a winner is declared after the play is over. As I have argued elsewhere,[125] this conception of the dispute resolution process is applied more broadly than just in the conventional courtroom. The adversarial model affects the way in which lawyers advise their clients ('get as much as you can'), negotiate disputes ('we can really get them on that') and plan transactions ('let's be sure to draft this to your advantage'). All of these activities in lawyering assume competition over the same limited and equally valued items (usually money) and assume that success is measured by maximising individual gain. Would Gilligan's Amy create a different model?

By returning to Heinz's dilemma we see some hints about what Amy might do. Instead of concluding that a choice must be made between life and property, in resolving the conflict between parties as Jake does, Amy sees no need to hierarchically order the claims. Instead, she tries to account for all the parties' needs, and searches for a way to find a solution that satisfies the needs of both. In her view, Heinz should be able to obtain the drug for his wife and the pharmacist should still receive payment. So Amy suggests a loan, a credit arrangement, or a discussion of other ways to structure the transaction. In short, she won't play by the adversarial rules. She searches outside the system for a way to solve the problem, trying to keep both parties in mind. Her methods substantiate Gilligan's observations that women will try to change the rules to preserve the relationships.

Furthermore, in addition to looking for more substantive solutions to the problem (ie not accepting the binary win/lose conception of the problem), Amy also wants to change the process. Amy sees no reason why she must act as a neutral arbiter of a dispute and make a decision based only on the information she has. She 'belie[ves] in communication as the mode of conflict resolution and [is convinced] that the solution to the dilemma will follow from its compelling representation'. If the parties talk directly to each other, they will be more likely to appreciate the importance of each other's needs. Thus, she believes direct communication, rather than third party mediated debate, might solve the problem, recognising that two apparently conflicting positions can both be simultaneously legitimate, and there need not be a single victor.

The notion that women might have more difficulty with full-commitment-to-one-side model of the adversary system is graphically illustrated by Hilary, one of the women lawyers in Gilligan's study. This lawyer finds herself in one of the classic moral dilemmas of the adversary system: she sees that her opponent has failed to make use of a document that is helpful to his case and harmful to hers. In deciding not to tell him about the document because of what she sees as her 'professional vulnerability' in the male adversary system, she concludes that 'the adversary system of justice impedes not only the supposed search for truth (the conventional criticism), but also the expression of concern for the person on the other side'. Gilligan describes Hilary's tension between her concept of rights (learned through legal training) and her female ethic of care as a sign of her socialisation in the male world of lawyering. Thus, the advocacy model, with its commitment to one-sided advocacy, seems somehow contrary to 'apprehending the reality of the other' which lawyers like Hilary experience. Even the continental inquisitorial model, frequently offered as an alternative to the adversarial model, includes most of these elements of the male system-hierarchy, advocacy, competition and binary results.

125 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *UCLA L Rev* 754.

So what kind of legal system would Amy and Hilary create if left to their own devices? They might look for ways to alter the harshness of win/lose results; they might alter the rules of the game (or make it less like a game); and they might alter the very structures and forms themselves. Thus, in a sense Amy and Hilary's approach can already be found in some of the current alternatives to the adversary model such as mediation. Much of the current interest in alternative dispute resolution is an attempt to modify the harshness of the adversarial process and expand the kinds of solutions available, in order to respond better to the varied needs of the parties. Amy's desire to engage the parties in direct communication with each other is reflected in mediation models where the parties talk directly to each other and forge their own solutions. The work of Gilligan and Noddings, demonstrating an ethic of care and a heightened sense of empathy in women, suggests that women lawyers may be particularly interested in mediation as an alternative to litigation as a method of resolving disputes.

Even within the present adversarial model, Amy and Hilary might, in their concern for others, want to provide for a broader conception of interested parties, permitting participation by those who might be affected by the dispute (an ethic of inclusion). In addition, like judges who increasingly are managing more of the details of their cases, Amy and Hilary might seek a more active role in settlement processes and rely less on court-ordered relief. Amy and Hilary might look for other ways to construct their lawsuits and remedies in much the same way as courts of equity mitigated the harshness of the law courts' very limited array of remedies by expanding the conception of what was possible.

