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).

136 Professor of Law, University of Michigan.

sameness and difference. The mainstream doctrine of the law of sex discrimination that results is, in my view, largely responsible for the fact that sex equality law has been so utterly ineffective at getting women what we need and are socially prevented from having on the basis of a condition of birth: a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity. Here I expose the sameness/difference theory of sex equality, briefly show how it dominates sex discrimination law and policy and underlies its discontents, and propose an alternative that might do something.

According to the approach to sex equality that has dominated politics, law, and social perception, equality is an equivalence, not a distinction, and sex is a distinction. The legal mandate of equal treatment – which is both a systemic norm and a specific legal doctrine becomes a matter of treating likes alike and unlikes unlike; and the sexes are defined as such by their mutual unlikeness. Put another way, gender is socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference doctrinally. A built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.

Upon further scrutiny, two alternate paths to equality for women emerge within this dominant approach, paths that roughly follow the lines of this tension. The leading one is: be the same as men. This path is termed gender-neutrality doctrinally and the single standard philosophically. It is testimony to how substance gets itself up as form in law that this rule is considered formal equality. Because this approach mirrors the ideology of the social world, it is considered abstract, meaning transparent of substance; also for this reason it is considered not only to be the standard, but a standard at all. It is so far the leading rule that the words 'equal to' are codes for, equivalent to, the words 'the same as' referent for both unspecified.

To women who want equality yet find that you are different, the doctrine provides an alternate route: be different from men. This equal recognition of difference is termed the special benefit rule or special protection rule legally, the double standard philosophically. It is in rather bad odour. Like pregnancy, which always calls it up, it is something of a doctrinal embarrassment. Considered an exception to true equality and not really a rule of law at all, this is the one place where the law of sex discrimination admits it is recognising something substantive. Together with the Bona Fide Occupational Qualification (BFOQ), the unique physical characteristic exception under ERA policy, compensatory legislation, and sex-conscious relief in particular litigation, affirmative action is thought to live here.[137]

The philosophy underlying the difference approach is that sex is a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine is to make normative rules conform to this empirical reality by granting women access to what men have access to: to the extent that women are no different from men, we deserve what they have. The differences branch, which is generally seen as patronising but necessary to avoid absurdity, exists to value or compensate

137 See Barbara Brown, Thomas Emerson, Gail Falk and Ann Freedman, 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women' (1981) 80 *Yale Law Journal* 893.

women for what we are or have become distinctively as women (by which is meant, unlike men) under existing conditions.

My concern is not with which of these paths to sex equality is preferable in the long run or more appropriate to any particular issue, although most discourse on sex discrimination revolves about these questions as if that were all there is. My point is logically prior: to treat issues of sex equality as issues of sameness and difference is to take a particular approach. I call this the difference approach because it is obsessed with the sex difference. The main theme in the fugue is 'we're the same, we're the same, we're the same'. The counterpoint theme (in a higher register) is 'but we're different, but we're different, but we're different'. Its underlying story is: on the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose. Division may be rational or irrational. Dominance either seems or is justified. The difference is there is a politics to this. Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender-neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both. Think about it like those anatomy models in medical school. A male body is the human body; all those extra things women have are studied in ob/gyn. It truly is a situation in which more is less. Approaching sex discrimination in this way – as if sex questions are difference questions and equality questions are sameness questions – provides two ways for the law to hold women to a male standard and call that sex equality.

Having been very hard on the difference answer to sex equality questions, I should say that it takes up a very important problem: how to get women access to everything we have been excluded from, while also valuing everything that women are or have been allowed to become or have developed as a consequence of our struggle either not to be excluded from most of life's pursuits or to be taken seriously under the terms that have been permitted to be our terms. It negotiates what we have managed in relation to men. Legally articulated as the need to conform normative standards to existing reality, the strongest doctrinal expression of its sameness idea would prohibit taking gender into account in any way.

