knowledge, what we label virtuous, grows out of these experiences. The very questions we ask, along with the answers we fashion, express these experiences. Therefore, if women collectively have different actual and potential experiences from men, they are likely to have different perspectives — different sets of values, beliefs, and concerns as a group.

I am not arguing that *all* women react the same way to or reach identical conclusions about issues in our society, nor do I believe that all women experience any one or more of the gendered experiences. Uniformity in interpretation and experiences is not necessary to the concept of gendered life. Individual experiences may differ from the socially constructed and culturally defined nexus, but they are still affected by them. Unadorned, uninterpreted events are not in and of themselves what one "experiences." Interpretation of events is an extremely significant aspect of this process of individual experiencing. Experiences do not take place in an interpretive vacuum, however, but are part of a social, interactive process. Culture and society provide the media through which experiences are understood. Our twentieth-century society has universal, totalizing cultural representations of women and women's experiences.[45] Even those critical of such 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 events, the process whereby events are given meaning, is not an autonomistic, individualistic procedure. Social action and interaction, as well as dominant cultural images, significantly contribute to individual interpretations of and reactions to events.

Further, I recognize that individual responses to similar experiences may differ as individual options (economic and otherwise) vary due to external circumstances such as race, sexuality, and social class.

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45. One example is that of motherhood. The construction of women as mothers affects all women's experiences in the culture whether they individually choose to be mothers or not. As women they are at least partially identified and defined as mothers, potential mothers, or past mothers.

Additionally, previous experiences may filter new ones, having in some instances much more significance than gender. To recognize that there may be differences *among* women does not, however, refute the observation that women's actual *and* potential shared experiences are female experiences, inescapably gendered within the larger culture and society.

B. *Differences Among Women*

A tendency to question the ability of any group of women to speak for others has begun to emerge in feminist legal theory. Initially, this perspective developed in response to minority women's criticisms that feminism was a "white middle-class, heterosexual movement."[46] Such criticism has made many feminist theorists reluctant to speak unless they have first disclaimed the notion that they are representing anything other than their individual (and, perhaps, their own class, race, and sexual preference) perspective. Many feel they must rattle off a litany of differences among women at the beginning of any discussion about feminism, society, and law — a distance placed between groups of women filled with assumptions about the nature of "representation" and about the essential and determinative character of race, class, and sexuality in defining an individual or group.

While few would dispute that characteristics such as race, class, and sexuality may be significant to one's experiences, it is a mistake to regard these markers of difference as the only relevant ones. Women may have other characteristics that give them a basis for cooperation and empathy. For example, in addition to race, class, and sexual preference, factors such as age, physical characteristics (including "handicaps" *and* "beauty" or 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"[47]), birth order, motherhood, grandmotherhood, intelligence, 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,

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46. For recent critiques of mainstream feminist legal theory for its white middle-class, heterosexual bias, see E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Harris, *supra* note 40; Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

47. From conversations between Gerda Lerner and the author. For a general discussion of male hegemony over that which is defined socially as "universal truth," see G. LERNER, THE CREATION OF PATRIARCHY 217-29 (1986).

and substance dependency, among others, shape how individual women experience the world.

Separating out a few differences as conclusively and exclusively determinative results in analyses that are impoverished reflections of the very complexity of women's gendered lives, which feminists should seek to understand and address. Such separation also results in a privileging that fosters the creation of hierarchies of oppression and claims of exclusive or genuine oppression. These, in turn, lead to a competition among oppressions that serves only the interests of the dominant social group. It is members of this group who are benefited when dominated groups fight among themselves at the margins of powerful institutions, which condescendingly have made room for only a few outsiders.

Privileging any one or two characteristics when so many have the potential to inform and create women's gendered lives is simplistic and will impede an articulation of the problems women share in society. Hierarchies limit participation and exclude voices necessary for the creation of solutions relevant to a broad spectrum of women. It would be interesting to consider how some characteristics or clusters of characteristics may cancel out, compensate for, or compete with others. For example, how do we place people with multiple sources of oppression in relation to others? If a white woman also is a welfare mother, can we consider her legitimately placed with the dominant group in society merely because she shares their skin color? I would argue clearly not, but where, then, does she fit among the oppressed? Can she really be considered *always* more privileged simply because of her race in a ranking of oppressions? A hierarchy of oppression that always places race at the top would consider her so. I believe oppression to be much more complex. Exclusion leads to conflict and competition. This disunity impedes the aggregation of power necessary for women of all groups to push back the barriers excluding most of us and our experiences.

The competition should not be with each other in the margins of society but with the powerful, dominant main structures whose visions and versions of reality are reflected in society's institutions. The task, then, for feminists of all races, classes, characteristics, and orientations, as well as for men who seek significant change in our social and cultural institutions, is to find common ground and work together. We must learn about and be sensitive to the many differences among us. Those differences, however, must not divide us to the point where we fight only among ourselves, each internal group urging its unifying source or sources of oppression as the only "true" oppression and seeking to silence others. The task should be to bring the many man-

ifestations of women's gendered lives into consideration, not to argue that only one version of gendered existence is entitled to be heard or addressed.

