FEMINIST THEORY AND LAW

MARTHA L. A. FINEMAN*

I. INTRODUCTION

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

> [The civil law] as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[1]

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

These exclusionary consequences of differences led many feminist legal scholars and practitioners (who finally did make it into the profession in relatively large numbers during the 1960s) to argue for equality in terms of sameness of treatment as a matter of moral and legal right.[2] Legal feminism, or feminism with a legal focus, was thus fashioned.

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* Maurice T. Moore Professor of Law, Columbia University. B.A. 1971, Temple University, J.D. 1975 University of Chicago. This article is based on Chapters 2 and 3 of MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

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

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

> [T]he same doctrinal approach that permits pregnancy to be treated *worse* than other disabilities is the same one that will allow the state constitutional freedom

This brand of legal feminism, dominant until recently, was primarily an equality-based strategy. It assumed no legally relevant differences between men and women, an emphasis determined by the many ways in which the law historically both condoned and facilitated women's exclusion from the public (and therefore, overtly powerful) aspects of society. Difference had provided the rationale and the justification of such exclusion, which was based on the belief that women's unique biological role in reproduction demanded protection from the rigors of public life. It was no surprise, therefore, that when significant numbers of women began to make inroads into public institutions such as the law, they sought to dismantle the ideology which had excluded them. Assimilation became the goal, and equality the articulated standard. However, our ways of thinking about differences and the value we attach to them have evolved over time, and the feminist project in law should respond to this evolution.

Another factor relevant in considering the limitations of assimilation as a feminist goal is law's structural and historical resistance to change. Law is a conservative discipline. This is relevant given that the exclusion of women from voting, jury service, and even the practice of law was the societal norm in our country until relatively recently.[3]

This historical exclusion should signal that there may be significant problems for women's adherence to an equality or neutrality model. Law as an institution—its procedures, structures,

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to create special *benefits* for pregnant women. The equality approach to pregnancy . . . necessarily creates not only the desired floor under the pregnant woman's rights but also the ceiling. . . . If we can't have it both ways, we need to think carefully about which way we want to have it.

My own feeling is that, for all its problems, the equality approach is the better one. The special treatment model has great costs.

. . . .

. . . . At this point, we need to think as deeply as we can about what we want the future of women and men to be. Do we want equality of the sexes—or do we want justice for two kinds of human beings who are fundamentally different?

Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196, 200 (1982) (emphasis in original).

3. The 19th Amendment to the U.S. Constitution (which gives women the right to vote) was proposed in June 1919 and ratified in August 1920. It was not ratified in Florida and South Carolina until 1969, in Georgia and Louisiana until 1970, in North Carolina until 1971, and in Mississippi until 1984. As late as 1961, women were not treated equally with regard to jury service. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a Florida statute requiring that women register before being eligible for jury duty). The Supreme Court upheld the exclusion of women from the practice of law in 1872. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872).

dominant concepts, and norms—was constructed at a time when women were systematically excluded from participation. Insofar as women's lives and experiences became the subjects of law, they were of necessity translated into law by men. Even social and cultural institutions that women occupy exclusively, such as "motherhood," were as legally significant categories initially what I call "colonized categories"—defined, controlled, and given legal content by men. Male norms and male understandings fashioned legal definitions of what constituted a family, who had claims and access to jobs and education, and, ultimately, how legal institutions functioned to give or deny redress for alleged and defined harms.[4]

Of course, women had been politically active and legally conscious during the *Bradwell* era. Some had sought to implement their views into law. The lessons from that era seemed clear about the dangers of a policy of difference. Florence Kelley and others from the National Consumer's League, for example, attempted to introduce a "female standard" into employment law, a standard that ultimately worked against many women's interests.[5]

These early women reformers believed that the only way to achieve equality was through the legal recognition and accommodation of women's differences. Unfortunately, they had to rely on men as the translators and transmitters of their views. This process was fraught with peril: male legal actors such as Felix Frankfurter, comfortable with and in control of "Law," shaped and reshaped their feminist clients' ideas until they were no longer recognizable as such.[6] Difference was ultimately translated as inferiority, resulting in stigma and exclusion.

In regard to the prospects for contemporary proponents of accommodation of differences, an important distinction between our own era and that of *Bradwell* is that feminists are no longer dependent upon the Frankfurters of the world for the translation

4. *See, e.g., supra* text accompanying note 1.

