

critique the dominant culture. Being 'other' allows women to understand 'plurality, diversity, and difference'.

From a postmodern perspective, feminist theory is inadequate when limited by the perception that there is one essential commonality among all women. Cultural feminists who focus on 'woman' solely as mother (actual or cultural) do not speak to the full complexity of female experience. Radical feminists, such as MacKinnon, who focus on 'woman' solely as 'sexual subordinate' also speak limited truths. Good feminist theory ought to reflect the real differences in women's realities, in our lived experiences. These include differences of race,²³⁶ class, age, physical ability, and sexual preference.

Postmodern legal theorists will want to reject the limitations caused by any categorisation. Although they will want to listen to the reality of lesbian experience, these theorists will not be inclined to build a grand theory based on the concept of 'woman' as 'lesbian'. In the final part of this essay, I offer some thoughts about the potential relevance of lesbian experience to the postmodern development of feminist legal theory.

The Retelling

I believe that current feminist legal theory is deficient and impoverished because it has not paid sufficient attention to the real life experiences of women who do not speak the 'dominant discourse'. Elsewhere I have urged that feminist law teaching ought to include 'listening to difference' and 'making connections'.²³⁷ Here I urge the same for feminist legal scholarship.

Most feminist legal theorists, by focusing on sameness and difference, have fallen into either the assimilationist trap (all women are the same as men/all women are the same) or the essentialist trap (all women are different from men in one essential way/all women are different, but what counts is their essential commonality). The only difference between assimilationists and essentialists is that the former ignore the reality of differences whereas the latter say that differences generally do not matter. The two concepts, assimilationism and essentialism, collapse into each other to the extent they treat women as a single class that is essentially the same.

Elizabeth Spelman describes the essentialist's solution to the 'differences' problem in feminist theory: 'The way to give proper significance to differences among women is to say that such differences simply are less significant than what women have in common. This solution is very neat, for it acknowledges differences among women only enough to bury them.'²³⁸ The difficulty arises when an individual essentialist theorist must determine the content of this commonality which is so significant that it trumps differences. When white, straight, economically privileged feminists name the commonality, and ignore differences, the result may be that all women are assimilated into a single class of white, straight, middle-class women.

It is not enough to name the differences of race, class, and sexuality. The differences need to be understood. Much recent feminist legal scholarship

236 For an especially good critique of the failure of feminist legal theorists to acknowledge and understand the difference that race makes, see A Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford L Rev* 581. (Extracted, *supra*.)

237 See P Cain, 'Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections' (1988) 38 *J of Legal Educ* 165.

238 See E Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988), p 3.

includes the perfunctory footnote, dropped the first time the essential category 'woman' is mentioned, which acknowledges the differences of race and class, and sometimes of sexual preference. Such politically correct footnotes name the differences, but I see no evidence in the accompanying texts that the differences matter. Scholarship that nominally recognises differences, but still categorises 'woman' from a single perspective is stuck in the assimilationist/essentialist trap.

I do not mean to ignore the importance of our commonalities. It is valuable to identify the similarities among all women. When we identify what we have in common, we begin to build bridges and connections. Yet if we ignore the differences, we risk distorting those connections, because any connection that fails to recognise differences is not a connection to the whole of the other self. A normative principle that honours only what I have in common with each of you fails to respect each of you for the individual woman that you are. To respect you, despite your difference, is an insult. Such respect is not respect for your difference, but only for our sameness. Such respect belittles your difference and says it does not matter. Such 'respect' falls into the assimilationist/essentialist trap.

Let me give you an example. A white law professor says to her black female colleague: 'Sometimes I forget that you are black. Sometimes I think of you as white.' The comment is meant as a compliment, but it denies the real life experience of the black woman to whom it is addressed. It says, ultimately, 'what I respect in you is only what you have in common with me'.

Now let me give you an example out of lesbian experience. A lesbian college teacher proposes a course entitled *The Outsider in 20th Century American Literature*. The course is to include writings of lesbians and gay men, as well as other outsiders, such as persons who have been in mental institutions or prisons. In discussing the potential course, the teacher's (presumably) heterosexual colleagues dismiss the notion that an author's sexuality might be an important aspect of her or his writing, claiming that sexuality is no different from 'a thousand other things' that might influence the writer'. None of the teacher's colleagues considers having to live as a 'different' person in a heterosexist culture as a factor important to one's writing.

