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### Nomos and Thanatos (Part B): Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation? Part I

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Richard F. Devlin\*

Nomos and Thanatos (Part B).  
Feminism as Jurisgenerative  
Transformation, or Resistance  
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## I. *Introduction*

In Part A of this essay, "The Killing Fields"<sup>1</sup>, I developed a critique of the disciplinary impulses that underlie modern law and legal theory. Invoking a number of perspectives and a plurality of analyses, I proposed that male-stream legal theory and contemporary law both assume as inevitable, and legitimize as appropriate, the funnelling of violence through law. The problem with a funnel, however, is that it does not curtail or reduce that which is channelled through it. On the contrary, to funnel is to condense and to intensify. Viewed from this perspective, interpreted from the bottom up, law and legal theory are not the antithesis of violence but rather its apotheosis.

Critique, however, can only take us so far, and alternative consciousness is not changed reality. In this second part of the essay, I attempt to cautiously outline a reconstructive sequel that suggests the possibility of making law and jurisprudence "otherwise". Specifically, I filter my reflections and tentative proposals through the critical prism of feminist theory and practice. Moreover, paralleling the pattern of argument in the first part of the essay, I will draw on "knowledges" that have, traditionally, either been alien to, or marginalized by, conventional jurisprudential inquiry. In this way, I hope to provide some critical distance on the theory and practice of modern law (and its hegemonic propensities) thereby enabling us to envision, even if only for a moment, the possible nature of a postmodern, postpatriarchal juridical regime.

In section II of this part of the essay, through an analysis of feminist literary criticism and feminist psychoanalysis, I outline two of the predominant themes that have, historically, pervaded feminist analysis: equalitarianism and gynocentrism. However, rather than seeing these approaches as being in conflict or antithetical, I will argue that, though in tension, they are potentially compatible and even mutually reinforcing. I will concretize this discussion through an affirmative interpretation of the analyses of Carol Gilligan and Catharine MacKinnon.<sup>1a</sup>

In section III, I relate these more thematic discussions to an overview of feminist responses to pornography, while in section IV, I suggest that the feminist turn to law, as it is currently constituted, while being part of the solution, tends to reinforce part of the thanatical problem. The conclusion attempts, briefly, to identify some of the strengths and

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1. (1989), 12 Dalhousie L. J. 298. For acknowledgements and caveats see Part A, footnotes 1 and 12. In particular, I am grateful for the critical commentary of Alexandra Z. Dobrowolsky.

1a. This essay was completed prior to the publication of Carol Gilligan et al., *Mapping The Moral Domain* (1989) and Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989).

weaknesses of the various theses presented in "Nomos and Thanatos, Parts A and B."

## II. *Feminism*

### 1) *The Significance of Feminism*

"The principal objective of feminist criticism has always been political: it seeks to expose, not to perpetuate, patriarchal practices."

Toril Moi<sup>2</sup>

Feminism, I think, is at the cutting edge of progressive social movements within post-industrial society. Feminism, by its very existence, demonstrates the poverty of liberalism's commitment to equality. It seeks to realize what for liberalism has been, at best, pious platitudes,<sup>3</sup> at worst, ideological obfuscation, chicanery and apologetics.<sup>4</sup> Feminism is progressive in the sense that it recognizes and acts upon the *needs* of women in contemporary society in order to help them achieve substantive equality. It aspires to a full recognition of women's humanity. Feminism helps.

Feminism can be distinguished from other progressive movements in that it is radically effective. It grows out of, and is underpinned by, the lived experiences of women and continually strives to improve the social, economic and political conditions within which women live. Whereas Marxism has been effectively relegated to the peripheral of the academy (at least in the rich western countries), feminism is a constitutive element of modern political practice. Moreover, social democracy, a stunted hybrid of socialism and liberalism, has proved itself incapable of doing more than making minor modifications to the basic structure of society, even when it can work out what it wants to do.

Critical theory, while perhaps the most progressive social theory, has remained just that, theory. In both its social-philosophical and legal manifestations it is very much the product of celebrated male professors at prestigious universities. For most, it is unintelligible and inaccessible, a sophisticated and convoluted critique with almost no direct or immediate political relevance. Although visionary, it has not yet made its way into the interstices of everyday human interaction. Critical theory, at this time, lacks both the means to communicate and a productive/receptive constituency.

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2. *Sexual/Textual Politics* (1986) xiv.

3. John Rawls, *A Theory of Justice* (1971).

4. Ronald Dworkin, "Liberalism" in *Public and Private Morality* 113 (S. Hampshire ed. 1978); *Taking Rights Seriously* (1978); *A Matter of Principle* (1984); *Law's Empire* (1986).

Feminism has advantages over all the foregoing. First and foremost, it is existentially located and radically contextual. It never forgets its experiential roots, its *raison d'être* and its ultimate purpose: the achievement of self determination, "home-rule",<sup>5</sup> and substantive equality for women. Second, although it is reflective and theoretical, it is also driven by political necessity and pragmatism. Feminism strives, not without success, to maintain the link between theory and practice. Third, it is in the political ascendancy. From being an outlandish and illegitimate quirk in the nineteenth century, it has gradually infiltrated the ranks of both liberalism and socialism, discovered their limitations, and transcended them, to espouse its own worldview.

That worldview is large. Feminism does not aspire to being just another pluralist constituency. It does not limit its agenda to incremental reformism, although that is one strategy available to feminism. Rather, feminism seeks to be transgressive and transformative. It is transgressive in the sense that its ambition is to go beyond the realm of what has hitherto been considered as the limits of the possible.<sup>6</sup> Feminism unmasks the repressive tolerance of rationalism — the "man on the Clapham omnibus" — to adumbrate the deep structured inequality, indeed misogyny, of contemporary society.

Significantly, many feminists argue that for this transgressive dynamic to be effective there must also be radical transformation. However, transformation is not to be confused with revolution, with women replacing the proletariat as the vanguard leading us into the millenium. Rather, transformation demands a complete restructuring and dehierarchization of human interaction in order to eradicate the massive imbalance in gender relations. Only in this way can substantive equality be achieved. In turn, this egalitarian dynamic simultaneously invokes and motivates a reconstitution of contemporary value structures so as to de-centre the excessively individualistic ethic which is characteristic of contemporary society and to emphasize a more inter-subjective one. Feminism's long term goal is therefore large: a complete reworking of our interpersonal relations, a reconstruction of the basic structures of society, and an alternative understanding of what we have historically known as "human nature".<sup>7</sup>

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5. Christine Boyle, "Home Rule for Women: Power Sharing Between Men and Women" (1983), 7 *Dalhousie L.J.* 790.

6. In this sense feminism shares with modernism the disbelief that conventional wisdom is as constraining as it is facilitative of our human potential. However, as we shall see below, feminism goes beyond modernism by providing tentative suggestions as to what "otherwise" might mean.

7. Marilyn French, *Beyond Power* (1985) ch. 6, "Feminism".

## 2) *Themes of Feminism*

Feminism is, and always has been, a heterogeneous and polyvocal "movement", one which has undergone numerous metamorphoses over the period of its existence.<sup>8</sup> Although this lack of fixity may mean that there is no "one true essential feminism" thereby rendering feminism undefinable, it is a veritable strength in that it allows for diversity, historical contingency, openness, ongoing dialogue and self-criticism. It renders feminism a dynamic and progressive movement.