5. *See, e.g.*, Sybil Lipshultz, *Social Feminism and Legal Discourse*, 1908-26, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 209 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); *see also* JANE J. MANSBRIDGE, WHY WE LOST THE E.R.A. 8-19 (1986); Martha A. Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 12-13 (1992); Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 414-16 (1992).

6. *See* Lipshultz, *supra* note 5, at 210 (commenting that the lawyers relied upon by social feminists to argue their cases expressed views on women and equality that differed from the views of social feminism).

of our ideas. Women now occupy professorships, hold membership in the bar, and compromise almost half of law classes; a few of us are even legislators and judges.[7] While the full integration of these professions is far from complete (especially at their most powerful levels), feminist women can at least give our own legal voice to our ideas.

The current generation of diverse feminist legal theories is an example of what can happen when such voices are heard. Feminist theorists articulate strategies for change across a wide spectrum. From continued adherence to the equality model to ideas of accommodation and acceptance of "special" needs, feminist-fashioned legal proposals seek to use law to better the position of women. In some specific areas, such as the development of "battered woman's syndrome," concepts of difference have been successfully introduced and generally accepted by the larger legal community.[8] In most areas of legal regulation, however, existing concepts that fail to account for or consider differences are not easily dismantled, and the law is assumed to be appropriately gender-neutral, at least in aspiration.

II. The Shape of the Contemporary Debate

One lesson to be gleaned from the results of the past several decades of equality feminism is that a theory of difference is necessary in order to do more than merely open the doors to institutions designed with men in mind. Arguing for a theory of difference questions the presumed neutrality of institutions, calling into question their legitimacy because they are reflective of

7. As of 1988 approximately 42% of those enrolled in law school were women. *A Review of Legal Education in the United States*, Fall 1988, 1988 A.B.A. Sec. Legal Educ. & Admission B.65. The Census Bureau has reported that as of 1989, 22.3% of all lawyers and judges were women. Bureau of the Census, U.S. Dep't of Com., Stat. Abstract of the U.S. 395 (1991).

8. These changes are marked by controversy. The battered woman's defense has been criticized as stigmatizing and failing to give acknowledgement to women's agency. *See, e.g.*, Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379 (1991). There is a great deal of concern over women being cast as "victims" and thus as passive receptors of definition and action by powerful men in society. *See, e.g.*, Christine A. Littleton, *Women's Experience and the Problems of Transition: Perspectives on Male Battering of Women*, 1989 U. Chi. Legal F. 23; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 195 (1986); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. Rev. 520 (1992).

primarily male experiences and concerns. In that way, a theory of difference has the potential to empower women.[9]

Around the issue of pregnancy, the attachment to the equality standard first seemed to falter. Feminists found themselves divided around the parameters of a sameness-difference debate focused specifically on reproductive biology. In the early articulation of the debate during the 1960s and 1970s, the equality feminists clearly held the dominant position. They argued that a recognition of differences would lead to writing the separate spheres ideology back into law.[10]

Variations on the equality theme contained the first signs of movement toward difference. Distinctions between types of equality emerged when some feminists sought to draw meaningful lines between concepts such as "equality in treatment" and "equality of result."[11] Other feminists have argued that equality needs to be supplemented by an appreciation of difference in certain narrowly defined classes of situations. In fact, one of the prominent early equality-of-treatment feminists partially recanted and fashioned an "episodic" approach to equality, arguing that while women and men are basically the same, the law needs to

9. Differences can empower—providing opportunity instead of stigma. This assertion is made without the intent to obscure the fact that a focus on differences holds potential dangers for women.