Adrienne Rich, a lesbian poet, echoes the same theme in the following story:

Two friends of mine, both artists, wrote me about reading the *Twenty-One Love Poems* with their male lovers, assuring me how 'universal' the poems were. I found myself angered, and when I asked myself why, I realised that it was anger at having my work essentially assimilated and stripped of its meaning, 'integrated' into heterosexual romance. That kind of 'acceptance' of the book seems to me a refusal of its deepest implications. The longing to simplify ... to assimilate lesbian experience by saying that 'relationship' is really all the same, love is always difficult – I see that as a denial, a kind of resistance, a refusal to read and hear what I've actually written, to acknowledge what I am.²³⁹

There is a commonality between Adrienne Rich and her heterosexual artist friends. They all experience love and relationship. Yet even if some portion of the love experience is universal, the heterosexual world will never understand the gay and lesbian world if we all focus on the commonality, the universal. To claim that lesbians are the same as heterosexual women or that black women are the

239 An interview with Adrienne Rich.

same as white women is to fall into the assimilationist/essentialist trap. Such claims deny the reality of our differences by ignoring or discounting them. Yet it is not enough to recognise and name the differences among us as women. We must also understand those differences.

I ask those of you in the audience who are heterosexual to focus on an important love relationship in your life. This could be a present relationship or a past one, or even the relationship you hope to have. I ask you: how would you feel about this relationship if it had to be kept utterly secret? Would you feel 'at one with the world' if a slight mistake in language ('we' instead of 'I') could lead to alienation from your friends and family, loss of your job? Would you feel at one with your lover if the only time you could touch or look into each other's eyes was in your own home – with the curtains drawn? What would such self-consciousness do to your relationship?

I use the following exercise to demonstrate to my students our different points of view. First I ask each student to write down three self-descriptive nouns or adjectives, to name three aspects of her (or his) personal self. When they have finished writing, we go around the room and each student reads the three choices aloud. For my women students, the list almost always includes either the word woman or female. Thus, we share a perception of self as female. The meaning of female may vary, but it is significant that we all view the fact that we are women as one of the three most important facts about ourselves.

As to the rest of the list, there are important differences. For example, no white woman ever mentions race, whereas every woman of colour does. Similarly, straight women do not include 'heterosexual' as one of the adjectives on their lists, whereas lesbians, who are open, always include 'lesbian' as one of the words on their lists. The point is, not only are we different from each other in such obvious ways as race and sexuality, but we perceive our differences differently.

The results of my exercise are not surprising. Because of the pervasive influences of sexism, racism, and heterosexism, white, heterosexual women think of gender as something that sets them apart, as something that defines them, whereas neither race nor sexuality seems to matter much. Yet if neither race nor sexuality matters much to a white, heterosexual woman, how can she begin to understand the ways in which it matters to others who are different from her in these dimensions?

I wonder sometimes whether heterosexual women really understand the role that heterosexuality plays in the maintenance of patriarchy. Indeed, I sometimes wonder whether lesbians really understand. And yet, if feminist legal theory is to provide meaningful guidance for the abolition of patriarchy, feminist theorists must understand heterosexuality as an institution and not merely as the dominant form of sexuality.

Adrienne Rich illuminated the problem years ago in her brilliant critique of heterosexuality:

[I]t is not enough for feminist thought that specifically lesbian texts exist. Any theory or cultural/political creation that treats lesbian existence as a marginal or less 'natural' phenomenon, as mere 'sexual preference,' or as the mirror image of either heterosexual or male homosexual relations, is profoundly weakened thereby ...²⁴⁰

240 A Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5 *Signs* 631.

Feminist research and theory that contributes to lesbian invisibility or marginality is actually working against the liberation and empowerment of woman as a group.²⁴¹

Adrienne Rich encourages us to look at heterosexuality from a new perspective, from the perspective of the 'lesbian possibility'. The invisibility of lesbian existence, however, removes the lesbian possibility from view. If there are no lesbians, the only possibility is heterosexuality. Men will assume all women are equally available as sex partners. Women will choose men and never question that choice.