Its guiding impulse is: we're as good as you. Anything you can do, we can do. Just get out of the way. I have to confess a sincere affection for this approach. It has gotten women some access to employment and education, the public pursuits, including academic, professional and blue-collar work; the military; and more than nominal access to athletics. It has moved to change the dead ends that were all we were seen as good for and has altered what passed for women's lack of physical training, which was really serious training in passivity and enforced weakness. It makes you want to cry sometimes to know that it has had to be a mission for many women just to be permitted to do the work of this society, to have the dignity of doing jobs a lot of other people don't even want to do.

The issue of including women in the military draft[138] has presented the sameness answer to the sex equality question in all its simple dignity and

138 *Rostker v Goldbert* (1981) 453 US 57. See also Lori Knornblum, 'Women Warrior in a Men's World: the Combat Exclusion' (1984) 2 *Law and Inequality: A Journal of Theory and Practice* 353.

complex equivocality. As a citizen, I should have to risk being killed just like you. The consequences of my resistance to this risk should count like yours. The undercurrent is: what's the matter, don't you want me to learn to kill … just like you? Sometimes I see this as a dialogue between women in the afterlife. The feminist says to the soldier, 'we fought for your equality'. The soldier says to the feminist, 'oh, no, we fought for your equality'.

Feminists have this nasty habit of counting bodies and refusing not to notice their gender. As applied, the sameness standard has mostly gotten men the benefit of those few things women have historically had – for all the good they did us. Almost every sex discrimination case that has been won at the Supreme Court level has been brought by a man.[139] Under the rule of gender-neutrality, the law of custody and divorce has been transformed, giving men an equal chance at custody of children and at alimony. Men often look like better 'parents' under gender-neutral rules like level of income and presence of nuclear family, because men make more money and (as they say) initiate the building of family units.[140] In effect, they get preferred because society advantages them before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account. The group realities that make women more in need of alimony are not permitted to matter, because only individual factors, gender-neutrally considered, may matter. So the fact that women will live their lives, as individuals, as members of the group women, with women's chances in a sex discriminatory society, may not count, or else it is sex discrimination. The equality principle in this guise mobilises the idea that the way to get things for women is to get them for men. Men have gotten them. Have women? We still have not got equal pay, or equal work, far less equal pay for equal work, and we are close to losing separate enclaves like women's schools through this approach.

Here is why. In reality, which this approach is not long on because it is liberal idealism talking to itself, virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other – their wars and rulerships – defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society. But whenever women are, by this standard, 'different' from men and insist on not having it held against us, whenever a difference is used to keep us second class and we refuse to smile about it, equality law has a paradigm trauma and it's crisis time for the doctrine.

What this doctrine has apparently meant by sex inequality is not what happens to us. The law of sex discrimination that has resulted seems to be looking only

139 David Cole, 'Strategies of Difference' (1984) 2 *Law and Inequality: A Journal of Theory and Practice* 33 at 34, note 4.

140 Leonore Weitzman, 'The Economic of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards' (1982) 28 *UCLA Law Rev* 1118 at 1251, documents indicate a decline in women's standard of living of 73% and an increase of men's of 42% and within a year after divorce.

for those ways women are kept down that have not wrapped themselves up as a difference – whether original, imposed, or imagined. Start with original: what to do about the fact that women actually have an ability men still lack, gestating children in utero. Pregnancy therefore is a difference. Difference doctrine says it is sex discrimination to give women what we need, because only women need it. It is not sex discrimination not to give women what we need because then only women will not get what we need. Move into imposed: what to do about the fact that most women are segregated into low-paying jobs where there are no men. Suspecting that the structure of the marketplace will be entirely subverted if comparable worth is put into effect, difference doctrine says that because there is no man to set a standard from which women's treatment is a deviation, there is no sex discrimination here, only sex difference. Never mind that there is no man to compare with because no man would do that job if he had a choice, and of course he has because he is a man, so he won't.[141]

Now move into the so-called subtle reaches of the imposed category, the *de facto* area. Most jobs in fact require that the person, gender-neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child. Pointing out that this raises a concern of sex in a society in which women are expected to care for the children is taken as day one of taking gender into account in the structuring of jobs. To do that would violate the rule against not noticing situated differences based on gender, so it never emerges that day one of taking gender into account was the day the job was structured with the expectation that its occupant would have no child care responsibilities. Imaginary sex differences – such as between male and female applicants to administer estates or between males aging and dying and females aging and dying – I will concede, the doctrine can handle.