10. *See, e.g.*, Williams, *supra* note 2. Williams argues that the "problem" of pregnancy can be dealt with by using an equality strategy that analogizes pregnancy in the workplace to illness. She asked: Why should a woman who gets pregnant and misses work "deserve[ ] to keep her job when any other worker who [gets] sick for any other reason [does] not?" *Id.* at 196. She argues for gender-neutral but improved sick-leave policies that offer both men and women protection in the event of a disability. *Id.*

11. My own early work attempted to draw such lines in a broad family context. In 1983 I argued for a distinction between "rule" and "result" equality and developed a critique of gender neutrality in law reform. *See* Martha A. 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, 826-42. Other scholars have continued along the lines first suggested in that 1983 article and have sought to draw distinctions among modes of equalities. *See, e.g.*, Mary Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201; Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma H. Kay, MODELS OF EQUALITY, 1985 U. ILL. L. REV. 39; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987). However, I soon realized that equality is a legal concept, considered foundational and thus carrying with it a significant and vital history of interpretation. It is not a term so easily captured and manipulated as to be readily available for feminist reforms. I subsequently argued for the "abdication" of equality and a resort to middle-range ideals. *See* MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) [hereinafter FINEMAN, ILLUSION OF EQUALITY].

acknowledge some biological differences by validating some sex-specific rules for pregnant, nursing or menstruating women.[12]

Biological sex differences would thus be "legally significant" only when they are being utilized for reproductive purposes. In assessing whether pregnancy discrimination had occurred, for example, the comparison would not be with broad categories such as "women" and "men" or "pregnant and non-pregnant persons."[13] Instead the law would focus on the narrower comparison between women and men who have engaged in reproductive behavior—sexual intercourse resulting in pregnancy.[14] The episodic analysis leaves in place the basic equality framework, merely distorting it for some specific events that have increasingly come to be seen by many legal feminists as not fitting comfortably or appropriately within the paradigm.

Increasingly, some feminists seem willing to move beyond equality rhetoric altogether. They call attention to the fact that "equality" tends to be translated as "sameness of treatment" in American legal culture and, for that reason, actually operates as a conceptual obstacle to the formulation and implementation of solutions to the unique economic and societal problems women encounter.[15] These "post-egalitarian feminists" urge a reconsideration and reconstruction of the present role of law in maintaining the unequal allocation of societal and economic power between men and women. They push us to move beyond equality and establish affirmative theories of difference—this time from a feminist perspective. They recognize that initial adherence to an equality concept was necessary in taking the first steps to change the law and legal institutions and that equality still has some use

12. *See* Herma H. Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1 (1985).

13. *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding California's disability insurance program against an equal protection challenge because the program distinguished between pregnant and non-pregnant persons, not males and females). The court held that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not," *id.* at 496-497, and that "[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities," *id.* at 496 n.20.

14. Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987). The author also sees a limited role for male-specific rules as in the case of rape. This is an "accommodationist" model that validates special treatment when it is used to accommodate physiologically-based differences.

15. *See, e.g.*, FINEMAN, ILLUSION OF EQUALITY, *supra* note 11; Diana Majury, *Strategizing in Equality*, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY, *supra* note 5, at 320; Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987).

in limited circumstances such as equal pay for equal work or voting rights. The argument is not that the concept is useless, but rather that equality should not be the overarching goal—the meta-objective that drives all feminist considerations.

Thus, for many American feminist legal scholars, there has been a move away from equality as one of the organizing principles of legal thought.[16] Feminist theory in law is seen as oppositional, challenging the status quo and the presumed neutrality of law and questioning the universality of the overarching abstract principles that have buttressed business as usual at most levels of society. But even though feminists are united in this basic first step, disagreements emerge.

Legal feminists who argue for "accommodation" as well as those who urge "acceptance" believe that differences should be explicitly addressed.[17] On the other hand, some feminists disillusioned with sameness of treatment resist difference, arguing that attention to difference is a concession to male power in that it accepts difference as the relevant defining force. They urge that concepts of dominance and subordination be used to rectify legal inequality.[18] A smaller group of legal feminists, often more

16. A simplistic notion of equality has created a particularly harmful set of problems in the family context. For example, the rhetoric surrounding the equality debate has raised questions in the context of adoptions. Unmarried fathers are employing equality models to attack the rules that treat them differently than the child's mother in terms of due process and substantive rights when a child is to be placed for adoption. *See* Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a single father who had lived with his children for five years may block the adoption of the children by withholding his consent). *But cf.* Quilloin v. Walcott, 434 U.S. 246 (1978) (holding that a natural father who had never exercised custody over or legitimated the child could not object to adoption). *See also* Lehr v. Robertson, 463 U.S. 248 (1983) (refusing to strike as unconstitutional a law that provided different procedures and rights to fathers of illegitimate children up for adoption than to mothers). In *Lehr*, the Court found it significant that the father had not maintained a relationship with the child since her birth, quoting with approval Justice Stewart's dissent in *Caban*: " 'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. . . . In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.' " *Lehr*, 463 U.S. at 260 n.16 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