If the choice is never questioned, can it be an authentic choice? Do heterosexual women really choose men or are they victims of false consciousness? And if they are victims of false consciousness, then how do we know that most women are heterosexual? Might they not choose otherwise if they were truly free to choose?

Marilyn Frye offers a challenge to feminist academics and I want to echo her in repeating it here for feminist legal theorists:

I want to ask heterosexual academic feminists to do some hard analytical and reflective work. To begin with, I want to say to them:

I wish you would notice that you are heterosexual.

I wish you would grow to the understanding that you choose heterosexuality.

I would like you to rise each morning and know that you are heterosexual and that you choose to be heterosexual – that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice.

I wish you would stop and seriously consider, as a broad and long-term feminist political strategy, the conversion of women to a woman-identified and woman-directed sexuality ...²⁴²

Frye reports that a typical response by heterosexual women to such enquiries is that, although they may understand what she is saying, they cannot just up and decide to be lesbian. I, too, have women colleagues and friends who similarly respond, with a shake of the head, that they are hopelessly heterosexual, that they just are not sexually attracted to women.

Frye says that she wants to ask such women (and so do I), 'Why not? Why don't women turn you on? Why aren't you attracted to women?' These are serious questions. Frye encourages heterosexual women to consider the origins of their sexual orientation:

The suppression of lesbian feeling, sensibility, and response has been so thorough and so brutal for such a long time, that if there were not a strong and widespread inclination to lesbianism, it would have been erased from human life. There is so much pressure on women to be heterosexual, and this pressure is both so pervasive and so completely denied, that I think heterosexuality cannot come naturally to many women; I think that widespread heterosexuality among women is a highly artificial product of the patriarchy ... I want heterosexual women to do intense and serious

241 *Ibid* at pp 632, 647–48.

242 Frye, 'A Lesbian Perspective on Women's Studies', in M Cruikshank (ed), *Lesbian Studies* (1982), pp 194, 196.

consciousness-raising and exploration of their own personal histories and to find out how and when in their own development the separation of women from the erotic came about for them. I would like heterosexual women to be as actively curious about how and why and when they became heterosexual as I have been about how and why and when I became lesbian.²⁴³

Silence

Engage in self-reflection. Did she really mean that? Am I supposed to sit here and consider lesbianism as a possibility? Why not? And if I do consider it, but choose men anyway, is my choice more authentic? What about tomorrow? Do I choose again? She doesn't understand. I did choose. Twenty years ago I chose for the children. Does that make my choice inauthentic? What does my choice mean for me today? What about those of us who choose to live alone, who reject intimacy altogether? Am I choosing to be lesbian if I reject men or only if I choose women? As a woman alone, how am I perceived? To take lesbianism seriously, do I have to reject men? Can I choose both women and men? What is all this about choice? I've been a lesbian all my life. I never chose it. I've just lived my life as it was.

Connections

The most consistent feminist claim, at least since the publication of Simone de Beauvoir's *The Second Sex*, is that knowledge of reality has been constructed from a male-centred standpoint. From their position as outsider, women have questioned that reality, because women's life experiences differ – often dramatically – from those of men. The most cohesive and challenging critiques of male-centred reality have been made by women from standpoints that are exactly opposite, experientially, from those of men'. One such critique is made by cultural feminists from the 'woman as mother' standpoint. Another is made by other radical feminists from the 'woman as sexual subordinate' standpoint.

The fact that so many women can identify common life experiences that are ignored by the male version of reality makes any critique based on such common experiences compelling and powerful. But theorists ought to resist transforming a critical standpoint into a new all-encompassing version of reality. Indeed, my fear is that what started as a useful critique of one privileged (male) view of reality may become a substitute claim for a different privileged (female) view of reality.

