

golden nugget of womanhood all women have as women; and it makes the participation of other women inessential to the production of the story. How lovely: the many turn out to be one, and the one that they are is me.¹⁹⁸

In a racist society like this one, the storytellers are usually white, and so 'woman' turns out to be 'white woman.'

Why, in the face of challenges from 'different' women and from feminist method itself, is feminist essentialism so persistent and pervasive? I think the reasons are several. Essentialism is intellectually convenient, and to a certain extent cognitively ingrained. Essentialism also carries with it important emotional and political payoffs. Finally, essentialism often appears (especially to white women) as the only alternative to chaos, mindless pluralism, and the end of the feminist movement. In my view, however, as long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, black women will never be anything more than a crossroads between two kinds of domination, or at the bottom of a hierarchy of oppressions; we will always be required to choose pieces of ourselves to present as wholeness ...

Our future survival is predicated upon our ability to relate within equality. As women, we must root out internalised patterns of oppression within ourselves if we are to move beyond the most superficial aspects of social change. Now we must recognise differences among women who are our equals, neither inferior nor superior, and devise ways to use each others' difference to enrich our vision and our joint struggles.¹⁹⁹

Audre Lorde

In this part of the article, I want to talk about what black women can bring to feminist theory to help us move beyond essentialism toward multiple consciousness as feminist and jurisprudential method. In my view, there are at least three major contributions that black women have to offer post-essentialist feminist theory: the recognition of a self that is multiplicitous, not unitary; the recognition that differences are always relational rather than inherent; and the recognition that wholeness and commonality are acts of will and creativity, rather than passive discovery ...

The Abandonment of Innocence

Black women experience not a single inner self (much less one that is essentially gendered), but many selves. This sense of a multiplicitous self is not unique to black women, but black women have expressed this sense in ways that are striking, poignant, and 'potentially' useful to feminist theory. bell hooks describes her experience in a creative writing programme at a predominantly white college, where she was encouraged to find 'her voice' as frustrating to her sense of multiplicity.

It seemed that many black students found our situations problematic precisely because our sense of self, and by definition our voice, was not, 'lateral, monologist, or static but rather multi-dimensional'. We were as at home in dialect as we were in standard English. Individuals who speak languages other than English, who speak patois as well as standard English, find it a necessary aspect of self-affirmation not to feel compelled to choose one voice over another, not to claim one as more authentic, but rather to

198 E Spelman, *op cit*, p 159.

199 A Lorde, *op cit*, p 122.

construct social realities that celebrate, acknowledge, and affirm differences, variety.²⁰⁰

This experience of multiplicity is also a sense of self-contradiction, of containing the oppressor within oneself. In her article *On Being the Object of Property*,²⁰¹ Patricia Williams writes about herself writing about her great-great-grandmother, 'picking through the ruins for my roots'.²⁰² What she finds is a paradox: she must claim for herself 'a heritage the weft of whose genesis is [her] own disinheritance.' Williams's great-great-grandmother, Sophie, was a slave, and at the age of about 11 was impregnated by her owner, a white lawyer named Austin Miller. Their daughter Mary, Williams's great-grandmother, was taken away from Sophie and raised as a house servant.

When Williams went to law school, her mother told her: 'The Millers were lawyers, so you have it in your blood.' Williams analyses this statement as asking her to acknowledge contradictory selves:

[S]he meant that no one should make me feel inferior because someone else's father was a judge. She wanted me to reclaim that part of my heritage from which I had been disinherited, and she wanted me to use it as a source of strength and self-confidence. At the same time, she was asking me to claim a part of myself that was the dispossessor of another part of myself, she was asking me to deny that disenfranchised little black girl of myself that felt powerless, vulnerable and, moreover, rightly felt so.²⁰³

The theory of black slavery, Williams notes, was based on the notion that black people are beings without will or personality, defined by 'irrationality, lack of control, and ugliness'. In contrast, 'wisdom, control, and aesthetic beauty signify the whole white personality in slave law'. In accepting her white self, her lawyer self, Williams must accept a legacy of not only a disinheritance but a negation of her black self. To the Millers, her forebears, the Williams, her forebears, did not even have selves as such.