17. Accommodationsts would approve special treatment for women when physiologically-based differences are at issue. These tend to be limited to fundamental reproductive differences. Acceptance, advanced by Christine Littleton, encompasses both biological and cultural sexual differences and seeks to ensure "symmetry" in positions by taking account of those differences. Lucinda Finley is also in this category. *See* Littleton, *supra* note 11. The acceptance approach seems to me to be the most promising, although, to date, it has not been used to discuss much beyond the "easy" case of pregnancy.

18. Catherine MacKinnon is the leading proponent of this analysis. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). Sometimes this

associated with disciplines other than law and typically calling themselves "post-modern," take the idea of difference to the extreme. These scholars import post-modern theory into the legal context in a way that is often problematic, simplified and reductionist. They divide the category of women into smaller and smaller subcategories, emphasizing other defining characteristics such as race or sexual orientation.[19] This results in a kind of hyper-individualism.

In contemporary critical thought there is an unspoken trend toward excessive reliance on the individual characteristics of the speaker to legitimate discourse. 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. In operation it places some discourse beyond criticism: discourse is accepted as authentic, not because of the nature of the rhetoric, but because of the nature of the individual speaker.

That the mere presence of a characteristic or set of characteristics in the individual gives that individual the authority and legitimacy to definitively represent the position of women sharing such characteristics is problematic. While characteristics may indicate experiences or potential experiences, they should not be considered in and of themselves sufficient or even necessary to validate the speaker's position. Rather the quality and nature of that which is spoken should be considered most relevant. We must focus on the discourse, the ideology. No groups or individuals should be immune from a critical and political assessment of what they advocate. Additionally, from a rudimentary political perspective, when authority or authenticity is located exclusively in individuals as representatives of groups, the token inclusion of such individuals becomes seen as a "solution" to the problems suffered by those groups.

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model productively leads to grounded considerations of gendered circumstances, but it has a tendency toward abstract presentation. Furthermore, it relies on negative characterizations such as "dominance" and "subordination" that may not be considered by many women as appropriate characterizations of what they experience in the context of motherhood or other forms of intimate connection.

19. *See, e.g.*, Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice?"*, 15 HARV. WOMEN'S L.J. 32 (1992); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

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 eradicate the perception of differences between women and men because it is a characteristically 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 finely tuned by the addition of other "authenticating" characteristics to gender, such as sexuality or race. Perhaps these additions are concessions to the notions of experiences and ideology; however, the basic tenet in this view of representation remains 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. Currently, this notion of representation is used simultaneously to legitimate and to privilege some women's voices. The process of legitimation is accomplished within unchanged institutions that use the representative woman against the radical potential and challenge of a discourse of gendered experience and ideology.

The gendered experience and ideology, however, are not capable of location within any individual woman. The notion of individual representation facilitates tokenism; furthermore, it can empower the individual woman while it renders her the most

effective weapon to silence the interests and voices of the women she has been designated to represent. The individual-based 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, 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.

An increasing number of legal feminists are concluding that the neutral equality model for law reform will serve as an artificial limit on the feminist project in law.[20] They are concluding that the unequal and inequitable position of women can only be addressed through pervasive recognition and, perhaps, legal accommodation of differences. Referencing ideals such as "justice" and "fairness" rather than focusing on equality, these feminists seek to make the circumstances of poor and working-class, nonprofessional women more visible. They may not have menus of solutions, but their goal is to present the pain that the status quo has wrought in the hope that it will cause those in positions of power to rethink the tired and trite images and ideological impositions that have crippled public policy up to this point.

20. *See* FINEMAN, ILLUSION OF EQUALITY, *supra* note 11; Kay, *supra* note 11; Majury, *supra* note 15; Marcus, *supra* note 15. The answer to the question "What is the feminist project in law?" changes over time as either the law or circumstances change or as perceptions of the problems alter. At any one time there are many feminist projects in law. The designation of what are the most pressing feminist projects varies with the feminists consulted. Some are concerned primarily with issues of legal knowledge and the production of doctrine, others with women's opportunities within the profession. Many are concerned with the impact of law on the perpetuation of a historically inequitable and gendered social existence.