I will also concede that there are many differences between women and men. I mean, can you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same? What the sameness standard fails to notice is that men's differences from women are equal to women's differences from men. There is an *equality* there. Yet the sexes are not socially equal. The difference approach misses the fact that hierarchy of power produces real as well as fantasied differences, differences that are also inequalities. What is missing in the difference approach is what Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes unlike, and nobody has questioned it since. Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender, so that it is women – women who want to make a case of unequal treatment in a world men have made in their image – (this is really the part Aristotle missed) – who have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident of birth?

The women that gender-neutrality benefits, and there are some, show the suppositions of this approach in highest relief. They are mostly women who have been able to construct a biography that somewhat approximates the male norm, at least on paper. They are the qualified, the least of sex discrimination's victims. When they are denied a man's chance, it looks the most like sex bias. The more unequal society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the *less* likely the difference doctrine is to be able to

141 Most women work at jobs mostly women do, and most of those jobs are paid less than jobs that mostly men do.

do anything about it, because unequal power creates both the appearance and the reality of sex differences along the same lines as it creates its sex inequalities.

The special benefits side of the difference approach has not compensated for the differential of being second class. The special benefits rule is the only place in mainstream equality doctrine where you get to identify as a woman and not have that mean giving up all claim to equal treatment – but it comes close. Under its double standard, women who stand to inherit something when their husbands die have gotten the exclusion of a small percentage of the inheritance tax, to the tune of Douglas J waxing eloquent about the difficulties of all women's economic situations.[142] If we're going to be stigmatised as different, it would be nice if the compensation would fit the disparity. Women have also gotten three more years than men get before we have to be advanced or kicked out of the military hierarchy, as compensation for being precluded from combat, the usual way to advance.[143] Women have also gotten excluded from contact jobs in male-only prisons because we might get raped, the court taking the viewpoint of the reasonable rapist on women's employment opportunities.[144] We also get protected out of jobs because of our fertility. The reason is that the job has health hazards, and somebody who might be a real person some day and therefore could sue – that is, a foetus – might be hurt if women, who apparently are not real persons and therefore can't sue either for the hazard to our health or for the lost employment opportunity, are given jobs that subject our bodies to possible harm.[145] Excluding women is always an option if equality feels in tension with the pursuit itself. They never seem to think of excluding men. Take combat. Somehow it takes the glory out of the foxhole, the buddiness out of the trenches, to imagine us out there. You get the feeling they might rather end the draft, they might even rather not fight wars at all than have to do it with us.

The double standard of these rules doesn't give women the dignity of the single standard; it also does not (as the differences standard does) suppress the gender of its referent, which is, of course, the female gender. I must also confess some affection for this standard. The work of Carol Gilligan on gender differences in moral reasonings[146] gives it a lot of dignity, more than it has ever had, more, frankly, than I thought it ever could have. But she achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.

Women have done good things, and it is a good thing to affirm them. I think quilts are art. I think women have a history. I think we create culture. I also know that we have not only been excluded from making what has been considered art;

142 *Kahn v Shevin* (1974) 416 US 351 at 353.

143 *Schlesinger v Balland* (1975) 419 US 498.

144 *Dothard v Rawlinson* (1977) 433 US 321; see also *Michael M v Sonoma County Superior Cour*t (1981) 450 US 464.

145 *Doerr v BF Goodrich* (1979) 484 F Supp 320 (ND Ohio); Wendy Webster Williams, 'Firing the Woman to Protect the Foetus: The Reconciliation of Foetal Protection with Employment Opportunity Goals Under Title VII' (1981) 69 *Georgetown LR* 641.