The process and rules of the adversary system itself might look different if there were more female voices in the legal profession. If Amy is less likely than Jake to make assertive, rights-based statements, is she less likely to adapt to the male-created advocacy mode? In my experience as a trial lawyer, I observed that some women had difficulty with the 'macho' ethic of the courtroom battle. Even those who did successfully adapt to the male model often confronted a dilemma because women were less likely to be perceived as behaving properly when engaged in strong adversarial conduct. It is important to be 'strong' in the courtroom, according to the stereotypic conception of appropriate trial behaviour. The woman who conforms to the female stereotype by being 'soft' or 'weak' is a bad trial lawyer; but if a woman is 'tough' or 'strong' in the courtroom, she is seen as acting inappropriately for a woman. Note, however, that this stereotyping is contextual: the same woman acting as a 'strong' or 'tough' mother with difficult children would be praised for that conduct. Women's strength is approved of with the proviso that it be exerted in appropriately female spheres. Amy and Hilary might create a different form of advocacy, one resembling a 'conversation' with the fact finder, relying on the creation of a relationship with the jury for its effectiveness, rather than on persuasive intimidation …

In sum, the growing strength of women's voice in the legal profession may change the adversarial system into a more co-operative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser. Some seeds of change may already be found in existing alternatives to the litigation model, such as mediation. It remains to be seen what further changes Portia's voice may make …

Directions for New Speculations

This brief and speculative discussion of how another voice might inform the law and the lawyering process may create more problems than it illuminates. Are

these different voices gender-based or just two thematically different ways of looking at the world? If these are women's voices, why haven't they been heard yet, since there are an increasing number of women in all parts of the profession? Will the new voices become assimilated to the old before they are heard in the legal system?

Have those women who have already become lawyers been socialised or self-selected to succeed with a man's voice? Have we sought to explain too much by transposing psychological observations to the legal arena? And perhaps most importantly, how will the 'women are different' argument play itself out in current legal disputes? Many of us feel the differences everyday. What we deplore is when they are used to oppress or disempower us or when they are used as immutable stereotypes that prevent recognition of individual variations. We don't yet know how many of the differences will disappear in a world socially and legally constructed so that gender is not a basis for domination. My point of view is that while we are observing the differences we might ask if we have something to learn from them. Whether or not the different voice is gendered, we might look at how our legal system might take account of a few more voices.

The new voice may create its own problems and dilemmas – the values of care, responsibility and relationship present their own difficulties. Can we care for all? How many (our client, the other client, the other lawyer, the entire system) can we be responsible for at any one time? Are all relationships good, the unequal relationships to the same extent as the equal relationships? By caring too much for others, do we lose sight of ourselves? Will too much contextualism prevent the emergence of any general principles by which we can guide ourselves? These are among the difficulties we will have to confront when and if a women's voice in the lawyering process is heard.

It is increasingly important to examine whether and how Portia might speak in a different voice and how we might try to avoid descriptions of the legal world that commit a serious fallacy by using the part (the male world of lawyers) to describe the whole. We have a demanding research agenda ahead for the study of a women's lawyering process in legal education, in the practice of law, in the structure of the profession and the legal system, and in the doctrinal and substantive values of our laws.

FROM GENDER DIFFERENCE TO FEMINIST SOLIDARITY: USING CAROL GILLIGAN AND AN ETHIC OF CARE IN LAW[126]

Leslie Bender[127]

Gilligan's work and the work of feminist gender difference theorists have generated a certain degree of controversy. Feminists who struggle against acknowledgement of sex or gender differences find Gilligan's variety of theory damagingly reminiscent of a romanticised 19th century 'separate spheres' ideology, and hence quite pernicious. Other feminists, who assert that gender relations are power hierarchies and about institutionalised privilege, consider Gilligan-type works disturbing, because they valorise 'voices' of women that are

126 (1990) 15 *Vermont Law Review* 1. (Footnotes edited.)

127 At the time of writing, Associate Professor, Syracuse University College of Law.

arguably results of subordination and oppression.[128] Some feminists combine both these arguments and criticise Gilligan's work for its vulnerability to cooptation, misuse, or appropriation by the conservative right.[129] Lately, another feminist critique of gender difference theories has emerged. This criticism is laced with postmodernist/poststructuralist theoretical concepts. It eschews difference theory's reliance upon a universalised liberal-humanist 'subject' or, more pointedly, on an unspoken assumption of a 'white, economically comfortable, heterosexual woman'. A similar criticism is wielded by critical race and sexuality theorists. These powerful challenges contend that gender difference theories are essentialist, ahistorical, and insensitive to differences of race, class, sexual preference, ethnicity, age, motherhood, and physical challenges.[130] Specific criticisms of Gilligan and other feminist difference theory projects are more prevalent in the non-legal literature, but they have made their way into law journals and legal conferences as well.[131] Does all this debate lead to a conclusion that although Gilligan's work provided a useful platform in the early 1980s for validating women's perspectives and knowledges (particularly when they deviated from the norms of the dominant discourses), hers is no longer a persuasive or viable theory?