IV. QUESTIONS OF REPRESENTATION

The current obsession with differences among women has a negative impact in that it provides yet another means to decide who is given a voice and who is silenced. It also reveals a problem with the idea of "representation." At least initially, it seems problematic that, by merely "having" or embodying a characteristic or set of characteristics, an individual has the authority and legitimacy to represent definitively the position of women sharing such characteristics. While characteristics may indicate experiences or potential experiences, they should not be considered in and of themselves sufficient or even necessary. It should not be the characteristics of the *speaker* which are considered most relevant but the quality and nature of that which is *spoken*. We must focus on the discourse, the ideology. No groups or persons should be immune from a critical and political assessment of what they advocate.

In contemporary critical thought there is a trend toward excessive reliance on the individual characteristics of the speaker to legitimate discourses. This focus erroneously furthers the idea that the individual is the agent of social action and change and masks the manifold ways in which oppression takes place and is fostered within the structures and dominant ideologies of our society. It operates to place some discourses beyond criticism; they are accepted as authentic, not because of the nature of the rhetoric, but because of the nature of the individual speaker. Additionally, from the most rudimentary political perspective, adhering to the notion that authority or authenticity is located exclusively in individuals as supposed representatives of groups with which they share characteristics, risks conveying the impression that the token inclusions of such individuals are "solutions" to the problems suffered by those groups.

This version of representation was evident in the earlier, token moves to incorporate women into law. By merely conceding a need for the presence of a woman or even several women in the legal profession, social institutions and legal ideology remained unchanged in accommodating feminist concerns and criticisms. This manifestation of "representation" equates one woman with another, making us fungible objectifications of the essential woman. This type of representation, in which one woman is deemed capable of acting for the whole, is totally insensitive to differences among women. It is also likely to act to eradicate the perception of differences between women and men

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because it is a characteristic-focused, not an experientially or ideologically focused, strategy. Not surprisingly, a woman chosen to "represent" her gender often is one whose interests and values coincide with those of the normalized male institutions that have deigned to include her. Furthermore, since ideology and structure are not relevant in the selection of a representative, the representative woman also often finds herself accommodating the behavioral norms and the professional standards of the institution, not challenging them, even if she initially had oppositional ideals.

This individualized concept of representation, initially adopted by feminists, has been refined and more finely tuned by the addition of other "authenticating" characteristics to gender, such as sexuality or race. Perhaps these additions are concessions to the notion of experiences and ideology; however, the basic tenet in this view of representation is still that an individual's possession of a characteristic or set of characteristics is both a necessary and a sufficient indication of "authenticity." The focus continues to be on the characteristics of the individual. The underlying assumption is circular: an individual having the designated characteristic can and does represent members of a community now defined by that characteristic.

This notion of representation currently is used simultaneously to legitimate and to privilege some women's voices. The process of legitimation is accomplished within unchanged institutions which use the representative woman against the radical potential and challenge of a discourse of gendered experience and ideology. The gendered experience, however, is not capable of location within any individual woman. The notion of individual representation facilitates tokenism; furthermore, it can empower an individual woman while it renders her the most effective weapon to silence the interests and voices of the women she is supposed to represent. The individualized mode of representation operates to exclude discordant voices, to prompt the drawing of boundaries and the placing of barriers, and to divide women on the basis of one or some of their potentially shared characteristics. At the same time, the individual-based representation minimizes or ignores the importance of other characteristics that might operate in a more inclusive manner.

Thus, a notion of representation that is dependent on the individual poses serious difficulties. It carries with it not only the potential for divisiveness but also the certainty of exclusion within the hypothetically available community of feminists. Moreover, individual-based representation allows tokenism to flourish and nurtures continued resistance to the radical potential for change through the ideological and structural implications of feminism within institutions.

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V. Conclusion

Feminist concerns are, and must continue to be, the subject of discourses located outside of law. Law as a dominant rhetorical system has established concepts that limit and contain feminist criticisms. Feminist theory must develop free of the restraints imposed by legal concepts of equality and neutrality, or it will be defined by them. Law is too crude an instrument to be employed for the development of a theory anchored in an appreciation of differences. Law can and should be the *object* of feminist inquiry, but to position law and law reform as the *objective* of such theorizing is to risk having incompletely developed feminist innovations distorted and appropriated by the institutionalized and intractable dictates of law.

In developing feminist legal theory outside of the constraints of law, we will be free to confront the inevitable tensions that occur in undertaking any theoretical exploration, such as those that arise in any consideration of differences. Both politically and theoretically, feminists should explore the differences between women and men to expose the exclusion of women's experience in law and to reveal the underlying power imbalance this exclusion represents. At the same time, focusing on the differences among women, while of theoretical significance, can and will be used politically to continue and justify exclusion. Feminism as a political, pragmatic methodology must be able to live with this type of tension which, given the current political arena, cannot be avoided. There are different urgencies in considering differences that are dependent upon the contexts in which feminists must operate. Theory that arises from the circumstances in which women find themselves is destined to contain paradoxes.