146 Carol Gilligan, *In a Different Voice (*1982).

our artefacts have been excluded from setting the standards by which art is art. Women have a history all right, but it is a history both of what was and of what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive. As if equality, in spite of everything, already ineluctably exists.

I am getting hard on this and am about to get harder on it. I do not think that the way women reason morally is morality 'in a different voice'. I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come. Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is also silence of the deep kind, the silence of being prevented from having anything to say. Sometimes it is permanent. All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.

So long as these issues are framed this way, demands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different. But this is the way men have it: equal and different too. They have it the same as women when they are the same and want it, and different from women when they are different and want to be, which usually they do. Equal and different too would only be parity. But under male supremacy, while being told we get it both ways, both the specialness of the pedestal and an even chance at the race, the ability to be a woman and a person, too, few women get much benefit of either.

There is an alternative approach, one that threads its way through existing law and expresses, I think, the reason equality law exists in the first place. It provides a second answer, a dissident answer in law and philosophy, to both the equality question and the gender question. In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which – as power succeeds in constructing social perception and social reality – derivatively becomes a categorical distinction, a difference. Here, on the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, because the systematically differential delivery of benefits and deprivations required making no mistake about who was who. Comparatively speaking, man has been resting ever since. Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power.

I call this the dominance approach, and it is the ground I have been standing on in criticising mainstream law. The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. Its task is not to formulate abstract standards that will produce determinate outcomes in particular cases. Its project is more substantive, more jurisprudential than formulaic, which is why it is difficult for

the mainstream discourse to dignify it as an approach to doctrine or to imagine it as a rule of law at all. It proposes to expose that which women have had little choice but to be confined to, in order to change it.

The dominance approach centers on the most sex-differential abuses of women as a gender, abuses that sex equality law in its difference garb could not confront. It is based on a reality about which little of a systematic nature was known before 1970, a reality that calls for a new conception of the problem of sex inequality. This new information includes not only the extent and intractability of sex segregation into poverty, which has been known before, but the range of issues termed violence against women, which has not been. It combines women's material desperation, through being relegated to categories of jobs that pay nil, with the massive amount of rape and attempted rape – 44% of all women – about which virtually nothing is done;[147] the sexual assault of children – 38% of girls and 10% of boys – which is apparently endemic to the patriarchal family;[148] the battery of women that is systematic in one-quarter to one-third of our homes;[149] prostitution, women's fundamental economic condition, what we do when all else fails,[150] and for many women in this country, all else fails often; and pornography, an industry that traffics in female flesh, making sex inequality into sex to the tune of eight billion dollars a year in profits largely to organised crime.

These experiences have been silenced out of the difference definition of sex equality largely because they happen almost exclusively to women. Understand: for this reason, they are considered not to raise sex equality issues. Because this treatment is done almost uniquely to women, it is implicitly treated as a difference, the sex difference, when in fact it is the socially situated subjection of women. The whole point of women's social relegation – to inferiority as a gender – is that for the most part these things aren't done to men. Men are not paid half of what women are paid for doing the same work on the basis of their equal difference. Everything they touch does not turn valueless because they touched it. When they are hit, a person has been assaulted. When they are sexually violated, it is not simply tolerated or found entertaining or defended as the necessary structure of the family, the price of civilisation, or a constitutional right.

Does this differential describe the sex difference? Maybe so. It does describe the systematic relegation of an entire group of people to a condition of inferiority and attribute it to their nature. If this differential were biological, maybe biological intervention would have to be considered. If it were evolutionary, perhaps men would have to evolve differently. Because I think it is political, I think its politics construct the deep structure of society. Men who do not rape women have nothing wrong with their hormones. Men who are made sick by pornography and do not eroticise their revulsion are not underevolved. This social status in which we can be used and abused and trivialised and humiliated and bought and sold and passed around and patted on the head and put in place

147 Diana Russell and Nancy Howell, 'The Prevalence of Rape in the United States Revisited' (1983) 8 *Signs: Journal of Women in Culture and Society* 689.