I have been struggling with this idea of post-Gilliganism (not to mention postfeminism) and the imminent demise of difference theory. What is the value or 'truth' of a theory of gender differences? What is the meaning of the charge of essentialism? Does the rejection of difference theory mean that we will lose the category of women for purposes of our critiques and analyses? If so, what are the political and theoretical consequences of that move? I want to argue against critiques of feminist difference theory that lead to our inability to speak of women as a category for theorising and for political and legal struggle.

I believe it is politically and theoretically premature to give up the 'class' of women for our analysis. Differences among women based on particularised cultural, historical, and political factors ought not be ignored, but they also ought not serve to break down the category of women into infinitely smaller groups, until we end up with an analysis that can only effectively cover individuals. Real differences among women notwithstanding, there is enough that is cohesive and common about the category of women to bridge the differences for purposes of political solidarity and legal analysis. Domination, subordination, exclusion,

128 See, *inter alia*, Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989); J Auerback, L Blum, V Smith, C Williams, 'Commentary: On Gilligan's In a Different Voice' (1985) 11 *Feminist Studies* 149; Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory' (1987) 12 *Signs* 621; Joan Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs* 644; Martha Reineke, 'The Politics of Difference: A Critique of Carol Gilligan' (1987) 2 *Canadian Journal of Feminist Ethics* 3.

129 See eg Ann Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale LJ* 1373. (Extracted in Chapter 4.)

130 See eg Nancy Fraser and Linda Nicholson, 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism', in *Feminism/Postmodernism,* L Nicholson (ed) (1990); Clare Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1989) 3 *Berkeley Women's LJ* 1; Audre Lorde, 'Age, Race, Class and Sex: Women Redefining Difference', in *Sister Outsider* (1984); Martha Minow, 'Beyond Universality' (1989) *U Chicago Legal F* 115; Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

131 See eg Angela Harris, 'Race and Essentialism in Feminist Theory (1990) 42 *Stanford LR* 581. (Extracted *infra*); D Rhode, 'The Woman's Point of View' (1988) 38 *Journal of Legal Education* 39. (Extracted *infra*); A Scales, *op cit*.

lesser status, and inter-personal care-giving responsibility infuse women's experiences and gender construction in patriarchal societies, even though these phenomena manifest themselves differently in different women's particularised lives. Yet, we can say meaningful things about women that respond to the concerns, needs and experiences of women from different economic classes, different races, different privileges and statuses. Women, with all our differences accounted for, can achieve a feminist solidarity for social and legal transformation. Gender difference theories, which investigate and work from these acknowledged commonalities among women, provide a rich vein (a motherlode) for us to tap in our reconstructive and transformative efforts.

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

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

Overview of Gender Difference Theories

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

Working from this premise of difference, gender difference theorists identify the traits, characteristics, and orientations of gender construction and study how the gender woman is distinguishable from the gender man. These theorists often need to redescribe and name women's approaches and orientations, because if those characteristics had been defined at all, it was from a male observer's perspective and measured against a norm of male traits. Unlike some feminist theorists who want to eliminate gender differences once differences are redefined, difference theorists celebrate and learn from gender differences. In addition, many gender difference theorists privilege some or all of women's gender traits.

Traditional descriptions of gender difference theories end here, but I think it is unfair to assume that difference theorists are oblivious to the painful reality of gender power dynamics. Despite Professor Catharine MacKinnon's authoritative distinction between difference and dominance theories, I find that gender difference theories incorporate premises of gender dominance theory. They recognise that women have been denied political power and other significant kinds of social and inter-personal power. It is a chicken-and-egg problem whether gender differences precipitated power/treatment differences or power/treatment differences created gender differences. I maintain that this unresolvable causal problem is an incoherent enquiry in the first instance, because the phenomena are not neatly dichotomised, but inter-related and inter-active. Feminists ought not let our theory-building be immobilised by the muck of this causation quagmire. However it was that the domination of women got started, throughout our history and up to the present, women have lived in a society that treats us differently from men. Difference theorists claim that different treatment, roles, expectations, and experiences based on gender correlate with different modes of thinking, acting, inter-relating, and interpreting reality. These differences from men create issues of common concern and interest for women. Dominance theorists may even agree, but they part company on ways in which they understand and utilise these differences.