III. The Concept of a Gendered Life

A. *Making Gender Central*

I have been developing the concept of a "gendered life" to give content and legitimacy to a legal concern for differences. The idea of a gendered life is based on the premise that women share as a group the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which their gender is culturally relevant. These experiences, actual or potential, provide the occasion for women to develop a perspective that is rooted in their appreciation of and reaction to the gendered nature of our social world. This concept does not assume that women respond identically to an appreciation of gendered existence. It does presume that with gender revealed as a central social and cultural consideration, women's attention in many areas can productively be directed toward confronting and challenging the gendered implications of our lives.[21] This concept of gendered life begins with the observation that women's existences are constituted by a variety of experiences—material, psychological, physical, social, and cultural—some of which may be described as biologically based, while others seem more rooted in culture and custom. The actual or potential experiences of rape, sexual harassment, pornography, and other sexualized violence that women may suffer 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.

On the question of superficial similarities, I concede that while some gendered experiences are events that are shared with men, there is, nevertheless, often a unique way in which these events are generally or typically lived or experienced by women in our culture. The example of aging, as a life event, falls into this category. While both men and women age, the implications of aging

21. In a world in which gender is more than semantics, feminist legal theory cannot be gender-neutral, nor can it have as its goal equality in the traditional, formal legal sense of that word. Feminist theory must be woman-centered, gendered by its very nature, because it takes as its raw building material women's experiences. Since women live gendered lives in our culture, any analysis that begins with their experiences must of necessity be gendered analysis. Addressing the real material consequences of women's gendered life experiences cannot be accomplished by a system that refuses to recognize gender as a relevant perspective, imposing "neutral" conclusions on women's circumstances.

from both a social and economic perspective are different for the genders in our culture.[22]

The concept of gendered life is my attempt to create a methodolgy for the argument that a recognition of difference is necessary to remedy socially and culturally imposed harms to women. Notice that the formulation of the difference debate is distinguishable from that of Justice Bradley's opinion in the *Bradwell* decision.[23] In *Bradwell*, differences were based on biology, nature, and, ultimately, on God, and they operated as an exclusionary device to limit women's participation.[24] The contemporary difference argument, by contrast, is grounded in empirical realizations, in experiences, and in society and culture. It is an affirmative position, arguing for remedies and for differentiated treatment to rectify existing pervasive social and legal inequality.

B. *Gendered Life in Application*

A recent employment discrimination case provides an example of this type of sensitivity to difference.[25] In that case, Judge Robert R. Beezer (a Reagan appointee on the Ninth Circuit) adopted a "reasonable woman" standard for the assessment of allegations of sexual harassment:

> [W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common . . . .
>
> [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a

22. *See generally* PAUL E. ZOPF, AMERICAN WOMEN IN POVERTY 109-11 (1989).

23. *See supra* note 1 and accompanying text.

24. *See id.*

25. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The particular aspect of protectiveness evidenced in *Bradwell*, however, may still be detected in court cases. *See, e.g.*, Int'l Union, U.A.W. v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991) (upholding a company policy which banned women of child-bearing years from occupying particular positions of employment based on evidence that exposure to lead in those positions would cause severe birth defects if a woman were to become pregnant). While this case was later reversed by the Supreme Court, the Court did not reject the basic premise of the lower court—that all women should be viewed as potential mothers—but instead emphasized the woman's right to make choices regarding childbearing and pregnancy.

> full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[26]

The majority opinion adopted a reasonable woman standard in recognition of the fact that women experience at least some aspects of the world differently than men.[27]

Judge Beezer was opposed to a purely subjective test and indicated that the "objective" reasonable woman standard was fashioned "[i]n order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee."[28] He noted that the court found it necessary to "adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[29] The court reversed the trial judge's finding that the woman, who had received "love letters" from a male colleague whom she found frightening, had failed to state a prima facie case of hostile environment sexual harassment.

On a very significant level, the opinion in this case is a victory for feminist legal theorists who emphasize the different ways in which men and women in our culture experience events. Feminist legal writers' works are cited in the text of the opinion.[30] Even more important, the court did not systematically ignore relevant aspects of women's gendered lives and did not adopt male experiences as the norm. In referencing the real-world context of sexual violence toward women, Judge Beezer recognized that this reality can shape an individual woman's reception of amorous and insistent unwanted declarations of affection.[31]

But before feminists do too much celebrating, it is important to remember that winning one battle is not the same as winning the war. For example, in *Scott v. Sears, Roebuck & Co.*,[32] the Sev-

26. *Ellison*, 924 F.2d at 878-79 (citations omitted).