148 Dianna Russell, 'The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children' (1983) 7 *Child Abuse and Neglect: the International Journal* 133.

149 E Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (1979).

150 Kathleen Barry, *Female Sexual Slavery* (1979); Moira Griffin, 'Wives, Hookers and the Law: the Case for Decriminalising Prostitution' (1982) 10 *Student Lawyer* 18.

and told to smile so that we look as though we're enjoying it all is not what some of us have in mind as sex equality.

This second approach – which is not abstract, which is at odds with socially imposed reality and therefore does not look like a standard according to the standard for standards – became the implicit model for racial justice applied by the courts during the 1960s. It has since eroded with the erosion of judicial commitment to racial equality. It was based on the realisation that the condition of blacks in particular was not fundamentally a matter of rational or irrational differentiation on the basis of race but was fundamentally a matter of white supremacy, under which racial differences became invidious as a consequence.[151] To consider gender in this way, observe again that men are as different from women as women are from men, but socially the sexes are not equally powerful. To be on the top of a hierarchy is certainly different from being on the bottom, but that is an obfuscatingly neutralised way of putting it, as a hierarchy is a great deal more than that. If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorisation of individuals. This is what the difference approach thinks it is and is therefore sensitive to. But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.

If differentiation into classifications, in itself, is discrimination, as it is in difference doctrine, the use of law to change group-based social inequalities becomes problematic, even contradictory. This is because the group whose situation is to be changed must necessarily be legally identified and delineated, yet to do so is considered in fundamental tension with the guarantee against legally sanctioned inequality. If differentiation is discrimination, affirmative action, and any legal change in social inequality, is discrimination, but the existing social differentiations which constitute the inequality are not? This is only to say that, in the view that equates differentiation with discrimination, changing an unequal *status quo* is discrimination, but allowing it to exist is not.

Looking at the difference approach and the dominance approach from each other's point of view clarifies some otherwise confusing tensions in sex equality debates. From the point of view of the dominance approach, it becomes clear that the difference approach adopts the point of view of male supremacy on the status of the sexes. Simply by treating the *status quo* as 'the standard' it invisibly and uncritically accepts the arrangements under male supremacy. In this sense, the difference approach is masculinist, although it can be expressed in a female voice. The dominance approach, in that it sees the inequalities of the social world from the standpoint of the subordination of women to men, is feminist.

If you look through the lens of the difference approach at the world as the dominance approach imagines it – that is, if you try to see real inequality through a lens that has difficulty seeing an inequality as an inequality if it also appears as a difference – you see demands for change in the distribution of power as demands for special protection. This is because the only tools that the difference paradigm offers to comprehend disparity equate the recognition of a gender line with an admission of lack of entitlement to equality under law. Since equality

151 *Loving v Virginia* (1967) 388 US 1, first used the term 'white supremacy' in invalidating an anti-miscegenation law as a violation of equal protection. The law equally forbade whites and blacks to inter-marry.

questions are primarily confronted in this approach as matters of empirical fit[152] – that is, as matters of accurately shaping legal rules (implicitly modeled on the standard men set) to the way the world is (also implicitly modeled on the standard men set) – any existing differences must be negated to merit equal treatment. For ethnicity as well as for gender, it is basic to mainstream discrimination doctrine to preclude any true diversity among equals or true equality within diversity.

To the difference approach, it further follows that any attempt to change the way the world actually is looks like a moral question requiring a separate judgment of how things ought to be. This approach imagines asking the following disinterested question that can be answered neutrally as to groups: against the weight of empirical difference, should we treat some as the equals of others, even when they may not be entitled to it because they are not up to standard? Because this construction of the problem is part of what the dominance approach unmasks, it does not arise with the dominance approach, which therefore does not see its own foundations as moral. If sex inequalities are approached as matters of imposed status, which are in need of change if a legal mandate of equality means anything at all, the question whether women should be treated unequally means simply whether women should be treated as less. When it is exposed as a naked power question, there is no separable question of what ought to be. The only real question is what is and is not a gender question. Once no amount of difference justifies treating women as subhuman, eliminating that is what equality law is for.