Williams's choice ultimately is not to deny either self, but to recognise them both, and in so doing to acknowledge guilt as well as innocence. She ends the piece by invoking 'the presence of polar bears': bears that mauled a child to death at the Brooklyn Zoo and were subsequently killed themselves, bears judged in public debate as simultaneously 'innocent, naturally territorial, unfairly imprisoned, and guilty'.

This complex resolution rejects the easy innocence of supposing oneself to be an essential black self with a legacy of oppression by the guilty white other. With such multilayered analyses, black women can bring to feminist theory stories of how it is to have multiple and contradictory selves, selves that contain the oppressor as well as the oppressed.

Strategic Identities and Difference

A post-essentialist feminism can benefit not only from the abandonment of the quest for a unitary self, but also from Martha Minow's realisation that difference – and therefore identity – is always relational, not inherent. Zora Neale Hurston's work is a good illustration of this notion.

200 B Hooks, *Talking Back* (1989) at 122.

201 (1988) 14 *Signs* 5.

202 *Ibid*, p 5.

203 *Ibid*.

In an essay written for a white audience, *How It Feels to Be Me*,²⁰⁴ Hurston argues that her colour is not an inherent part of her being, but a response to her surroundings. She recalls the day she 'became coloured' – the day she left her home in an all-black community to go to school: 'I left Eatonville, the town of the oleanders, as Zora. When I disembarked from the river-boat at Jacksonville, she was no more. It seemed that I had suffered a sea change. I was not Zora of Orange County any more, I was now a little coloured girl.'²⁰⁵ But even as an adult, Hurston insists, her coloured self is always situations 'I'd not always feel coloured. Even now I often achieve the unconscious Zora of Eatonville before the Hegira. I feel most coloured when I am thrown against a sharp white background.'²⁰⁶

As an example, Hurston describes the experience of listening to music in a jazz club with a white male friend:

My pulse is throbbing like a war drum. I want to slaughter something – give pain, give death to what, I do not know. But the piece ends. The men of the orchestra wipe their lips and rest their fingers. I creep back slowly to the veneer we call civilisation with the last tone and find the white friend sitting motionless in his seat, smoking calmly.

'Good music they have here,' he remarks, drumming the table with his fingertips.

Music. The great blobs of purple and red emotion have not touched him. He has only heard what I felt. He is far away and I see him but dimly across the ocean and the continent that have fallen between us. He is so pale with his whiteness then and I am so coloured.²⁰⁷

In reaction to the presence of whites – both her white companion and the white readers of her essay – Hurston invokes and uses the traditional stereotype of black people as tied to the jungle, 'living in the jungle way'. Yet in a later essay for a black audience, *What White Publishers Won't Print*,²⁰⁸ she criticises the white 'folklore of reversion to type':

This curious doctrine has such wide acceptance that it is tragic. One has only to examine the huge literature on it to be convinced. No matter how high we may seem to climb, put us under strain and we revert to type, that is, to the bush. Under a superficial layer of western culture, the jungle drums throb in our veins.²⁰⁹

The difference between the first essay, in which Hurston revels in the trope of black person as primitive, and the second essay, in which she deplores it, lies in the distinction between an identity that is contingent, temporary, and relational, and an identity that is fixed, inherent, and essential. Zora as jungle woman is fine as an argument, a reaction to her white friend's experience; what is abhorrent is the notion that Zora can always and only be a jungle woman. One image is in flux, 'inspired' by a relationship with another; the other is static, unchanging, and ultimately reductive and sterile rather than creative.

204 In *I Love Myself When I Am Laughing – And Then Again when I Am Looking Mean and Impressive*, A Walker (ed) (1979), p 152.

205 *Ibid*, p 153.

206 *Ibid*, p 154.

207 *Ibid*.

208 In *I Love Myself When I am Laughing*, *op cit*, p 169.

209 *Ibid*, p 172.