However, despite this heterogeneity, on my understanding, it is possible to discern, in particular, two pervasive themes<sup>9</sup> or traditions which have manifested themselves, with various intensities, in the works and programmes of different participants at different times.<sup>10</sup> As I shall suggest, these two themes co-exist in a mutually reinforcing tension<sup>11</sup>

8. There are many different feminist voices, including, for example, radical feminism: Zillah Eisenstein, *The Radical Future of Liberal Feminism* (1981), Liz Stanley and Sue Wise, *Breaking Out, Feminist Consciousness and Feminist Research* (1983); marxist feminism: Charnie Guettel, *Marxism and Feminism* (1974), Lydia Sargent (ed.) *Women and Revolution* (1981);

socialist feminism: Mary O'Brien, *The Politics of Reproduction* (1981);

critical legal feminism: Fran Olsen, "The Family and the Market" (1983), 96 Harvard L.Rev. 1497, "The Sex of Law" (unpublished manuscript 1984);

psychoanalytic feminism: Carol Gilligan, *In a Different Voice* (1982). [Hereinafter cited as *Voice*];

lesbian feminism: Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" (1980), 5 Signs 631;

black feminism: Bell Hooks, *Feminist Theory: From Margin to Centre* (1984);

existentialist feminism: Simone de Beauvoir, *The Second Sex* (1957);

liberal feminism: Elizabeth Wolgast, *Equality and the Rights of Women* (1980), Ann Scales, "Towards a Feminist Jurisprudence" (1980-81), 56 Indiana L.J. 375, Wendy Williams, "The Equality Crisis" (1982), 7 Womens' Rights Law Reporter 175, Susan Okin, *Women in Western Political Thought* (1979), "Justice and Gender", 16 Philosophy and Public Affairs 42 (1987), Jean Elshtain, *Public Man, Private Woman* (1981), Janet Radcliffe Richards, *The Skeptical Feminist* (1980).

For a useful overview of various feminist perspectives see A. Jagger, "Political Philosophies of Women's Liberation" in *Feminism and Philosophy* 7 (M. Vetterling-Bruggin, F. Elliston, J. English, eds. 1977).

9. See also Seyla Benhabib and Drucilla Cornell, "Introduction: Feminism as Critique" (1986), 5 Praxis International 365; K. Lahey, "Feminism, Theory and Method" (April 1984), (Unpublished Paper, presented at special conference on Feminist Legal Theory, Osgoode Hall Law School); "Equality and Specificity" (unpublished manuscript).

10. It is important that I point out that my claim is not that these two themes, either conjunctively or in opposition, capture the essence of feminism; they are not necessarily its determining features. There are many other vitally important cross-currents in the matrix of feminism which contribute immensely to the richness and novelty of both its theory and practice. I concentrate on these aspects because they have a direct and immediate impact upon the nature and direction of feminist jurisprudence. See further, Julia Kristeva, "Women's Time" (1981), 7 Signs 13.

11. I use the term "tension" in preference to the more vogueish "contradiction" because, politically, a tension can be more creative than a potentially polarizing and stultifying



which contributes greatly to the reconstructive nature of feminism. I shall characterize<sup>12</sup> these as the "equality approach" and the "gynocentric approach."

a) *The Equality Approach*

Historically, equalitarianism has been the dominant organizing principle or concept for feminism. The basic claim of the equality approach is that men and women share a common humanity, that they are fundamentally equal and that there is no justifiable reason to treat one group as different from the other.<sup>13</sup> Consequently, women are entitled to participate in all aspects of contemporary society. The equalitarian feminist demand is for:

"the full extension of political, civic and juridical equality to women; the rights to public political participation; the realization of social justice in the workplace and other institutions and the legal abolition of sex discrimination such as to allow women to become full economic, civic and political agents."<sup>14</sup>

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contradiction which may assume a non-transcendable dichotomy. See also Fran Olsen, "The Family and the Market," *supra* note 8.

12. James Boyd White, *The Legal Imagination* (1985) draws an important distinction between characterize and caricature. I propose to do the former.

13. For classic statements of this position see Mary Wollstonecroft, *A Vindication of the Rights of Women* (1792); John Stuart Mill and Harriet Taylor Mill "The Subjection of Women" in *Essays on Sex Equality* 125 (A. Rossi ed. 1970); As framed by Elizabeth Cady Stanton et al. in the celebrated Seneca Falls Declaration, feminism considers

these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

For a brief review of aspects of the history of women's shifting attitudes on difference and equality, see Ellen Dubois in "Feminist Discourse, Moral Values and the Law — A Conversation" (1985), 34 Buffalo L.Rev. 11 [hereinafter cited as "Discourse"]; Janet Radcliffe Richards, *The Skeptical Feminist* (1980). E. Lanz and B. Myerhoff even suggest that equality is a reality in many aspects of contemporary American life, *The Feminization of America* (1985). For a useful brief compilation of French women's claims for equality over the last three centuries, see, *New French Feminisms* 6-7, 28-29 (E. Marks & I. de Courtivron eds. 1980).

14. See Benhabib and Cornell, *supra*, note 9. See also: Yolande Cohen "Thoughts on Women and Power" in G. Finn and A. Miles *Feminism in Canada* (1983), 229, 235. Equalitarianism was basic tenet of both the E.R.A. movement and the supporters of entrenching the equality provisions in the Canadian Charter of Rights and Freedoms, as well as the gender neutralization of the Criminal Code to reclassify "rape" as "sexual assault". It is also the basic position adopted by the suffragettes, National Organization for Women, and "La Ligue" — now "le Droit des Femmes" in France.

It is important to point out that the quotation in the text is not suggesting what is the essence of "equality". Rather it is an attempt to capture what, historically, has been the nature, aspirations and significance of most feminist claims to equality. For a useful discussion of competing interpretations/visions of equality see Colleen Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in *Charterwatch* 195 (C. Boyle, A.W. MacKay, E. McBride, J.A. Yogis eds. 1986). Sheppard discusses the important differences between conservative, liberal and post-liberal conceptions of equality.

Equalitarian feminists also suggest that to accept a distinction based on gender or reproductive ability is to either risk<sup>15</sup> or tolerate a hierarchical dualism in which men dominate and women are subordinate. Equalitarians argue that in the male constructed world in which we live, difference equals domination.<sup>16</sup> It risks confining women to be "moral neatness of the female tended hearth".<sup>17</sup> Consequently, some equalitarian feminists reject what might be called "feminine values" as relics of oppression.<sup>18</sup>

### b) *The Gynocentric Approach*

"Feminine values are the means of our oppression, the only place we are allowed to be; but they are also potentially subversive because they are so contradictory to the established order outside ourselves."

Yolande Cohen<sup>19</sup>

The articulation of the gynocentric perspective is of more recent vintage<sup>20</sup> in feminism and is still in embryonic form. The basic claim of the gynocentric approach<sup>21</sup> is that there are important distinctions between

15. See, for example, Wendy Williams' call for an absolute sex neutrality:

If we can't have it both ways, we need to think very carefully which way we chose.

"The Equality Crisis: Some Reflections on Courts, Culture and Feminism" (1982), 7 Women's Rights L.R. 175, 196.

16. Catharine MacKinnon, "On Difference and Dominance" *Feminism Unmodified* (1987) [hereinafter cited as *Feminism Unmodified*]. It is important to point out that I am not necessarily identifying equalitarianism with liberal feminism. Although both John Stuart Mill and Catharine MacKinnon may favour equality over difference it can hardly be said that the latter is a liberal. By the same token, those who favour gynocentrism may also have very different politico-economic visions. Feminism throws a spanner in the works of traditional political pigeon-holing.