Catharine MacKinnon, for example, critiques the patriarchy from a 'woman as sexual subordinate' standpoint. As compelling as her critique is, it should not be viewed as the one and only existential reality for women. And yet MacKinnon herself is so committed to this standpoint that she sometimes seems to claim it as the only reality for women.²⁴⁴

MacKinnon's theory is that woman's subordination is universal and constant, but not necessarily inevitable. She cautions against building theory on the basis of Carol Gilligan's discovery of woman's 'different voice' because the women Gilligan listened to were all victims of the patriarchy. Thus, MacKinnon is wary of assigning value to their moral voice. As she explains:

[By] establishing that women reason differently from men on moral questions, [Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to

243 *Ibid* at pp 196–97.

244 CA MacKinnon, *Feminist Theory of the State*, p 116.

women for its own use. When difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness ... To the extent materialism means anything at all, it means that what women have been and thought is what they have been permitted to be and think. Whatever this is, it is not women's, possessive.²⁴⁵

When MacKinnon espoused these beliefs regarding women's subordination and inauthenticity in a dialogue with Gilligan at the now somewhat infamous 'Mitchell Lecture' at Buffalo, Mary Dunlap (a lesbian), who was also a speaker at the event, interrupted. Dunlap said: 'I am speaking out of turn. I am also standing, which I am told by some is a male thing to do. But I am still a woman standing.'

I am not subordinate to any man! I find myself very often contesting efforts at my subordination – both standing and lying down and sitting and in various other positions – but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never not been subordinate to men. So I stand here an exception and invite all other women here to be an exception and stand.

MacKinnon has subsequently described this event as 'a stunning example of the denial of gender',²⁴⁶ claiming that Dunlap was saying, 'that all women who are exempt from the condition of women, all women who are not women, stand with me'. I believe MacKinnon misinterpreted Dunlap's reaction. Dunlap's claim that her experiential reality is often free of male domination was not a denial of the existence of male power, nor a statement that she had risen above other women. It was merely a statement of fact about her reality, a statement she felt compelled to make because MacKinnon's description of 'what is' had continued to exclude Dunlap's reality.

Dunlap's reality is not irrelevant to feminist theory. Mary Dunlap, and I, and other lesbians who live our private lives removed from the intimate presence of men do indeed experience time free from male domination. When we leave the male-dominated public sphere, we come home to a woman-identified private sphere. That does not mean that the patriarchy as an institution does not exist for us or that the patriarchy does not exist during the time that we experience freedom from male domination. It means simply that we experience significant periods of non-subordination, during which we, as women, are free to develop a sense of self that is our own and not a mere construct of the patriarchy.

Nor do we work at this experience of non-subordination and creation of authentic self to set ourselves apart from other women. We are not asserting a 'proud disidentification from the rest of [our] sex and proud denial of the rest of [our] life'.²⁴⁷ The struggle is to make non-subordination a reality for all women, and the reality of non-subordination in some women's lives is relevant to this struggle. The reality of non-subordination in lesbian lives offers the 'lesbian possibility' as a solution.

At the same time, I believe MacKinnon's claim that all women are subordinate to men all the time is a fair claim upon which to critique the male version of reality, because subordination is such a pervasive experience for women. Her claim

245 *Ibid*, p 51.

246 *Feminism Unmodified*, pp 305–06, n 6.

247 *Feminism Unmodified*, pp 305–06.

gives her a valid standpoint for her critique even though it is not experientially true for all women. Similarly, I believe Robin West's claim that all women are 'connected' to life is a fair claim upon which to critique the male version of the 'separation thesis'. But I do not believe that the 'connection thesis' is true of all women'. Feminist legal theorists must be careful not to confuse 'standpoint critiques' with existential reality. And the theorist who has not confused the two must also be careful to prevent her readers from making the confusion.

The problem with current feminist theory is that the more abstract and universal it is, the more it fails to relate to the lived reality of many women. One problem with much feminist legal theory is that it has abstracted and universalised from the experience of heterosexual women. Consider again Marilyn Frye's challenge to heterosexual academic feminists: 'I wish you would notice that you are heterosexual. I wish you would grow to the understanding that you choose heterosexuality ... that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice.'²⁴⁸

Marilyn Frye's challenge was specifically addressed to heterosexual women. When I elected to adopt her challenge at the Women and the Law Conference (and in this essay), I was choosing a 'lesbian standpoint' to critique the dominant reality in the same way that some cultural feminists have chosen a 'mother standpoint' to critique patriarchy. My intent was not to convert a roomful of women to lesbianism. It was to raise everyone's self-consciousness about our different 'standpoints'. Feminist legal theory must recognise differences in order to avoid reinforcing lesbian invisibility or marginality, ie impeding 'the liberation and empowerment of woman as a group'.