Thus, 'how it feels to be coloured Zora' depends on the answer to these questions: 'Compared to what? As of when? Who is asking? In what context? For what purpose? With what interests and presuppositions?' What Hurston rigorously shows is that questions of difference and identity are always functions of a specific interlocutory situation – and the answers, matters of strategy rather than truth.²¹⁰ Any 'essential self' is always an invention; the evil is in denying its artificiality.

To be compatible with this conception of the self, feminist theorising about 'women' must similarly be strategic and contingent, focusing on relationships, not essences. One result will be that men will cease to be a faceless 'Other' and reappear as potential allies in political struggle. Another will be that women will be able to acknowledge their differences without threatening feminism itself. In the process, as feminists begin to attack racism and classism and homophobia, feminism will change from being only about 'women as women' (modified women need not apply), to being about all kinds of oppression based on seemingly inherent and unalterable characteristics. We need not wait for a unified theory of oppression; that theory can be feminism.

Integrity as Will and Idea

Because each had discovered years before that they were neither white nor male, and that all freedom and triumph was forbidden to them, they had set about creating something else to be.²¹¹

Toni Morrison

Finally, black women can help the feminist movement move beyond its fascination with essentialism through the recognition that wholeness of the self and commonality with others are asserted (if never completely achieved) through creative action, not realised in shared victimisation. Feminist theory at present, especially feminist legal theory, tends to focus on women as passive victims. For example, for MacKinnon, women have been so objectified by men that the miracle is how they are able to exist at all. Women are the victims, the acted-upon, the helpless, until by radical enlightenment they are somehow empowered to act for themselves. Similarly, for West, the 'fundamental fact' of women's lives is pain – 'the violence, the danger, the boredom, the ennui, the non-productivity, the poverty, the fear, the numbness, the frigidity, the isolation, the low self-esteem, and the pathetic attempts to assimilate.'²¹²

This story of woman as victim is meant to encourage solidarity by emphasising women's shared oppression, thus denying or minimising difference, and to further the notion of an essential woman – she who is victimised. But as bell hooks has succinctly noted, the notion that women's commonality lies in their shared victimisation by men 'directly reflects male supremacist thinking. Sexist ideology teaches women that to be female is to be a victim.'²¹³ Moreover, the story of woman as passive victim denies the ability of women to shape their own lives, whether for better or worse. It also may thwart their abilities. Like Minnie Bruce Pratt, reluctant to look farther than commonality for fear of jeopardising the comfort of shared experience, women who rely on their victimisation to

210 Barbara Johnson, 'Thresholds of Difference', in *Race, Writing and Difference*, *op cit*, pp 323–24.

211 Toni Morrison, *Sula* (1974) p 52.

212 R West, 'Jurisprudence and Gender' (1987) 3 *Wisconsin Women's LJ* 81. (Extracted at p 227.)

213 B Hooks, *Feminist Theory*, *op cit*, p 45.

define themselves may be reluctant to let it go and create their own self-definitions.²¹⁴

At the individual level, black women have had to learn to construct themselves in a society that denied them full selves. Again, Zora Neale Hurston's writings are suggestive. Though Hurston plays with being her 'coloured self' and again with being 'the eternal feminine with its string of beads',²¹⁵ she ends *How It Feels to Be Coloured Me* with an image of herself as neither essentially black nor essentially female, but simply:

a brown bag of miscellany propped against a wall. Against a wall in company with other bags, white, red and yellow. Pour out the contents, and there is discovered a jumble of small things priceless and worthless. A first-water diamond, an empty spool, bits of broken glass, lengths of string, a key to a door long since crumbled away, a rusty knife-blade, old shoes saved for a road that never was and never will be, a nail bent under the weight of things too heavy for any nail, a dried flower or two still fragrant. In your hand is the brown bag. On the ground before you is the jumble it held – so much like the jumble in the bags, could they be emptied, that all might be dumped in a single heap and the bags refilled without altering the content of any greatly. A bit of coloured glass more or less would not matter. Perhaps that is how the 'Great Stuffer of Bags' filled them in the first place, who knows?²¹⁶

Hurston thus insists on a conception of identity as a construction, not an essence – something made of fragments of experience, not discovered in one's body or unveiled after male domination is eliminated.