17. I.M. Young, "Impartiality and the Civic Public" (1986), 56 *Praxis International* 381, 389.

18. Angela Miles posits that such a rejection can be identified in the works of, *inter alia*, Simone de Beauvoir, *Second Sex*, 23-25 (1953); Shulamith Firestone, *Dialectic of Sex* (1970); Juliet Mitchell, "Women: the longest revolution" (1966), 40 *New Left Rev.* 11, and "Women: the longest revolution" (1967), 41 *New Left Rev.* 81; Betty Friedan, *Feminine Mystique* 55; Ti-Grace Atkinson, *Amazon Odyssey* (1974); Jeffner Allen, "Motherhood: The Annihilation of Women" in *Mothering* 315 (J. Trebilcock ed. 1984).

19. Cohen, *supra* note 14, at 245.

20. Gynocentrism is not a completely new phenomenon in that, historically, there have been several feminist activists and theorists who generally fit this perspective. For discussion see: Michele Riot-Sarcey and Elani Varikas, "Feminist Consciousness in the 19th Century" (1986), 5 *Praxis International* 443; Sklar, "Hull House in the 1890's: A Community of Women Reformers" (1985), 10 *Signs* 658.

21. For the classic collection of articles which incorporate this viewpoint which has influenced my own thoughts significantly see *Feminism in Canada*, *supra*, note 14. Angela Miles describes this project as "Integrative Feminism", *ibid.* at 12. See also her "The Integrative Feminine Principle in North American Feminist Radicalism: Value Basis of a New Feminism" (1981), 4 *Women's Studies International Quarterly* 481 [hereinafter cited as I.F.P.]; "Integrative Feminism" (1984), *Fireweed* [hereinafter cited as I.F.]. Conspicuous by its absence in this



men and women, that although this awareness has historically operated to the disadvantage of women, there is something valuable within this feminine culture that should be identified, preserved, extended and shifted from "margin to centre"<sup>22</sup> rather than be surrounded or abandoned in the quest for equality. This approach seeks to affirm and (re)valorize characteristics, activities and values such as contextualism and holism; compassion and responsibility; nurturing and sharing; cooperation and interdependence; relationalism and empathy; intuition and emotion.<sup>23</sup> Its challenge and re-vision is therefore ambitious: it rejects the contemporary traditions of moral, political and legal life and aspires to reconstruct the whole of human interaction on the basis of pro-social, pro-creative, anti-destructive<sup>24</sup> and (re)productive<sup>25</sup> values. Gynocentrism

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interdisciplinary collection is any discussion of law. See, however, K. Lahey, *supra* note 9 and Colleen Sheppard, *supra* note 14, at 216-223.

The sources of gynocentrism and the documentation of women's difference are varied, and often appear as subtexts rather than explicit, fully recognized themes. Mary O'Brien, *Politics of Reproduction* (1981), relates gynocentrism to the birthing process, as does A. Rich, *Of Women Born* (1976). Jean Baker Miller, *Toward a New Psychology of Women* (1976), Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978) and Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements of the Human Malaise* (1976) relate it to psychosocial analysis of human development. Carol Gilligan, *In a Different Voice* (1982) outlines an alternative moral structure for women, which differs from the abstract sense of justice which predominates today. Several political perspectives also incorporate this view: A. Dworkin, *Our Blood* 63-64 (1976); *Capitalist Patriarchy and the Case for Socialist Feminism* (Z. Eisenstein ed. 1979); L. Fritz, *Thinking Like a Woman* (1975); N. Harstock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in *Discovering Reality*, 283 (S. Harding and M. Hintikka eds. 1983).

See also, Barbara Burris, "The Fourth World Manifesto" in A. Koedt et al. *Radical Feminism* (1973); B. Ehrenreich and D. English, *For Her Own Good: 150 Years of the Experts Advice to Women* (1978), at 342; Roxanne Dunbar, "Female Revolution as the Basis for Social Revolution" in R. Morgan, *Sisterhood Is Powerful*, 677 (1970); Sheila Rowbotham, *Woman's Consciousness, Man's World* (1973); Dorothy, "Position Paper of a Feminist on the Report of the Royal Commission on the Status of Women in Canada and the National Ad Hoc Committee on the Status of Women" (1971), 2 *New Feminist* 3; Iris Marion Young, "Impartiality and the Civic Public: Some Implications and Feminist Critiques of Moral and Political Theory" (1986), 5 *Praxis International* 381; Judy Chicago, *Through the Flower* (1975). For a brief overview of the literature and practice see Miles "I.F.P." and Fireweed "I.F.", *ibid*.

22. Bell Hooks, *Feminist Theory: From Margin to Centre* (1984).

23. These values frequently are contrasted with "malist" or androcentric values such as individualism and separation, competitiveness and domination, abstraction and rationalism, and egocentrism.

24. Jeri Dawn Wine even goes so far as to suggest that there is a commitment to non-violence. "Gynocentric Values and Feminist Psychology" in *Feminism In Canada*, *supra* note 14, at 67; see also Marilyn French, *Beyond Power*, 445 (1985); and S. Ruddick, "Preservative Love and Military Destruction" in *Mothering*, *supra* note 18, at 231. see generally, Cynthia E. Enloe, "Feminists Thinking about War, Militarism and Peace" in *Analyzing Gender* 526 (B. Hess and M. Ferre eds. 1987).

25. O'Brien, "Feminism and Revolution" in *Feminism in Canada*, *supra* note 14, at 252. As sometimes articulated, gynocentrism privileges reproduction over production, a position that is

seeks to change the very nature and terms<sup>26</sup> of power relations, "of what it means to be a woman and what it means to be a man".<sup>27</sup> By drawing on its reservoir of transformative values, it promises to take us beyond equality as it has been traditionally conceived, "towards a new departure for humanity as a whole".<sup>28</sup> It calls for a feminization of humanity and the negation of the negation imposed by the imperialism of "male-stream" conventional wisdom.

Gynocentrism acknowledges that the achievements of equalitarianism have been significant.<sup>29</sup> However, it suggests that equalitarianism, on its own, lacks an emancipatory vision, that it constructs feminism as merely another constituency in the pluralist regime.<sup>30</sup> Equalitarianism does not make the fundamental challenge to man's definition and structuring of the "prototype human being". Ultimately, its central weakness is that it comes dangerously close to being premised on an "essentially male model of humanity". Moreover, it runs the very real dangers of being yet another patriarchal cul de sac,<sup>31</sup> or assimilation.

The equalitarians are similarly perturbed by the gynocentric turn in feminist discourse. They are seriously concerned that such an approach is both strategically dangerous and conceptually misconceived. Gynocentrism is perceived as dangerous in that, by seemingly accepting a moral division of labour, it reconfirms traditional stereotypes of the feminine woman, thereby restricting women's horizons and confining them to the

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as critical of traditional Marxism as it is of liberalism. See for example Linda Nicholson, "Feminism and Marx: Integrating Kinship with the Economic" (1986), 5 *Praxis International* 368; Mary O'Brien, "Reproducing Marxist Man", In *The Sexism of Social and Political Theory* 107 (L. Clarke & L. Lange eds. 1979); Dorothy Smith, "The Problem of the Main Business" (Address, Dalhousie University, 9th March 1988).

26. Betty Friedan asks "Can women, will women, even try to change the terms?" *The Second Stage* 33 (1981).

27. Geraldine Finn in *Feminism in Canada*, *supra* note 14 at 303.

28. A. Miles, in *Feminism in Canada*, *supra* note 14, at 214. Marcuse, "Marxism and Feminism" (1974), 2 *Women's Studies* 279, 281. But see A. Rich for a more cautious feminist approach:

The urge to leap across feminism to "human liberation" is a tragic and dangerous mistake.

"Toward a Woman Centred University", *Lies, Secrets and Silence* (1979) at 134, 11.