My 'lesbian standpoint' enables me to see two versions of reality. The dominant reality, which I experience as 'theirs' includes the following: lesbians are not mothers, all women are dominated by men, male relationships are valuable and female relationships are not, lesbian is a dirty word, lesbians are sick, women who live alone desire men, women who live together desire men, no one knows a lesbian, lesbians don't have families, all feminist legal theorists are heterosexual, all women in this room are heterosexual, lesbians are sex, most women are heterosexual and not lesbian.

By contrast, the reality that I live, the reality I call 'mine' includes the following: some mothers are lesbian, many women are lesbian, many lesbian women are not dominated by men, many women do not desire men, lesbian is a beautiful word, lesbians are love, love is intimacy, the heterosexual/lesbian dichotomy is false, all lesbians are born into families, lesbians are family, some feminist legal theorists are lesbian, lesbians are brave.

Why is the lesbian so invisible in feminist legal theory? Why is 'my reality' so different from 'their reality?' And which reality is true? For the postmodernist, the last question is meaningless. But the first two are not.

248 Frye, *op cit.*

DECONSTRUCTING GENDER²⁴⁹

Joan C Williams²⁵⁰

Introduction

I start out, as have many others, from the deep split among American feminists between 'sameness' and 'difference.' The driving force behind the mid-20th century resurgence of American feminism was an insistence on the fundamental similarity of men and women and, hence, their essential equality. Betty Friedan comes to mind as an enormously influential housewife whose focus on men and women as individuals made her intensely hostile to gender stereotyping.²⁵¹ Mid-century feminism, now often referred to somewhat derisively as assimilationism, focused on providing opportunities to women in realms traditionally preserved for men. In the 1980s two phenomena have shifted feminists' attention from assimilationists' focus on how individual women are like men to a focus on gender differences, on how women as a group differ from men as a group. The first is the feminisation of poverty, which dramatises the chronic and increasing economic vulnerability of women. Feminists now realise that the assimilationists' traditional focus on gender-neutrality may have rendered women more vulnerable to certain gender-related disabilities that have important economic consequences. The second phenomenon that plays a central role in the current feminist imagination is that of career women 'choosing' to abandon or subordinate their careers so they can spend time with their small children. These phenomena highlight the fact that deep-seated social differences continue to encourage men and women to make quite different choices with respect to work and family. Thus, 'sameness' scholars are increasingly confronted by the existence of gender differences.

Do these challenges to assimilationism prove that we should stop trying to kid ourselves and admit the 'real' differences between men and women, as the popular press drums into us day after day and as the 'feminism of difference' appears to confirm? Do such phenomena mean that feminists' traditional focus on gender-neutrality is a bankrupt ideal? I will argue no on both counts, taking an approach quite different from that ordinarily taken by feminists on the sameness side of the spectrum. 'Sameness' feminists usually have responded to the feminists of difference by reiterating their basic insight that individual men and women can be very similar. While true this is not an adequate response to the basic insight of 'difference' feminists: that gender exists, that men and women differ as groups. In this chapter I try to speak to feminists of difference on their own terms. While I take gender seriously, I disagree with the description of gender provided by difference feminists ...

Refocusing the Debate

This section pursues two themes that will be crucial in refocusing the debate within feminism away from the destructive battle between 'sameness' and 'difference' toward a deeper understanding of gender as a system of power relations. I first argue that despite the force of Catharine MacKinnon's insight that gender involves disparities of power, her rejection of the traditional feminist ideal of gender-neutrality rests on misconceptions about this traditional goal,

249 (1989) 87 *Michigan Law Review* 797.

250 At the time of writing, Associate Professor of Law, Washington College of Law, American University.

251 B Friedan, *The Feminine Mystique* (1963).

whose core aim is to oppose rules that institutionalise a correlation between gender and sex. Thus the traditional goal is not one of gender blindness; the goal instead is to deinstitutionalise gender, a long and arduous process that first requires us to see through the seductive descriptions of men and women offered by domesticity. I conclude the chapter by arguing that to the extent these descriptions offer an accurate description of gender differences, they merely reflect the realities of the oppressive gender system. Beyond that, the description is unconvincing.