This insistence on the importance of will and creativity seems to threaten feminism at one level, because it gives strength back to the concept of autonomy, making possible the recognition of the element of consent in relations of domination, and attributes to women the power that makes culpable the many ways in which white women have actively used their race privilege against their sisters of colour. Although feminists are correct to recognise the powerful force of sheer physical coercion in ensuring compliance with patriarchal hegemony, we must also come to terms with the ways in which women's culture has served to enlist women's support in perpetuating existing power relations.

However, at another level, the recognition of the role of creativity and will in shaping our lives is liberating, for it allows us to acknowledge and celebrate the creativity and joy with which many women have survived and turned existing relations of domination to their own ends. Works of black literature like *Beloved*, *The Colour Purple*, and *Song of Solomon*, among others, do not linger on black women's victimisation and misery; though they recognise our pain, they ultimately celebrate our transcendence.

Finally, on a collective level this emphasis on will and creativity reminds us that bridges between women are built, not found. The discovery of shared suffering is a connection more illusory than real; what will truly bring and keep us together is the use of effort and imagination to root out and examine our differences, for only the recognition of women's differences can ultimately bring feminist movement to strength. This is hard work, and painful work; but it is also radical

214 Minnie Bruce Pratt, *Identity: Skin Blood Heart* in MB Pratt and B Smith, *Yours in Struggle: Three Feminist Perspectives on Anti-Semitism and Racism* (1984).

215 Z Hurston, *op cit*, p 155.

216 *Ibid*.

work, real work. As Barbara Smith has said, 'What I really feel is radical is trying to make coalitions with people who are different from you. I feel it is radical to be dealing with race and sex and class and sexual identity all at one time. I think that is really radical because it has never been done before.'²¹⁷

FEMINIST JURISPRUDENCE: GROUNDING THE THEORIES²¹⁸

Patricia A Cain²¹⁹

Introduction

This essay originates from my participation in a workshop of the same title at the 20th National Conference on Women and the Law, held in Oakland, California in Spring 1989. The workshop focused on the following two questions: (1) to what extent is feminist theoretical scholarship in the field of law actually grounded in the experience of women (ie based on feminist method); and (2) to the extent that the theory is grounded in women's experience, does it reflect the diversity of women's experience?

Because I had recently been struggling with both of these issues, I readily accepted the invitation to participate. At the time, I hoped that my preparation for the workshop would help clarify my own thinking about the connections between feminist method and theory. My particular concern was that feminist legal theorists often ignore, or at best marginalise, lesbian experience. I call this the problem of the invisible lesbian. It is a problem that has serious consequences for the building of feminist legal theory.

What makes any theory particularly feminist is that it is derived from female experience, from a point of view contrary to the dominant male perception of reality. If feminist legal theory is derived from a feminist method uninformed by critical lesbian experience, the theory will be incomplete. Lesbian experience is essential to the formation of feminist theory because it stands in opposition to the institution of heterosexuality, which is a core element of male-centred reality. To the extent feminist legal theory seeks to challenge the male view of reality, it cannot afford to ignore lesbian experience.

The invisibility (or marginalisation) of lesbian experience in feminist legal theory calls for further scrutiny. First of all, we ought to question why the invisibility is so prevalent. Second, we ought to consider what difference an eradication of that invisibility might make.

During the workshop at the Women and the Law Conference, my aim was to explore the fact of lesbian invisibility. I hoped to engage the audience in a form of consciousness-raising (CR) that would deepen their understanding of the invisibility problem and then lead to a discussion of feminist legal theory in which the centrality of lesbian experience was assumed. I was committed to consciousness-raising as my means of communication because I believe CR is an example of genuine feminist method.

I think of CR as a process that occurs whenever women come together to share experiences that produce a new critical understanding of what it means to be a woman. Normally CR occurs when women gather and talk in a space that feels safe enough to explore topics that are private, topics that are rarely discussed.