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

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

Without a doubt, women of colour are excluded and oppressed in more complex and different ways from white women, just as poor women are oppressed and excluded in more dramatic ways than rich women. We cannot separate which parts of our oppression are gender-based and which parts are race or class-based. These dominating and oppressing forces interact synergistically. But, that does not mean that women of all races, classes, and identities cannot work together in feminist solidarity to end unjust discrimination against all women and all people. In the United States, for example, sexual difference remained a formal barrier to women's right to vote until 1920, long after formal barriers of race and property ownership had been eliminated for men. No woman – whether white or black, rich or poor, physically challenged or able-bodied, heterosexual or lesbian – was allowed to vote in federal elections. Although the Constitution was amended over a century ago in an attempt to provide equal rights and mark a formal end to race discrimination, an Equal Rights Amendment, designed to achieve a similar constitutional guarantee for women, has been repeatedly defeated. Discrimination against women because we are women continues. The Supreme Court has decided that legislatively enacted discriminations based on race are subject to the strictest scrutiny by the courts under the equal protection clause of the Fourteenth Amendment, but discriminations based on gender do not require as close attention. Furthermore, there is an underlying assumption that discriminations that disadvantage women based on their sex, as opposed to their race, may be justified on some occasions. For example, Title VII, a federally enacted equal employment law, permits sex-based discrimination in situations where sex is shown to be a bona fide occupational qualification, but contains no parallel exception for race-based discriminations. Women can work together to change these legal impediments to substantive equality for all women. Where necessary, we can treat gender separately without obscuring racial, economic, or other group struggles.

A jurisprudence that recognises gender differences seems basically correct to me, whether we like those differences or not, whether we permit courts to rely on them, or whether we believe we can change them once we figure out how they happen. My experiences, my observations of people, my intuitions, my feelings, and my studies lead me to believe that gender differences do exist. If they exist (and for as long as they do), our legal theories ought to take what we learn from gender differences analysis into consideration. Even though particularlised circumstances and other social-cultural constructs (such as race, class, and sexual orientation) may cause some women to understand themselves and their lives very differently from other women, females are still constructed as women, and as such we share something in the lived experiences of that gender construction. The gender construction of women has strong cultural meanings in patriarchies; it causes people to conceive of women as importantly different from – and often lesser than – men. As a function of being so constructed, women think and act differently from men, even men who are otherwise like us. Part of that difference has to do with power relations. Hence, at this juncture, difference theory is integrally related to – even inseparable from – dominance theory.

Finally, feminist difference theories understand gender differences as affecting or being affected by one's self-perception and one's perceptions about relationships. On this issue gender difference theories may diverge from dominance theories. Carol Gilligan suggests that many gender differences grow out of distinct conceptions of self and relations-to-others. Building on the work of Nancy

Chodorow,[132] she submits that women tend to understand people more relationally, as inter-connected and mutually dependent, whereas men tend to conceptualise people as more independent, autonomous, and ego-boundaried. According to Gilligan, these differing self-conceptions kindle gender-linked concepts of morality, human inter-personal relationships, and appropriate behaviours. Women's predominant focus for resolving ethical dilemmas is the maintenance of relationships and avoidance of hurt. This is achieved through a contextualised ethic of responsibility and care. Men focus more heavily on ordered hierarchies of principles of justice and rights (such as formal equality) to resolve moral problems. This standard stuff of Gilliganesque analysis, found in many law review articles that discuss her work, is a bit oversimplified and 'vulgarised,' but it touches on what is helpful for my argument about gender difference and legal change. Later in this essay I will explore the legal and socially transformative significance of the relational and care aspects of gender difference that Gilligan attributes, at least subtly, to women as a 'different voice' …

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

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

If stereotypes are going to be used against us, as they have been in the past, they will be so used regardless of what we say or do. Those who want to exercise their power by disadvantaging women based on stereotypes did so long before we celebrated women's cultures and will do so long after, no matter which strategy we select in our struggle for justice for women. Those who use disadvantaging stereotypes do not obtain their power by appropriating the language that we use to describe ourselves. Use of stereotypes to disadvantage groups is a matter of

132 Nancy Chodorow, *The Reproduction of Mothering* (1978).

pre-existing power, not the triumphant, persuasive or rhetorical force of alternative discourses. We ought not let others' temporary control of the dominant discourse disempower us from speaking honestly and openly about ourselves, about how we think and know, how we love and inter-relate, how we care or what we care about, how we understand justice, and how we can bring about a better life for all. Our political electivity comes from our willingness to speak our truths as we see them; not our fear of succumbing to other imposed stereotypes. If there are things about the gendered construction of women, things that have shaped our lived experiences, our relationships, and our views of the world, things that we consider good, valuable, and essential to peace, equality, and justice, then we should share them and require that they be used in reconstructing our laws. Yet, we should not be convinced to surrender them freely and without strings to the dominant powers, because they will call them 'human', discount women's contributions, and possibly distort them by partial and limited understandings. If the legal powers-that-be can decide that they know as much about 'humanism', 'care' and 'responsibility' as anyone, they can also decide that women's presence, perspectives, understandings, and experiences will not be needed to reconceptualise law with these values. We must be an integral part of this reconstruction, because our knowledges and perceptions, which we developed as gendered women, are critical to this transformative project.