From Gender-neutrality to Deinstitutionalising Gender

'Sameness' feminists' focus on the similarities between individual men and individual women led them to advocate 'gender-neutral' categories that do not rely on gender stereotypes to differentiate between men and women. Recent feminists have challenged the traditional goal of gender-neutrality on the grounds that it mandates a blindness to gender that has left women in a worse position than they were before the 20th century challenge to gender roles.

This argument has been made in two different ways. Scholars such as Martha Fineman have argued that liberal feminists' insistence on gender-neutrality in the formulation of 'no-fault' divorce laws has led to courts' willful blindness to the ways in which marriage systematically helps men's, and hurts women's, careers.²⁵² Catharine MacKinnon has generalised this argument. She argues that because women are systematically disadvantaged by their sex, properly designed remedial measures can legitimately be framed by reference to sex.²⁵³

MacKinnon's 'inequality approach' would allow for separate standards for men and women so long as 'the policy or practice in question [does not] integrally contribute to the maintenance of an underclass or a deprived position because of gender status'. The strongest form her argument takes is that adherence to gender roles disadvantages women: Why let liberal feminists' taboo against differential treatment of women eliminate the most effective solution to inequality?

This debate is graced by a core truth and massive confusion. The core truth is that an insistence on gender-neutrality by definition precludes protection women victimised by gender.

The confusion stems from the use of the term gender-neutrality. One could argue that problems created by the gendered structure of wage labour, or other aspects of the gender system, should not be remedied through the use of categories that identify the protected group by reference to the gender roles that have disadvantaged them. For example, one could argue that workers whose careers were disadvantaged by choices in favour of child care should not be given the additional support they need to 'catch up' with their former spouses, on the grounds that the group protected inevitably would be mostly female, and this could reinforce the stereotype that women need special protections. Yet I know of no feminist of any stripe who makes this argument, which would be the position of someone committed to gender-neutrality.

Traditionally, feminists have insisted not upon a blindness to gender, but on opposition to the traditional correlation between sex and gender. MacKinnon's

252 Fineman, 'Implementing Equality: Ideology, Contradiction and Social Change' (1983) *Wis L Rev* at 789, 791.

253 *Sexual Harassment* at pp 100–41 (discussing *Phillips v Martin Marietta Corp* 400 US 542 (1971)); *Feminism Unmodified* at pp 35–36.

crucial divergence is that she accepts the use of sex as a proxy for gender. Thus MacKinnon sees nothing inherently objectionable about protecting workers who have given up ideal worker status due to child care responsibilities by offering protections to women. Her inequality approach allows disadvantages produced by gender to be remedied by reference to sex. This is in effect an acceptance and a reinforcement of the societal presumption that the social role of primary caretaker is necessarily correlated with possession of a vagina.

MacKinnon's approach without a doubt would serve to reinforce and to legitimise gender stereotypes that are an integral part of the increasingly oppressive gender system. Let's focus on a specific example. Scholars have found that the abolition of the maternal presumption in child custody decisions has had two deleterious impacts on women.²⁵⁴ First, in the 90% of the cases where mothers received custody, mothers often find themselves bargaining away financial claims in exchange for custody of the children. Even if the father does not want custody, his lawyer often will advise him to claim it in order to have a bargaining chip with which to bargain down his wife's financial claims. Second, the abolition of the maternal preference has created situations where a father who wants custody often wins even if he was not the primary caretaker prior to the divorce – on the grounds that he can offer the children a better life because he is richer than his former wife. In these circumstances, the ironic result of a mother's sacrifice of ideal worker status for the sake of her children is that she ultimately loses the children.