The concern of this paper is not to "leap across" feminism, but to inquire into the potential of feminist reconstruction, and to raise concerns about the pervasiveness of patriarchal hegemony, both substantively and methodologically.

29. For a review of the success of equalitarianism in an area of sex discrimination see Herma Hill Kay, *Text, cases and materials on Sex-Based Discrimination* (2d) (1981). See also W. Chafe, *Women and Equality* (1977).

30. Angela Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in *Feminism in Canada*, *supra* note 14, 213 at 214. Yolande Cohen, "Thoughts on Women and Power" in *Feminism in Canada*, *ibid.* 229 at 230. See also Miles, "I.F.", *supra* note 21.

31. Marilyn French, *Beyond Power*, *supra* note 6.

disempowered and deprived<sup>32</sup> private sphere. Difference reinforces and colludes in the continued marginalization, subordination and oppression of women.<sup>33</sup> Egalitarian feminists fear that gynocentrism is conceptually misconceived in that it simply assumes that these are women's values, an assumption that smacks of biological reductionism. It is argued, instead, that gender is socially constructed, that these values are not necessarily women's but are rather those which the powerholders in society—men—have allowed or imposed upon women. We cannot know what women's values are because they have been coerced, constrained and inhibited from developing an autonomous culture. Gynocentrism unmasked, is perhaps masculinist ventriloquism, or simply an inversion of an always and already androcentric construction.

The tension between these two themes is deep and pervasive, resulting in very different theories, analyses and recommendations for practice. While the concept of equalitarianism is fairly well known and understood (particularly by lawyers), the concept of gynocentrism will undoubtedly appear foreign to many readers, and probably utopian. To make the concept more accessible, I wish to adumbrate two relatively recent developments which incorporate this perspective. The first will almost certainly be alien to the vast majority of the legal community: the New French Feminism, while the second has circulated more widely: Carol Gilligan's espousal of a "different voice". The purpose of the following discussion will be to suggest that gynocentrism can have an existence relatively autonomous from patriarchal hegemony; that gynocentrism does indicate the possibility of a society and legal system different from that which currently prevails, and that that difference is substantive.

i) *Difference and Literary Criticism*

a) *Trespassers on the Lawns of Patriarchy*:<sup>34</sup>  
*The Feminist Hermeneutics of Suspicion*

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32. Hannah Arendt has drawn this politico-etymological connection, *The Human Condition* (1958).

33. Miles, "Feminism, Equality and Liberation" in (1985), 1 C.J.W.L. 42, 55. But neither are the gynocentrists unaware of the danger. Thus Kristeva posits . . . "What an unbelievable force for subversion in the modern world! And at the same time what playing with fire!", "Women's Time" in *Feminist Theory: A Critique of Ideology*, 48 (N. Keohane, M. Rosaldo, & B. Gelpi eds. 1982). See also I.M. Young, "Humanism, Gynocentrism and Feminist Politics" (1985), 8 Women's Studies International Forum 173, and Sheppard on the dangers and promise of gynocentrism, *supra* note 14 at 220.

34. Carolyn G. Heibrun, Forward to *Poetics of Gender* at viii (Nancy K. Miller ed. 1986).

"It is obvious that the values of women differ very often from the values which have been made by the other sex. Yet it is the masculine values that prevail."

Virginia Woolf<sup>35</sup>

"... it is not difference in itself that has been dangerous to women and other oppressed groups, but the political uses to which the idea of difference has been put."

Hester Eisenstein and Alice Jardine<sup>36</sup>

In the last fifteen years or so, various feminist scholars and activists in a variety of disciplines and fora have begun to recognize the importance and transformative potential of "difference". These inquiries have taken place in intellectually diverse "disciplines" such as "psychoanalysis" and "psychology";<sup>37</sup> "literature"<sup>38</sup> and "linguistics",<sup>39</sup> "history",<sup>40</sup> "anthropology",<sup>41</sup> and "sociology",<sup>42</sup> "politics"<sup>43</sup> and "philosophy"<sup>44</sup> and,

35. *A Room of One's Own*, 76 (1929).

36. Introduction, *The Future of Difference* xxiii (H. Eisenstein & A. Jardine eds. 1980).

37. Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); Juliet Mitchell, *Psychoanalysis and Feminism* (1974); Dorothea Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements of the Human Malaise* (1976); Nancy Chodorow, "Gender, Relation and Difference in Psychoanalytic Perspective" in *The Future of Difference*, *supra* note 36; Jean Baker Miller, *Toward a New Psychology of Women* (1976); S. Orbach and L. Eichenbaum, *Understanding Women: A Feminist Psychoanalytic Approach* (1983).

38. *Writing and Sexual Difference* (E. Abel ed. 1982); *The New Feminist Criticism: Essays on Women, Literature and Theory* (E. Showalter ed. 1985); *Gynocritics/Gynocritiques: Feminist Approaches to Canadian and Quebec Women Writers* (Barbara Godard ed. 1987).

39. Robin Lakoff, *Language and Woman's Place* (1975); Cheris Kramaræ, *Women and Men Speaking* (1981); C. Kramer et al. "Perspectives on Language and Communication" (1978), 3 *Signs* 638; Sally McConnell Ginet, "Difference and Language: A Linguists Perspective" in *The Future of Difference* 157, *supra* note 36; S. McConnell Ginet et al. *Women and Language in Literature and Society* (R. Borber & N. Furman eds. 1980); *Language and Sex: Difference and Dominance* (B. Thorne & Nancy Henley eds. 1975); Symposium (1978), 3 *Signs*.

40. Bernice A. Carroll, *Liberating Womens History* (1976); Barbara Ehrenreich and Deidre English, *For Her Own Good* (1978); Gerda Lerner, *The Majority Finds Its Past: Placing Women in History* (1979); Joan Kelly, *Women, History and Theory* (1984); Alison Prentice et al. *Canadian Women: A History* (1988).

41. *Toward an Anthropology of Women* (Rayna Rapp Reiter ed. 1975); *Woman, Culture and Society* (M. Rosaldo and L. Lamphere eds. 1974).

42. *Another Voice: Feminist Perspectives on Social Life and Social Science* (1975).

43. Elizabeth Janeway, *The Powers of the Weak* (1980); Elizabeth Janeway, "Women and the Uses of Power" in *The Future of Difference*, *supra* note 36 at 327; Ruth Messinger, "Women in Power and Politics" in *The Future of Difference*, *supra* note 36 at 318; Alison Jaggar, *Feminist Politics and Human Nature* (1983); N. Hartsock, *Money, Sex and Power: Toward a Feminist Historical Materialism* (1983); Marilyn French, *Beyond Power* (1985); Kathy Ferguson, *The Feminist Case Against Bureaucracy* (1984); Alison McPhail et al. *Women Organizing For Change* (1988).

44. Elizabeth Wolgast, *Equality and the Rights of Women* (1980); *Women and Values: Readings in Recent Feminist Philosophy* (M. Pearsall ed. 1986); *Mothering* (Joyce Trebilcot ed. 1984); Alice Jardine, *Gynesis: Configurations of Women and Modernity* (1985); M.



the masculinist bastion par excellence, "science".<sup>45</sup> North American legal communities, however, have been somewhat slower to take up these initiatives,<sup>46</sup> and efforts to discuss legal recognition and espousal of difference immediately conjure up legitimate concerns about the racist, hierarchicalized dichotomy of "separate but equal" as immortalized by *Plessy v. Ferguson*.<sup>47</sup>

Still, I think it is important for lawyers, and particularly crucial for (pro) feminist lawyers, to discuss "difference" as a useful, desirable and possibly even essential politico-legal strategy, in achieving the ultimate goal: real equality and choice for women. To introduce this discussion of law and difference, it may be helpful if we trace the development of similar discourses in another discipline where there has already been substantial progress on such issues.