27. *Id.* at 879-80.

28. *Id.* at 879.

29. *Id.*

30. Judge Beezer cites the following feminist writings in the area of sexual harassment: Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (contending that the characteristically male view depicts sexual harassment as comparatively harmless amusement); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (arguing that men tend to view some form of sexual harassment as "harmless social interaction to which only over-sensitive women would object"). *Ellison*, 924 F.2d at 878-79.

31. *Ellison v. Brady*, 924 F.2d 876, 879 (9th Cir. 1991).

32. 798 F.2d 210 (7th Cir. 1986).

enth Circuit found that allegations of repeated propositions by a supervisor along with slapped buttocks and sexual comments from co-workers did not poison a woman's work environment.

Also ominous for those who support the reasonable woman standard is the delineation of that standard in *Rabidue v. Osceola Refining Co.*[33] There, a divided panel of the Sixth Circuit Court of Appeals held that sexually explicit and derogatory remarks about women and the presence of pinups in the office did not seriously affect the female plaintiff's psychological well-being.[34] Other courts have shown similar tendencies to co-opt the concept of reasonableness (applied to women explicitly or generically), making it coterminous with the "common sense" of a male judge.[35]

C. *Who is the Reasonable Woman—Differences Among Women*

We must also be aware that opinions such as Judge Beezer's in *Ellison* reflect an aspect of the difference debate with which feminist legal scholarship continues to struggle on a basic conceptual level. At the same time that Judge Beezer affirmed that there are relevant legal differences between the social and cultural experiences of men and women, he assumed that a reasonable woman standard can be applied in the context of the fact-finding process. The opinion does make note of the possibility for relevant differences among women, but banishes any doubt that it generates in the interest of protecting employers from the "idiosyncratic concerns of the rare hyper-sensitive employee."[36]

The potential existence of any differences among female perspectives is not reason enough to withhold a gender-specific standard given the need that, the court concludes, exists for "[a] gender-conscious examination of sexual harassment [that] enables women to participate in the workplace on an equal footing with men."[37] While the distinction may be considered welcome and even necessary, the question arises whether recognition of this aspect of difference alone is enough. What about the di-

33. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).
34. *Id.* at 617.
35. *See, e.g.*, Lipsett v. University of P.R., 740 F. Supp. 921, 925 (D. P.R. 1990) (refusing to hear as unnecessary expert testimony regarding sexual harassment "because it deals with common occurrences that the jurors have knowledge of through their experiences in everyday life and their attitudes toward sexual matters").
36. *Ellison*, 924 F.2d at 879.
37. *Id.*

lemma presented by the recognition that there are relevant differences among women?[38]

The thorny theoretical question concerning the identification of relevant differences among women—and how feminist discourse should recognize and accommodate these differences—has produced intense debate.[39] While I agree with the importance of considering differences, recent developments seem to have silenced or restricted the voices of many women. When women believe that they cannot speak for anyone other than those women with whom they share major non-gender characteristics (such as class, sexual preference, or race), debate becomes paralyzed.

Some writers have even gone so far in accommodating differences among women that they suggest that it is problematic to even use an unqualified category of "woman" upon which we can build theory and/or assign social, cultural, or political considerations or consequences.[40] Others question whether we can speak even for ourselves—challenging the concept of self and asserting that no unitary beings exist over time, in space, to whom one can pretend to give coherent voice.[41] Thus, we are either in a group, a cluster, or as an individual—reduced to multiple categories and divided from each other.[42] The politics and implications of these discourses seem problematic. In response to concerns about essentializing women as a category that erases differences and privilege, it is important to remember that as the questioning of categories (in fact, the questioning of the whole process of

38. Martha Minow develops the various aspects of the dilemma, which she describes as "[t]he risk of recreating difference by either noticing it or ignoring it," in her recent book. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 40 (1990).

39. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

40. For a further exposition of this view, see Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 838-41 (1990). Cain argues that the category "woman" is multifarious and denies unitariness. She says that a post-modern feminism would focus not on "woman" but "women." This is her answer to the criticism that there is not an appropriate category around which feminism can operate in post-modern theory.

41. *See id.* at 806-10. Cain describes the social constructionist position of woman as a category whose content is filled out by the creators of the category. "Self-definition," she claims, is "never something I can do independently." *Id.* at 810. She does suggest that one brand of radical feminism hopes to reconstruct the category in feminist terms. *Id.*

42. Robin West has voiced a powerful critique of this tendency. *See* Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 84-89. For attempts to provide a post-modern connection, see Drucilla Cornell, *The Doubly-Prized World: Myth Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990).

categorization) goes on, society generates, and continues to recreate and act upon, universalized cultural representations of women and women's experiences. Even those critical of cultural constructions of essentialist images must recognize the force these images hold.[43]

To put forth an example of one of these images, I earlier referred to the institution of motherhood as a "colonized category" in law.[44] All women must care about social and legal constructions of motherhood, because, although we may make individual choices not to become a mother, social construction and its legal ramifications operate independent of individual choice. As demonstrated by decisions such as *Johnson Controls*,[45] women will be treated as mothers (or potential mothers) because "Woman," as a cultural and legal category, inevitably encompasses and incorporates socially constructed notions of motherhood in its definition.

In addition, it is important to note that although the social and legal construction of motherhood occurs in a variety of different contexts, there is a common image of "mother" which emerges. A comparison of images of single motherhood which emerge in both poverty and in divorce discourses, for example, demonstrates that concepts and totalizing ideals tend to cross over.[46] The ideas (and ideals) forged in one context constrain and direct the debates in another. Motherhood as a totalizing, culturally defined institution is applied across race and class lines. She is objectified—heterosexual, ideally married, chaste, self-sacrificing, etc.—a rather statistically improbable and oppressive construct. This process of objectification is inevitable, although the form of the image may be up for reconstruction:

> It is the expression of ideas that makes it possible to hold them, think about them, react to them, and spread them to others. There must be an image, as articulated in art, in words, or in other symbols. The notion that an idea can somehow

43. None of us completely escapes the dominant images of the society within which we operate. Interpretation of life events, the process whereby events are given meaning, is not an atomistic, individualistic procedure. Social action and interaction, as well as dominant cultural images, significantly contribute to individual interpretation of and reaction to events. Furthermore, the law utilizes and facilitates the construction of these totalizing social and cultural images.

44. *See supra* text accompanying note 4.

45. Int'l Union, U.A.W. v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991).

46. The idea of cross-over discourses in regard to single mothers is explored in Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274-95.

> exist without objectification in an expression of any kind is an illusion, though the expression may take the form of a term or image in one's own mind: i.e., as a contemplated exchange with others.[47]

The assertion that there is a totalizing tendency represented in the social and legal construction of women as "Women" suggests that there is a basis for women to work together across their differences. This hopeful twist on gender stereotyping is premised on its utility for unifying different groups of women.

Using the concept of gendered lives that I developed earlier to distinguish women's from men's lived experiences in our culture, it is possible to see some unifying potential in the very extensiveness of the cultural stereotype. The existence of the social construction suggests that, while few could legitimately dispute that characteristics such as race, class and sexuality significantly affect one's experiences, it is erroneous to proceed as though these differences are always relevant.

Characteristics in addition to race, class and sexual orientation affect and contribute to the construct of gender as unifying. For example, age, physical characteristics (including disabilities and beauty or the lack thereof), religion, marital status, the level of male identification (which is independent of both marital status and sexual orientation—what Gerda Lerner has referred to as "the man in our head"[48]), birth order, motherhood, grandmotherhood, intelligence, rural or urban existence, responsiveness to change, ability to accept ambivalence in one's personal life or in society, sources of income (self, spouse or state), degree of poverty or wealth, and substance dependency, among others, shape existence by influencing the perspectives of women, and those who relate to women.