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

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

There are so many questions to explore. Is an ethic of care just an aspect of personal morality conceived as justice, as Kohlberg has argued?[133] Does an ethic of care involve empathy,[134] compassion as sympathy, or compassion as co-feeling? Is an ethic of care a perspective that can or should inform legal processes? What difference would this difference make? Do we need rights, principles, and generalisable rules for predictability and stability? Will a care perspective lead to chaos or relativism? If not, how should we understand its application and differing results in varied situations? Furthermore, are these perspectives of care and justice in too much tension to be fruitfully combined? If

133 L Kohlberg, *The Psychology of Moral Development: Essays on Moral Development* (1984), pp 231–32.

134 Lynne Henderson, 'Legality and Empathy' (1987) 85 *Michigan LR* 1574.

people learn to focus on one orientation or the other, as Gilligan's studies indicate, can we ever integrate them in our thinking or in our law? How can law-makers, lawyers, judges, professors, and law students study, learn from, borrow from, and reconstitute law with a gender-based ethic of care and responsibility? Can we benefit from an ethic of care in law without limiting ourselves to either/or, dualistic thinking and dichotomous paradigms? Finally, are there only two dichotomous perspectives – care and justice – or are there multiple perspectives that intersect and combine in different ways at different times?

Gender difference theory provides a rich source for transforming law. Feminist legal theories ought to do more than expose our legal system's warts. We must supply new vocabularies, perspectives, paradigms, methodologies, and practices. Insights from difference theories about gender bias, marginality and exclusion, relationships and difference, co-operation, values of care, listening, responsibility, and solidarity can inform legal practice and jurisprudence to move us toward goals of democracy, justice, and true equality. For example, our statutory and common law legal system can develop new categories of civil law analysis (rather than criminal or regulatory law) that recognise and value relationships, inter-personal responsibility, and human needs for safety, health, education, and security, rather than its traditional focus on money and commodities.

Law can develop new methods of conflict resolution that are not premised on adversarial, competitive, win-or-lose models. An ethic of care and women's gender differences can teach us other, and perhaps better, ways to seek truth and understand justice. Law can redefine who counts as parties to controversies, reconsider what counts as relevant information, imagine new kinds of remedies to redress injuries, fulfill needs, and promote equality. Learning from feminist critiques, law can become more humble and self-critical. It can question its biases and exclusionary practices; and it can respond to what it learns by making concrete changes in perspectives, substance, and methods. Law can reformulate its understandings about power and privilege and restructure its role in eliminating hierarchy and domination. Feminist theories, and gender difference theories in particular, offer strategies and knowledges to guide this transformation of our legal system.

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

Conclusion

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

portrayed as a woman in our cultural myths for centuries. It is time we use women's gender cultures to guide the law in its quest for justice.

Carol Gilligan's work helps us understand some ways in which women's perspectives and approaches differ from men's. Relying on her insights, some feminist legal theorists have been able to show how women's differences have been left out of law. Three things have happened with Gilligan's work. First, her writings have been used as a shorthand for the idea of gender difference and the necessity to rethink the exclusionary practices that have generated existing disciplinary models. Second, they have served as a symbol of the validation of women's differences (and sometimes of their privileging, as in, 'care is better than justice' and 'relationships are better than rights'). Finally, the values of care and relational theories have provided important methodological precepts for rethinking disciplines and institutions generally, and law, in particular. I find all three moves engaging. Despite the potent and important critiques that have been wielded against Gilligan's work and gender difference theories, I have argued in this essay for the continued use of gender difference analysis as a stepping stone to feminist solidarity. A gender-based ethic of care, co-operation, and interpersonal responsibility; contextualised legal and substantive equality analyses; and feminist insights about diversity, power, privilege and exclusion are invaluable to our efforts to create a new legal regime.

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

DIFFERENCE AND DOMINANCE: ON SEX DISCRIMINATION[135]

Catharine MacKinnon[136]

What is a gender question a question of? What is an inequality question a question of? These two questions underlie applications of the equality principle to issues of gender, but they are seldom explicitly asked. I think it speaks to the way gender has structured thought and perception that mainstream legal and moral theory tacitly gives the same answer to them both: these are questions of

135 *Feminism Unmodified* (Harvard University Press, 1987). (Footnotes edited).

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