One of the most prolific and potentially fruitful developments in the last ten years in thinking about law has been the transdisciplinary impulse to relate law and literature. This "interpretative turn"<sup>48</sup> is of crucial

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Belenky, B. Clinchey et al., *Women's Way of Knowing* (1986); *Women and Moral Theory* (E. Kittay, D. Meyers eds. 1987); N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984); B. Harrison, *Making the Connections: Essays in Feminist Social Ethics* (1985); Jean Grimshaw, *Feminist Philosophers* (1986); Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination* (Carol Gould ed. 1984); Gloria Steinham, "If Moral Decay is the Question, is a Feminist Ethic the Answer", *Ms. Magazine*, Sept. 1987, 57. For a particularly powerful French critique of the imbricated patriarchy of philosophy see Michele Le Doenff, "Women and Philosophy" (1977), 17 *Radical Philosophy* 2.

45. S. Harding, *The Science Question in Feminism* (1986); E. Keller, *Reflections on Gender and Science* (1985); "Special Issue I: Feminism, and Science" (1987), 2 *Hypatia*; "Special Issue II Feminism and Science" (1988), 3 *Hypatia*.

46. But see Colleen Sheppard, *supra* note 14.

47. 163 U.S. 537 (1896). For classic examples of the sexism of the separate spheres ideology at work see, *Bradwell v. Illinois*, 83 U.S. 130, 16 Wall. 141 (1873); *Muller v. Oregon*, 208 U.S., 28 S.Ct. 324 (1908); *Geduldig v. Aiello*, 471 U.S. 484 (1974); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

For Canadian equivalents see, *In re Mabel P. French* (1905), 37 N.B.R. 359 (S.C.); *Edwards v. A.G. for Canada*, [1928] S.C.R. 276; [1930] A.C. 124, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.). [The Persons Case]. For further discussion of this case see M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (Unpublished manuscript, Sept. 1986); *Bliss v. A.G. of Canada*, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 92 D.L.R. (3d) 417.

48. See Brest, "Interpretation and Interest" (1982), 34 *Stan. L. Rev.* 765; Fish, "Fish v. Fiss" (1984), 36 *Stan. L. Rev.* 1325; Fiss, "Objectivity and Interpretation" (1982), 34 *Stan. L. Rev.* 739; "Interpretation Symposium" (1985), 58 *S. Cal. L. Rev.* 1; "Symposium: Law and Literature" (1982), 60 *Tex. L. Rev.* 373; Weisberg, "A Response to Fish and White" (1984), 5 *Miss. C.L. Rev.* 57; White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985), 52 *U. Chi. L. Rev.* 684; see also McIntosh, "Legal Hermeneutics: A Philosophical Critique" (1982), 35 *Okla. L. Rev.* 1; Patterson, "Interpretation in Law — Toward a Reconstruction of the Current Debate" (1984), 29 *Vill. L. Rev.* 671; Phelps & Pitts, "Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation" (1985), 29 *St. Louis U.L.J.* 353. Levinson, "On Dworkin, Kennedy, and Ely:

significance for an understanding of law, in that one of its central achievements has been to reject the "received hierarchy of text and reader",<sup>49</sup> thereby highlighting the *relational* nature of author-text-reader, and inducing the correlative awareness of the unavoidability of the plurality of legal meanings. The interpretative turn therefore challenges, in a fundamental way, the traditional jurisprudential dichotomization of law as either a transcendental subject or reified object. It recognizes law as relational, interpretable, and non-essential.

Unfortunately, as is common with jurisprudential discourse, the openness of this interpretative turn is more apparent than real. Not only are the law and literature debates very much the progeny of an elite and perhaps politically irrelevant academy, they are predominantly a male-centred and male-determined debate. Put differently, despite a vibrant and vital dynamic of feminist literary criticism and theory, gender conscious interpretations have been muted in the legal academy.<sup>50</sup>

In this part of the article I hope to trace a pattern. I wish to briefly discuss aspects of the more traditional feminist analyses of literature which focus most of their efforts on demonstrating the gender bias of most traditionally valued literature. I hope to make explicit the homology between this enterprise and equalitarianism. On this foundation, I wish to proceed to a more recent impulse in feminist literary theory, one which can be usefully identified as a countertradition of "a different voice". In order to partake of the flavour of this impulse it will be helpful if we abandon the parochialism of North American inquiry, to encourage inter-cultural exchange by outlining the work of one particularly vocal grouping of feminist voices, what has become known as the New French Feminisms. This critical discussion will help identify potential sources for that different voice. The final section will attempt to articulate the substance of that voice, thereby leading us towards an "ethic of care", which, I suggest, tentatively leads towards a legal theory and practice that can point towards the transcendence of our current, thanatically determined legal system.

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Decoding the Legal Past" (1984), 51 *Partisan Rev.* 248, 262; See Fried, "Sonnet LXV and the 'Black Ink' of the Framers' Intention" (1987), 100 *Harv. L. Rev.* 751; Posner, "Law and Literature" (1986), 72 *Va. L. Rev.* 1351; Christopher Norris, "Law, Reconstruction and the Resistance to Theory" (1988), 15 *Journal of Law and Society* 166.

49. Toril Moi, *Sexual/Textual Politics* 25 (1986).

50. An obvious and urgent question is "Why?". Clearly such a question goes beyond the narrow confines of this paper but I would suggest that the reason is not because feminists do not wish to participate in the interpretative turn, rather it is because the academy — be it literary, legal or even left — views feminism with a siege mentality, as a threat to the cosy comfort of the intellectual old boys club.



*The Feminist Equalitarian Critique of Literary Criticism*

In 1981, Elaine Showalter posited that it was possible to identify two modes of feminist criticism. The first she identified as "the feminist critique" claiming that,

it is concerned with feminist *as reader*, and it offers feminist readings of texts which consider the images and stereotypes of women in literature, the omissions and misconceptions about women in criticism, and women as signs in semiotic systems.<sup>51</sup>

Showalter identified the second mode as "gynocriticism" which emphasizes

the study of women *as writers*, and its subjects are the history, styles, themes, genres and structures of writing by women; the psychodynamics of female creativity, the trajectory of the individual or collective female career and the evolution and laws of a female literary tradition.<sup>52</sup>

My suggestion is that "the feminist critique" homologizes with equalitarianism, while "gynocriticism" parallels "difference".

It will be helpful if we articulate the basic project of "the feminist critique" in a little more detail. On a general level, feminist critics have identified language as "a", perhaps "the", central cultural phenomenon which constructs our understanding of the world and our mutual interaction. Words are neither essential nor transcendental, they are socially constructed.<sup>53</sup> Recognizing its inherently socialized and socializing potential, feminists have posited that language is a major component in the continued existence of sexism and patriarchy.<sup>54</sup> More specifically, by connecting text with context, feminist critics claim that gender and literature are inextricably intertwined, that gender-related factors are systemic and pervasive in the creation, dissemination and consumption of any literary work. Feminist criticism identifies the sexism of textual politics. Having identified these concerns, feminist critics claim that the impact of this gender encoding upon the reader is large, that it contributes in a significant way to the structuring of a reader's understanding and acceptance of social relations. Language imposes men's meaning upon women.

51. "Feminist Criticism in the Wilderness" (1981), 8 *Critical Inquiry* 179, 182.