In this shift of paradigms, equality propositions become no longer propositions of good and evil, but of power and powerlessness, no more disinterested in their origins or neutral in their arrival at conclusions than are the problems they address.

There came a time in black people's movement for equality in this country when slavery stopped being a question of how it could be justified and became a question of how it could be ended. Racial disparities surely existed, or racism would have been harmless, but at that point – a point not yet reached for issues of sex – no amount of group difference mattered anymore. This is the same point at which a groups characteristics, including empirical attributes, become constitutive of the fully human, rather than being defined as exceptions to or as distinct from the fully human. To one-sidedly measure one group's differences against a standard set by the other incarnates partial standards. The moment when one's particular qualities become part of the standard by which humanity is measured is a millenial moment.

To summarise the argument: seeing sex equality questions as matters of reasonable or unreasonable classification is part of the way male dominance is expressed in law. If you follow my shift in perspective from gender as difference to gender as dominance, gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect. The difference approach tries to map reality; the dominance approach tries to challenge and change it. In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.

You can tell if sameness is your standard for equality if my critique of hierarchy looks like a request for special protection in disguise. It's not. It envisions a

152 J Tussman and J TenBroek first used the term 'fit' to characterise the necessary relation between a valued equality rule and the world to which it refers: 'The Equal Protection of the Laws' (1949) 37 *California L Rev* 341.

change that would make possible a simple equal chance for the first time. To define the reality of sex as difference and the warrant of equality as sameness is wrong on both counts. Sex, in nature, is not a bipolarity; it is a continuum. In society it is made into a bipolarity. Once this is done, to require that one be the same as those who set the standard – those which one is already socially defined as different from – simply means that sex equality is conceptually designed never to be achieved. Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one's entitlement to be equally treated is measured. Doctrinally speaking, the deepest problems of sex inequality will not find women 'similarly situated'[153] to men. Far less will practices of sex inequality require that acts be intentionally discriminatory.[154] All that is required is that the *status quo* be maintained. As a strategy for maintaining social power first structure reality unequally, then require that entitlement to alter it be grounded on a lack of distinction in situation; first structure perception so that different equals inferior, then require that discrimination be activated by evil minds who know they are treating equals as less.

I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak. So long as sex equality is limited by sex difference, whether you like it or don't like it, whether you value it or seek to negate it, whether you stake it out as a ground for feminism or occupy it as the terrain of misogyny, women will be born, degraded, and die. We would settle for that equal protection of the laws under which one would be born, live, and die, in a country where protection is not a dirty word and equality is not a special privilege.

SEXUAL DIFFERENCE, THE FEMININE, AND EQUIVALENCY: A CRITIQUE OF MACKINNON'S TOWARD A FEMINIST THEORY OF THE STATE[155]

Drucilla Cornell[156]

Introduction

Catharine MacKinnon's *Toward a Feminist Theory of the State* is a provocative challenge to both conceptions of liberal jurisprudence and to the traditional Marxist critique of liberalism. Each stands accused of erasing the centrality of gender, sex, and sexuality in the development of a modern legal system. This erasure, MacKinnon believes, can only perpetuate injustice at its base through

153 *Royster Guano Co v Virginia* (1920) 253 US 412 at 415: 'A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Reed v Reed* (1971) 404 US 71 at 76: 'Regardless of their sex, persons within any one of the enumerated classes … are similarly situated … By providing dissimilar treatment for men and women who are thus similarly situations, the challenged section violates the Equal Protection Clause.'

154 *Washington v Davis* (1976) 426 US 229 and *Personnel Administrator of Massachusetts v Feeney* (1979) 442 US 229 require that intentional discrimination be shown for discrimination to be shown.

155 (1990) 100 *Yale Law Journal* at 2247–75.

156 At the time of writing, Professor of Law, Benjamin Cardozo School of Law, Yeshiva University.