217 Barbara Smith and Beverly Smith, 'Across the Kitchen Table: A Sister-to-Sister Dialogue', in *This Bridge Called My Back*, *op cit*, p 126.

218 (1989) *Berkeley Women's Law Journal* 191. (Footnotes edited.)

219 Professor of Law, University of Texas.

One does not usually think of a speech to a crowded room of 300 women as CR. Nonetheless, by telling my own and others' personal stories, followed by an invitation for critical self-reflection, my hope was to cause a shift in the level of consciousness of many women in the room. I think we succeeded. The response to my presentation, as I experienced it, was a resounding silence – a silence that I now interpret positively. Valid self-reflection, I was told by women in the audience, requires some separate space, some silence.

Feminist Jurisprudence, Feminist Method, and Feminist Legal Scholarship

A. Feminist Jurisprudence

The first recorded use of the phrase 'feminist jurisprudence' occurred in 1978 at a conference celebrating the 25th anniversary of women graduates of the Harvard Law School. Professor Ann Scales, then a Harvard student, moderated a panel of feminist lawyers, legal educators, and judges. The question for debate was whether there was in fact, or should be, such a thing as a feminist jurisprudence. As I understand it from Professor Scales, the consensus was that there should not be.

Professor Scales, unwilling to abide by the consensus, entitled her first scholarly article *Towards a Feminist Jurisprudence*.²²⁰ She admitted that the risk of calling her project 'feminist jurisprudence' was that the work might be misunderstood as a politically-motivated argument for special laws favouring women. Actually, she intended to question, from a feminist perspective, the completeness of a jurisprudence that is not responsive to specifically female concerns (eg pregnancy).

More recently, Professor Robin West has claimed that 'feminist jurisprudence is a conceptual anomaly'.²²¹ Existing jurisprudence is masculine, according to West, because it is about the connection between patriarchal laws and human beings, who are presumed by those laws to be male. Feminist jurisprudence cannot exist until patriarchy is abolished.

I understand Professor West to be saying that we cannot create a complete theory of law (a jurisprudence) that is truly feminist until conditions are such that we can build the theory authentically. So long as patriarchal dominance continues, female authenticity is presumably impossible. As Catharine MacKinnon keeps reminding us, she (the 'female') cannot articulate her own definitions now 'because his foot is on her throat'.²²²

Without fully accepting the West/MacKinnon thesis (I believe we have glimpses of our own authenticity even within the patriarchy), I do agree that we do not now have a feminist jurisprudence. We do have (and West agrees) feminist legal theory. That is, we have feminist critiques of existing (masculine) jurisprudence.²²³ We have examples of feminist deconstruction that uncover the male bias in the existing legal system. And we have feminist litigation that strives to restructure the existing system. Thus we are moving 'towards a

220 (1981) 56 *Indiana LJ* 375. (Extracted in Chapter 4.)

221 'Jurisprudence and Gender' (1988) 55 *U Chi L Rev* 1 at 4. (Extracted, *supra*.)

222 DuBois, Dunlap, Gilligan, MacKinnon, Merkel-Meadow, 'Feminist Discourse: Moral Values and the Law – A Conversation' (1985) 34 *Buffalo L Rev* at 11, 74–75.

223 See eg M Minow, 'Forward: Justice Engendered' (1987) *Harv L Rev* 10; Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 *S Cal L Rev* 1877; Scales, 'The Emergence of Feminist Jurisprudence' (1986) 95 *Yale LJ* 1373. (Extracted in Chapter 4.); West *op cit*.

feminist jurisprudence', because the critiques and the litigation have challenged the strength of the patriarchy.

B. Feminist Method

Recent feminist legal scholarship emphasises the importance of feminist method'. While it is not clear whether feminist method is, in fact, limited to consciousness-raising,²²⁴ nor whether it should be,²²⁵ there does appear to be general agreement that feminist method begins with the primacy of women's experience. Listening to women and believing their stories is central to feminist method. If we are careful to listen to women when they describe the harms they experience as women, we are likely to get the legal theory right (ie perceive the problem correctly and propose the right solutions).