52. *Ibid* at 184-185. Invoking the empowering dynamic of naming, Showalter continues, "no English term exists for such a specialized critical discourse and so I have invented the term 'gynocritics'".

53. For similar arguments from a neo-Marxist perspective see *Culture, Media, Language* (Stuart-Hall et al. eds. 1980).

54. Sheila Rowbotham, *Women's Consciousness, Man's World* 32-33 (1973); Dale Spender, *Man Made Language* (1980).

The oppositional activities mobilised by such a critique range from the “obvious” — which had not been so obvious until the critique was made — to the subtle. Feminist critics draw attention to the unjustifiable preponderance of male authors in academic syllabi. They relate this bias to a patriarchal educational system which systematically undervalues and ignores women’s literary contributions because of its deeply entrenched premise that “artistic creativity is a fundamentally male quality”.<sup>55</sup> By interpreting through a “hermeneutics of suspicion”<sup>56</sup> feminists unmask and criticize the sexism and misogyny of cultural texts from Petrarch to Shakespeare, from classical mythology to the Bible — both the Old Testament and the New, — from Chaucer to Milton, from fairy tales to pornography, from D.H. Lawrence to Norman Mailer.<sup>57</sup> They argue that the use of the generic “he” universalizes maleness, reinforces androcentricity as the benchmark of existence, and eradicates women’s undeniable contribution to society. They object strongly to female stereotyping inculcated via “images of women” which are constructed in literature, thereby providing a severely constrained panorama of role models for women.<sup>58</sup> One aspect of the critical project is consciousness raising, to help the reader become a “resisting reader”,<sup>59</sup> to be aware of the ideological fallout of uncritically absorbing such texts.<sup>60</sup> In brief, feminist critics unpack the sexual politics of the aesthetic.

The parallels with equalitarianism in other fields are obvious. The basic criticism is that women have been excluded, perhaps intentionally,<sup>61</sup> and that the enforced silence has been an important aspect in the continuing subordination and inequality of women in society. The critique is levelled against the exclusion with its correlative detrimental impact upon women, but as call for action it articulates little more than a demand for access and inclusion,<sup>62</sup> a fair kick at the literary-linguistic can. “Feminist theorists seek equality and bolster their demands with

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55. S. Gilbert and S. Gubar, *The Madwoman in the Attic* (1979).

56. E. Showalter, “Towards a Feminist Poetics” in *Women Writing and Writing About Women*, 22 (M. Jacobus ed. 1979). Showalter adopts this phrase from Paul Ricoeur, *Freud and Philosophy*, 32-36 (1970).

57. See for example, Kate Millett, *Sexual Politics* (1970); Katherine M. Rogers, *The Troublesome Helpmate* (1986); Elizabeth Meese, *Crossing The Double Cross* 9 (1987).

58. Mary Ellman, “Feminine Stereotypes” in *Thinking About Women* (1968); Susan Kippelman Cornillon, *Images of Women in Fiction* (1972).

59. Judith Fetterley, *The Resisting Reader* (1978).

60. Annette Kolodny, “Dancing Through the Minefield . . .” (1980), 6 *Feminist Studies* 1.

61. “Women writers were not haphazardly ‘forgotten’ but deliberately buried”, Annis Pratt, “The New Feminist Criticism” (1970-71), 32 *College English* 872.

62. Annette Kolodny, “Some notes on defining a feminist literary criticism” (1975-76), 2 *Critical Inquiry* 75.

claims of similarity.”<sup>63</sup> This type of feminist criticism and revision is important in that it explodes the liberal myths of cultural pluralism and openness to reveal that our literary-linguistic geneology has been truly *history* thereby excluding women’s *heritage*.<sup>64</sup>

However, it soon becomes apparent that this negative critique, the unearthing of the archaeology of women’s silence, although necessary and certainly beneficial, is by no means a sufficient foundation for fully articulating women’s contributions — past and present — to literature. The feminist effort to revise the male bias inherent in the evolution of literary merit leaves too much of the methodological, if not the substantive, androcentric structure intact. As Showalter pithily posits:

the feminist obsession with correcting, modifying supplementing, revising, humanizing or even attacking male critical theory keeps us dependent upon it and retards our progress in resolving our own theoretical problems.<sup>65</sup>

Feminist criticism continues to work within the masculinist paradigm, it does not challenge the paradigm itself in any fundamental way. It is partial rather than total criticism of the “economy of sameness”.<sup>66</sup> The most obvious example of its limitations is that its analyses are primarily concerned with male texts.

In the light of these limitations, Showalter calls for a “feminist criticism that is genuinely women centred, independent and intellectually coherent. It must find its own subject, its own system, its own theory, its own voice . . . we must choose to have the argument out at last on our own premises.”<sup>67</sup> This she names “gynocriticism” and emphasizes that its fundamental question is “what is *the difference* of women’s writing”?<sup>68</sup>

The most important shift envisioned by this proposal is that the data base be primarily women’s texts, not those of men.<sup>69</sup> The potentially

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63. Elizabeth Abel, Introduction (1981), 8 *Critical Inquiry* 173.

64. For a less than sympathetic male response which seeks to accommodate feminist criticism by reducing it to just another constituency in the cacophany of literary critical voices, see K.K. Ruthven, *Feminist Literary Studies* (1984).

65. Showalter, *supra*, note 51, at 183.

66. Meese, *supra* note 57, at 17.

67. Showalter, *supra* note 51, at 184.

68. *Ibid.*, at 185.

69. Not surprisingly, the primary emphases have been on the texts of white women, first world women, heterosexual women. Little was said at the time about lesbian or black women’s literature or criticism. In recent years *intra* gender differences have begun to be articulated, and not always without pain and mutual criticism. See, e.g., A. Rich, “Compulsory Heterosexuality and Lesbian Existence” (1980), 5 *Signs* 631, *On Lies, Secrets and Silences* (1979); B. Zimmerman, “What has never been: an overview of lesbian feminist literary criticism” (1981), 7 *Feminist Studies* 451; Barbara Smith, *Towards a Black Feminist Criticism* (1980). For more general discussions of the occlusion of different women see: Marilyn Frye, *The Politics of*

radical correlative of this "search for a muted female culture"<sup>70</sup> is that it provides the opportunity for an autonomous and distinctive feminist critical theory and practice of writing. Moreover, it opens up space for something more than negative critique, in so far as it reveals a sustained and ingenious feminist resilience to what had, at first blush, appeared to be a totalizing masculinist hegemony. The necessary critique clears the way for the reconstruction and affirmation of a tradition "of expressivity outside the dominant discourse" that not only can be recognized and redeemed, but also expanded.

Showalter's call was less an exhortation to commence a new endeavour than an articulation of what had already been interstitially underway in the anglophone feminist literary circles for the preceding several years. Several North American books and articles had been published which, despite important differences, had sought to identify both the existence of an extensive women's literature and the ways in which women's writing had been different.<sup>71</sup> They also began to inquire as to whether gender had been a determining factor in that difference.<sup>72</sup> However, in general, these anglophone efforts did not identify as their central concern the pivotal question of why women's writing was, and continues to be, different. Their discussions were diverse rather than central, in part because their tradition of North American empiricism left little space for more sustained reflection.

In the last five years or so, it may be possible to detect yet another shift in emphasis, or at least direction, in anglophone feminist literary thought.