While these results are no doubt infuriating, do they merit a return to a maternal presumption, as MacKinnon's approach seems to imply? No: the deconstruction of gender, by highlighting the chronic and increasing oppressiveness of the gender system, demonstrates the undesirability of the inequality approach, which would reinforce the gender system in both a symbolic way and a practical one. On a symbolic level, the inequality approach would reinforce and legitimise the traditional assumption that childrearing is naturally the province of women. MacKinnon's rule also would reinforce gender mandates in a very concrete way. Say a father chose to give up ideal worker status in order to undertake primary child care responsibility. MacKinnon's rule fails to help him because the rule is framed in terms of biology, not gender. The result: a strong message to fathers that they should not deviate from established gender roles. MacKinnon's rule operates to reinforce the gender system.

What we need, then, is a rule that avoids the traditional correlation between gender and sex, a rule that is sex- but not gender-neutral. The traditional goal, properly understood, is really one of sex neutrality, or, more descriptively, one of deinstitutionalising gender. It entails a systematic refusal to institutionalise gender in any form. This approach mandates not an enforced blindness to gender but, rather, a refusal to reinforce the traditional assumption that adherence to gender roles flows 'naturally' from biological sex. Reinforcing that assumption reinforces the grip of the gender system as a whole. For an example that highlights the distinction between gender-neutrality and deinstitutionalisation, let us return to our 'divorce revolution' example. It is grossly unfair for the courts suddenly to pretend that gender roles within marriage do not exist once a couple enters the courtroom, and the deinstitutionalisation of gender does not require it. What is needed is not a

254 See Polikoff, 'Why Mothers are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations' (1982) 7 *Women's Rts L Rep* 235.

gender-neutral rule but one that avoids the traditional shorthand of addressing gender by reference to sex.

This analysis shows that the traditional commitment, which is really one to deinstitutionalising gender rather than to gender-neutrality, need not preclude rules that protect people victimised by gender. People disadvantaged by gender can be protected by properly naming the group: in this case, not mothers but anyone who has eschewed ideal worker status to fulfill child care responsibilities. One court, motivated to clear thinking by a legislature opposed to rules that addressed gender disabilities by reference to sex, has actually framed child custody rules in this way.²⁵⁵

The traditional goal is misstated by the term gender-neutrality. The core feminist goal is not one of pretending gender does not exist. Instead, it is to deinstitutionalise the gendered structure of our society. There is no reason why, people disadvantaged by gender need to be suddenly disowned. The deconstruction of gender allows us to protect them by reference to their social roles instead of their genitals.

Deconstructing Difference

How can this be done? Certainly the hardest task in the process of deconstructing gender is to begin the long and arduous process of seeing through the descriptions of men and women offered by domesticity. Feminists need to explain exactly how the traditional descriptions of men and women are false. This is a job for social scientists, for a new Carol Gilligan in reverse, who can focus the massive literature on sex stereotyping in a way that dramatises that Gilligan is talking about metaphors, not actual people. Nonetheless, I offer some thoughts on Gilligan's central imagery: that women are focused on relationships, while men are not. As I see it, to the extent this is true, it is merely a restatement of male and female gender roles under the current gender system. Beyond that, it is unconvincing.

This is perhaps easiest to see from Gilligan's description of men as empty vessels of capitalist virtues – competitive and individualistic and espousing liberal ideology to justify this approach to life. Gilligan's description has an element of truth as a description of gender: it captures men's sense of entitlement to ideal worker status and their gendered choice in favour of their careers when presented with the choice society sets up between childcare responsibilities and being a 'responsible' worker.

Similarly, Gilligan's central claim that women are more focused on relationships reflects gender verities. It is true in the sense that women's lives are shaped by the needs of their children and their husbands – but this is just a restatement of the gender system that has traditionally defined women's social existence in terms of their husbands' need to eliminate child care and other responsibilities that detract from their ability to function as ideal workers. And when we speak of women's focus on relationships with men, we also reflect the underlying reality that the only alternative to marriage for most women – certainly for most mothers – has traditionally been poverty, a state of affairs that continues in force to this day.

The kernel of truth in Gilligan's 'voices,' then, is that Gilligan provides a description of gender differences related to men's and women's different roles

²⁵⁵ See *Garska v McCoy* (W Va 1981) 278 SE 2d 357 at 360–63, cited in Williams, 'The Equality Crisis: Some Reflections on Culture, Courts, and Feminism' (1982) 7 *Women's Rts L Rep* at 175, 190, n 80.