Consider Carol Gilligan's pathbreaking work in psychology.²²⁶ Feminist method led Gilligan to suggest new theories regarding women's moral development. Gilligan's method was to listen to female experience as female experience and not merely as other-than-male experience. Gilligan listened to women tell their own stories. She did not force the stories into preformed male categories. Because she really listened, she uncovered a 'different voice' than that heard by her male colleagues.

Theories about women, however, are not always grounded on feminist method. Theories about women, even if developed by a woman, are not necessarily based on women's experience. For example, women law professors are confined to an academic environment that is particularly male. There is no guarantee that those of us who focus our scholarship on legal issues of concern to women will necessarily build theories based on women's experience. Indeed, unless we take pains to seek out women's communities, empirical data about women, and other sources of female experience, there is every risk that we will do just the opposite.

Catharine MacKinnon may be the feminist legal scholar who has most consistently focused on the importance of feminist method.²²⁷ Feminist method, for MacKinnon, means women listening to other women.²²⁸ Women, as they listen to each other, tend to discover a commonality of experiences. Uncovering the fact of women's common experiences creates new knowledge.

MacKinnon listened to women's common experience of sexual harassment and built a legal theory that reflected that experience. In May, 1975, Working Women United held a 'Speak-Out' on sexual harassment. Women told their stories of being treated as sex objects at work. They spoke of the unarticulated job requirements for women, requirements regarding physical attractiveness and sexual availability. The organisation reported that 70% of the women who responded to their survey had experienced some sexual harassment on the job.²²⁹ During this part of the 1970s, individual women also began to bring their claims regarding sexual harassment to the courts.

224 See L Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *J Legal Educ* 3.

225 See Bottomley, Givson and Meteyard, 'Dworkin, Which Dworkin? Taking Feminism Seriously' (1987) 14 *Brit J L and Society* at 47, 56.

226 *In a Different Voice: Psychological Theory and Women's Development* (1982).

227 *Feminism Unmodified* (Harvard UP, 1987).

228 See CA MacKinnon, *Toward a Feminist Theory of the State* (Harvard UP, 1989), Chapters 5 and 6.

229 Silverman, *Sexual Harassment: Working Women's Dilemma in Building Feminist Theory* (Longman, 1981), p 84.

MacKinnon, beginning with the data of real women's experience,²³⁰ and building on the arguments put forth by feminist litigators, developed a legal theory that characterised sexual harassment as a form of sex discrimination that ought to be covered by Title VII. A theory was necessary because existing jurisprudence did not recognise sexual harassment as a harm which the law should remedy. The theory revealed the male bias of the law (ignoring harms that only occur to women) and proposed a revision: a remedy for sexual harassment harms under Title VII.

C. Feminist Legal Scholarship

To be classified as feminist, legal scholarship should be based on women's experience. My particular concern is whether the 'women's experience' that informs feminist legal theory excludes lesbian experience. I will briefly discuss what I consider to be the three stages of feminist legal scholarship' and will review what impact, if any, lesbian experience has had on the development of each of these stages ...

The author then considers the achievements of the women's movement in the United States of America in the 1960s, which she labels the 'second wave' of feminism. In that period, Cain writes, the Equal Pay Act of 1963 and Title VII²³¹ which prohibited sex discrimination in employment exhibited a 'commitment to the principle of equal opportunity'. In 1966 the National Organisation for Women was founded: focusing on formal equality in the public arena, but initially avoiding contentious issues such as abortion and sexual and reproductive freedom. Lesbian feminists, she writes, were 'disinherited' by the mainstream feminist movement of this time.