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*Reality: Essays in Feminist Theory* (1983); Bell Hooks, *Ain't I a Woman Too: Black Women and Feminism* (1981), *Feminist Theory: from Margin to Center* (1984); Gloria Joseph, "The Incompatible Menage a Trois: Marxism, Feminism and Racism", in *Women and Revolution*, 91-107 (L. Sargent ed. 1981); Audre Lorde, "An Open Letter to Mary Daly", in *This Bridge Called My Back: Writings by Radical Women of Color*, 94-97 (Cherri Moraga and Gloria Anzaldua eds. 1981); Maria C. Lugones and Elizabeth V. Spelman, "Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for the Woman's Voice" (1983), 6 *Hypatia Women's Studies International Forum* 6, at 578-81; Elizabeth Spelman, "Theories of Race and Gender: The Erasure of Black Women" (1980-82), 5 *Quest* 4, 36-62. 70. Moi *supra* note 2 at 76.

71. See for example, *The (M)other Tongue: Essays in Feminist Psychoanalytic Interpretation* 22-23 (Shirley Nelson Gardiner et al. eds. 1985).

72. See for example, Patricia Meyer Spacks, *The Female Imagination* (1975); Ellen Moers, *Literary Women* (1976); Elaine Showalter, *A Literature of their Own* (1977); Nina Baym, *Woman's Fiction* (1978); Sandra Gilbert and Susan Gubar, *The Madwoman in the Attic* (1979); Margaret Homans, *Women Writers and Poetic Indentity* (1980); Annette Kolodny, "Some Notes on Defining a 'feminist literary criticism'" (1975-76), 2 *Critical Inquiry* 75; Robin Lakoff, *Language and Woman's Place* (1975). For a useful review of some of these important texts see Toril Moi, *supra*, note 2, Ch. 3 and 4. Indeed, as early as 1923 Virginia Woolf had suggested the possibility of such a distinctive mode of writing in her references to "a woman's sentence" in "Romance and the Heart", *Contemporary Writers* 124 (1965).



There now appear to be several serious North American attempts to suggest explanations as to why women might speak and write differently from men, in *The (M)other Tongue*.<sup>73</sup> This relocation of emphasis is inspired by the desire to challenge the androcentric literary paradigm, to critique its unidimensionality and exclusivity, and to give original value to that which has been traditionally devalued by the masculinist gatekeepers of the literary establishment.<sup>74</sup>

However, the main impulse underlying this differential enterprise has not been indigenously anglophone. Rather, it has been inspired by a group of women scholars working, for the most part in France, to articulate, justify and valorize the importance of "difference". Their contribution is both intriguing and politically crucial so it may be useful if we partake of a "French detour" in order to develop a critical awareness of the origins, development and impact of difference.

b) *The Cartographies of Silence*:<sup>75</sup>

i) *New French Feminisms*:<sup>76</sup> *Difference Developed: The Sources of the Different Voice*

The limits of my language means the limits of my world.<sup>77</sup>  
To imagine a language, means to imagine a form of life.<sup>78</sup>

Ludwig Wittgenstein

Like their Anglo-American counterparts, the primary concern of the New French Feminists (N.F.F.) is to inquire into the nature and relations of language, power and gender. They also identify and critique the historical exclusion of women from culturally valued discourse and writing as a central component in the oppression and repression of women by phallographic<sup>79</sup> societies. Where the N.F.F. come into their own,

73. *The (M)other Tongue*, supra note 71. See, also, *Writing and Sexual Difference* (Elizabeth Abel ed. 1982); *The Poetics of Gender* (Nancy K. Miller ed. 1986).

74. See for example Jean Bethke Elshtain, "Feminist Discourse and its Discontents: Language, Power and Meaning" (1981-82), 7 *Signs* 603.

75. A. Rich, *The Dream of a Common Language* (1978).

76. For useful introductions to the New French Feminists, See Elaine Showalter, "Feminist Criticism in the Wilderness" (1981), 8 *Critical Inquiry* 179; Ann Rosalind Jones, "Writing the Body: Toward an Understanding of L'Écriture Féminine" (1981), 7 *Feminist Studies* 247; Elaine Marks, "Women and Literature in France" (1978), 3 *Signs* 832; Carolyn Groensteen Burke, "A Report from Paris: Women's Writing and the Women's Movement" (1977-78), 3 *Signs* 843.

77. Cited in K.K. Ruthven, *Feminist Literary Studies* 59 (1984).

78. *Philosophical Investigations* para. 19, 53 (1958).

79. French feminists frequently refer to the prefix "phal" in order to identify the inherent maleness of so much of contemporary knowledge, social structures, and social activities. This term has also begun to infiltrate jurisprudential discourse, see e.g. Christine Littleton, "Reconstructing Sexual Equality" (1987), 75 *Cal. L.Rev.* 1279.

however, is their adamant insistence that the reason for this systemic silencing and enforced absence has been the masculinist refusal to recognize women's specificity, women's difference. They advocate that the effective vocalization and inscription of such difference would seriously threaten the monologic, phallus-identity fundamental to mankind's domination of others, including women and nature. The N.F.F.'s attempt to challenge this androcentric colonialism by being positive, by tentatively creating, locating, and valorizing alternative, specifically feminist, languages and literature — what they call *parole féminine, l'écriture féminine*.<sup>80</sup> Thus, the central concern for the N.F.F. is not feminism and equality, but feminism and difference and their mutually constitutive relationship.

The historical origins of the N.F.F. can, roughly, be traced back to the pseudo-revolutionary days of May 1968, and the subsequent realization that the radical men of the New Left were just as patriarchal, sexist and intolerant of gender issues as their bourgeois forefathers and brothers. In response, the *Mouvement de Libération des Femmes* (M.L.F.)<sup>81</sup> sought to develop its own distinct agendas, agendas that were responsive to the concerns and needs of women. Their activities have ranged from consciousness raising groups to intentionally polemical political action, from the creation of alternative discursive fora to the establishment of non-co-optable journals and even an independent publishing house. Their underlying motivation has been to identify and challenge the deep structural sexism of contemporary French culture, what they called "everyday sexism".<sup>82</sup>

The intellectual geneologies of the N.F.F. are extremely diverse, including biology, linguistics, neo-Freudian and Lacanian psychoanalysis, social constructionism, structuralism, Derridean deconstruction, and neo-Marxism. Predictably, but unfortunately, because of this genealogical prehistory much of the N.F.F. is, at best, unfamiliar and demanding and, at worst, inaccessible to the uninitiated.<sup>83</sup> But difficulty, as Colin McCabe

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80. It should go without saying that not all French feminists agree with the N.F.F. analysis, assessment, critique and program. Others, including de Beauvoir, have voiced serious concerns about the dangers in espousing difference. See also Monique Wittig, *The Guerillas* (1973) trans. David LeVay. For useful North American introductions to this opposition to N.F.F. See H.V. Wenzel "The Text as Body Politics" (1981), 7 *Feminist Studies* 264; Ann R. Jones, "Writing the Body" (1981), 7 *Feminist Studies* 247.

81. The M.L.F. was not an organization, but rather an amalgam of diverse radical women's groups, including "Politique et psychanalyse" and "Feministes révolutionnaires". For a fuller discussion of the troubled history of the M.L.F. see Toril Moi, "Introduction" *French Feminist Thought* (1987); Claire Duchén, *Feminism in France* (1986).

82. This historical account draws heavily on Marks and de Courtivron, *The New French Feminisms* (1980), Introduction III, and Duchén *supra* note 81.

83. Marks, *supra*, note 76, at 833.



points out, "is an ideological notion . . . (because) within our ascriptions of difficulty lie subterranean and complex evaluations".<sup>84</sup> Difficulty is integrally connected with unfamiliarity, lack of experience. But these "circumstances of ignorance" are not fixed, essential or fortuitous. They are not very much the outcome of social structures that have been chosen and perpetuated by those with the power to construct and constrain our cultural milieu and experiences. Thus, those who aspire to be progressive should be suspicious about the familiar and the facile and, at least, be open-minded about the unfamiliar and the difficult. More importantly, difficulty is inevitable in that in attempting to achieve what the N.F.F. aspires to — articulating that which has never been articulated — is, of necessity, unfamiliar. It is a new language.