III. Conclusion

The concept of a gendered experience, which I initially offered in an attempt to open a space for women's perspective in

47. Murray Edelman, Category Mistakes and Public Opinion 11 (1992) (unpublished manuscript on file with the author).

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

law as distinct from men's, is now used to provide the occasion for unity among women over some specifics of their lives. Women have characteristics or clusters of characteristics related to the gendered aspects of their lives that have social and legal significance and, therefore, give women a basis for cooperation and empathy across their differences. By using the terminology of "gendered lives" I am isolating the so-called feminine traits that are different, recognizing them as limited to a historical, social and political context.[49] Because gendered experiences focus us on specific experiences, hopefully they can avoid perpetrating an idealized, universal notion of "Woman."

Attention to the force that an imposed (and therefore common) socially constructed concept of gender exercises upon aspects of all women's lives presents an opportunity for diverse women to participate in resisting that imposition. Women can coalesce across differences to work together on the project of defining for ourselves the implications and ramifications of the gendered aspects of our lives.

In other words, I am interested in exploring whether it is possible to have an affirmative politics of difference that defines groups and classifications tenuously, whereby group identification is recognized as politically necessary, but is also seen, in the words of Iris Marion Young, as "ambiguous, relational, shifting," without "clear borders" that bind people in all circumstances, for all time.[50] Women need not be considered to be inevitably either in opposition to or having little in common with other women because of non-gender group differences. Women can converge to organize around overlapping experiences.[51]

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49. Patricia Cain has described me as a "cultural feminist," someone she defines as ascribing both to a social constructionist view of the category woman and "embrac[ing] woman's difference." Patrick Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 806 (1990). However, my concern is not the expenditure of feminist energies valuing or devaluing women's difference as such. What I am arguing for is a theory which recognizes our "gendered lives"—something quite different.

50. IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 171 (1990). Young argues that women of different races, classes, and sexual preferences can seize the power of naming their differences as women without being frozen into essentialist categories. Differences can be understood and accommodated in the context of specificity, variation and heterogeneity. She defines this as "relational understanding" of difference. The relevance of differences depends on context and shifts in the contexts.

51. A gendered experience approach is also consistent with the philosophy underlying feminist methodology since it focuses on the concrete, not the abstractions of women's lives. In feminist theory, methodology is a step-by-step part of theory. For the most part, feminist methodology is about making theory more concrete, bringing in stories and other ways of identifying and describing women's experiences as they exist and as they have been left out of the legal system. Angela Harris refers to shifting methodology as a

My hopes for a development of the concept of gendered lives as a creative way to simultaneously address both distinct aspects of the difference debate may be too optimistic. On the other hand, the renewed interest in difference in feminist legal theory that has occurred during the last decade is positive because it reaffirms that our struggle over content and meaning in law is inherently political and that perspectives count.

It also seems that many of the alternative ways of discussing the uniqueness of women's position in society are unfruitful. For example, a benefit of the gendered life concept is that it does not contain any inherent negative content as does a domination model that brings with it notions of victimization. Many women may not be comfortable with a rhetoric that places their life experiences in a hegemonic web of oppression and domination. To return to motherhood, for example: while it may be a burdensome status in many regards, most mothers do not experience it as "oppressive." There is a need for new ways to express women's experiences that do not alienate women who live some aspects of traditional lives or trivialize their voluntarily shouldering of material or social disadvantages as products of false consciousness or individual or group pathology.

Furthermore, the gendered life concept has advantages because it anticipates that women's lives are always composites of concerns, characteristics and components that constantly shift as situations and circumstances change. Gendered life assumes the relational nature of experience and presumes that we are all af-

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way to get around dangerous gender essentialism. *See* Harris, *supra* note 39. Deborah Rhode turns to it as a way to assure that critical theory does not become so abstract so as to remove itself from women's experiences. *See* Rhode, *supra* note 39. Methodology, not always explicitly as such, includes literature (Adrienne Rich is as quoted as any legal scholar) and psychology (note the role of CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) as a way of bringing in women's experiences seemingly excluded from traditional legal rhetoric). *See* Rhode, *supra* note 35.

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

fected by social patterns and material circumstances. It is a term with built-in complexity, just like women's lives.

I recognize that the focus on difference at the core of the gendered life concept is fraught with potential pitfalls. Difference can be used to divide women, diluting our collective potential to challenge male defined and controlled gendered notions of law that systematically disadvantage women in a variety of contexts. Yet, I defend my present attempt by stating that this is merely the beginning of my search for pragmatic ways for legal feminists to work with law, recognizing its gendered nature and the need for the context supplied by considerations of difference.