In 'Stage Two' — the period in which feminist theory centred on the equality/sameness/difference issue — also ignored lesbian experience. In Patricia Cain's analysis, the work of both cultural feminists, such as Carol Gilligan and Robin West, and dominance theorists such as Catharine MacKinnon, fail to acknowledge lesbian feminists. Cultural feminists concentration on women as nurturers of and carers for children and women's greater connectedness to others, presupposes female heterosexuality, to the exclusion of lesbian women. Catharine MacKinnon's insistence of recasting the sameness/difference debate in the language of dominance and subordination is equally premised on heterosexuality, again to the exclusion of lesbian feminists.

On MacKinnon's views Cain writes:

To the claim that lesbian experience is different, that lesbians are not subordinate to men, that their care is not male-directed, MacKinnon appears to have two different responses. Her first response is that exceptions do not matter. MacKinnon's intent is to offer a critique of the structural condition of women as sexual subordinates and not to make existential claims about all women. It does not affect her theory that all women are not always subordinated to men. Thus, for MacKinnon, lesbian experience of non-subordination is simply irrelevant.

230 See CA MacKinnon, *Sexual Harassment of Working Women* (1979).

231 Civil Rights Act 1964, 42 USC 1981 (1982).

Her second response is more troubling. It goes beyond the assertion that lesbian experience is irrelevant; it denies the claim that lesbian experience is free from male domination.

Some have argued that lesbian sexuality – meaning here simply women having sex with women, not with men – solves the problem of gender by eliminating men from women’s voluntary sexual encounters. Yet women’s sexuality remains constructed under conditions of male supremacy; women remain socially defined as women in relation to men; the definition of women as men’s inferiors remains sexual even if not heterosexual, whether men are present at the time or not.²³²

I find this passage objectionable for several reasons. My primary objection is that MacKinnon has defined lesbian sexuality to suit her purposes (‘simply women having sex with women’ – ie with nothing else changed except that a woman replaces a man). Although I do not dispute that lesbian couples can sometimes escape their heterosexual counterparts, I am infuriated by MacKinnon’s silencing of the rest of lesbian experience. Where is MacKinnon’s feminist method? To whom does she choose to listen? Would it not enrich her theory to recognise the reality of non-subordination that some lesbians claim as their experiential reality and ask about its relevance to her underlying theory? And yet, because her theory is premised on a single commonality among women, sexual subordination, MacKinnon fails to see the relevance of the lesbian claim to non-domination, even when it stands – literally – in front of her.

The exclusion of lesbian experience from feminist legal theory is also documented in Clare Dalton’s recent summary of feminist legal thought.²³³ Dalton describes present aspirations to feminist jurisprudence as falling within two camps: ‘woman as mother’ theories and ‘woman as sexual subordinate’ theories. Neither camp embraces lesbian experience as central to the formation of theory. I suspect Professor Dalton’s description is accurate. I can find no major ‘theory piece’ by a legal scholar that focuses on the experience of adult women loving each other as the core experience for building a legal theory premised on caring and connections. And although ‘woman as sexual subordinate’ theorists are more likely to acknowledge the fact of lesbian existence, they focus on a critique of male dominance rather than on lesbian bonding as a possible alternative to male dominance.

3. Stage Three: Postmodernism

Borrowing from Clare Dalton, I call the third stage of feminist legal theory postmodernism. Postmodern thought challenges notions such as objectivity and universality. The postmodern ‘knowing self’ is subjective, concrete and particular, constructed through the lived experiences of the subject.

Postmodern feminism is generally associated with French feminists, such as Helene Cixous, Luce Irigaray, and Julia Kristeva.²³⁴ The influence of Simone de Beauvoir’s work²³⁵ on these theorists is evident. Beauvoir’s existential analysis of woman as ‘other’ is conceived by postmodern feminists as enabling women to

232 CA MacKinnon, *Feminist Theory of State*, at pp 141–42.

233 C Dalton, ‘Where We Stand: Observations on the Situation of Feminist Legal Thought’ (1988) 3 *Berkeley Women’s LJ* 1.

234 For an excellent overview of postmodern feminism, and of these three French theorists in particular, see R Tong, *Feminist Thought: A Comprehensive Introduction* (1989), pp 217–33.

235 S de Beauvoir, *The Second Sex* (1952).

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.