The New French Feminisms have gone beyond a programme of critique, of unmasking sexism and stereotyping — both explicit and implicit — of unpacking the omissions and misconceptions in traditional literature. Although beneficial and necessary, such consciousness-raising strategies are perceived as inadequate by many French feminists. At best, they may push for a reformist equality, an equality that runs the risk of simply smoothing the sharp edges of misogyny, sandpapering the extremities and thereby permitting, indeed perhaps even reinforcing, the continued existence of the basic structures of masculinist hegemony.

Instead, the N.F.F. propose and proceed immediately with their vision: to directly undercut traditional textual conventions through the subversive tactics of appropriating and revising women's texts, styles and themes, and by articulating the traditional muteness of difference. The N.F.F. seek to elucidate the distinctiveness of women's language "in contrast, not relation, to the dominant conventions".<sup>85</sup> They seek to present a new, alternative, gender-specific vantage point (episteme) independent and subversive of, and different from, the currently prevailing phallogocentric paradigm. "... L'écriture féminine . . . reasserts the *value* of the feminine and identifies the theoretical project of feminist criticism as the analysis of difference."<sup>86</sup> Central to this project of articulating and valorizing difference has been their eulogy and reappropriation of "la jouissance",<sup>87</sup> women's pleasure, the libidinal

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84. Preface, Gayatri Chakravorty Spivak, *In Other Worlds* (1987).

85. Elizabeth Abel, Introduction, "Writing and Sexual Difference" (1981), 8 *Critical Inquiry* 173, 177.

86. Elaine Showalter, *supra* note 51, at 186.

87. "Jouissance" is one of the central terms of French feminist literary discourses. There does not exist a suitable English language equivalent for this experience. Reflecting the importance of the power of naming, this has now become a neologism in certain North American feminist circles. Marks and de Courtivron interpret it as follows:

economy of women. Difference and la jouissance, they suggest, have the power to de-range and de-centre the “reigning phallus”.<sup>88</sup>

Leading names within this gynocritical dynamic include Hélène Cixous,<sup>89</sup> Julia Kristeva,<sup>90</sup> and Luce Irigaray,<sup>91</sup> and their texts have been energizing catalysts for a host of others.<sup>92</sup>

## ii) *Hélène Cixous*

Cixous is profoundly skeptical of equalitarianism suggesting that it is a bourgeois feminist effort to gain legitimacy *within* a patriarchal society.

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The verb *jouir* (“to enjoy, to experience sexual pleasure”) and the substantive *la jouissance* (“sexual pleasure, bliss, rapture”) occur frequently in the texts of the new French feminisms. . . . This pleasure, when attributed to a woman, is considered to be a different order from the pleasure that is represented within the male libidinal economy often described in terms of the capitalist gain and profit motive. Women’s *jouissance* carries with it the notion of fluidity, diffusion, duration. It is a kind of potlatch in the world of orgasms, a giving, expending, dispensing of pleasure without concern about ends or closure. One can easily see how the same imagery could be used to describe women’s writing.

*Supra*, note 82 at 36-37.

Marilyn French has adopted this idea, but has anglicized it to render it a “pleasure principle”, a counterparadigm to the patriarchal dynamic towards power and domination, an ethical standard which can provide guidance and encouragement in the project of “feminizing the world”. *Beyond Power supra* note 7, Chs. 6 and 7.

88. Elaine Marks and I. de Courtivron, *supra* note 82 at 36.

89. Helene Cixous, “The Laugh of the Medusa” (1975-76), 1 *Signs* 875; *Portrait de Dora* (1986); *Angst* (1977) (Trans 1985).

90. Julia Kristeva, *Revolution in Poetic Language* (1984) (Margaret Waller trans.); *About Chinese Women* (1977) (Anita Burrows trans.); *Powers of Horror* (1932), (Leon Roudiez trans.); *Polylogue* (1977); *Desire in Language* (Leon Roudiez ed. 1980); *The Kristeva Reader* (Toril Moi ed. 1986).

91. Luce Irigaray, *Speculum: de l'autre femme* (1974) (Gillian C. Gill trans. *Speculum: Of the Other Woman* (1985); *Ce sexe qui n'en est pas un* (1977) (Catherine Porter trans., *This Sex Which is Not One* (1985)); *Amante Marine: De Friedrich Nietzsche* (1980). In this paper I do not discuss the contribution of Luce Irigaray. Drawing on post-Lacanian psychological theory and deconstruction, Irigaray argues that, traditionally, women have been culturally understood as the “other” of man, as lack, deficiency, incomplete and, ultimately, as his inferior. Thus, she argues that women’s oppression/repression is not simply political or economic, rather it is imbricated in our very understanding and knowledge of the world.

Her affirmative practice is to suggest, inchoately, a conception of woman as she might exist beyond masculine representations of her. I say “inchoately” because to identify woman via a male constructed language would be to represent her, but once again only within the discourse of male theory. Irigaray therefore prefers the gaps, the silences, the blanks in order to indicate but not to define. However, when Irigaray does move beyond refusal and invocation of the blank spaces, she also draws on maternal and reproductive metaphors, as well as female sexuality. See for example “When Our Lips Speak Together” (1980), 6 *Signs* 69.

92. See Elaine Marks, *supra*, note 76 at 838-840. It should also be pointed out that each of these women insist that their projects are diverse from the others, that their work is not an integrated vanguard. Indeed, there are, perhaps fundamental, political differences between them.

Her ambition is the transformation of patriarchal society, to reconstruct it upon a more heterogeneous basis, a society underpinned by a feminine multiplicity, a substantively different, matrifocal and alterior society.

The central concern of Cixous' work is the connection between women's writing and women's body.<sup>93</sup> By articulating and developing this connection, Cixous attempts, through a metaphorical discourse, to envision a less dichotomized, mutually alienating conjuncture of social relations. Her enterprise is to imagine and evoke both the means and the possible nature of a society liberated from phallogratic domination. In pursuit of this end, she quests for transformed language and literature.

Cixous' work is remarkably evocative, imaginative and suggestive, both in form and substance.<sup>94</sup> On occasion, she indicates that the actual biological sex of the author is irrelevant, that difference is to be located in the writing itself.<sup>95</sup> However, her most significant work challenges the masculine tradition of father as creator by locating the source of difference in women's bodies, thereby emphasizing "the voice of milk and blood".<sup>96</sup> Through euphoric "verbal rhapsody"<sup>97</sup> she envisions the female body as plenitude, as capable of a plethora of procreative capabilities: gestation, birth, lactation, writing.

She is giving birth, with the strength of a lioness. Of a plant. Of a cosmogony. Of a woman . . . A desire for text! Confusion! What possesses her? A child! Paper! Intoxications. I'm overflowing! My breasts overflow! Milk. Ink. The moment of suckling. And I? I too am hungry. The taste of milk, of ink!<sup>98</sup>

The richness of these maternal metaphors, while themselves pregnant, are also a source of dilemma. Despite her apparent rejection of reductionist biologism and essentialism on a theoretical level, Cixous seemingly buys into these understandings in the course of her own, intentionally inspirational, literary practice, thereby problematically reducing "jouissance" to either women's reproductive opportunity or their sexuality, a pleasure principle equally and exclusively accessible to

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93. See for example *La venue à l'écriture* (1977).

94. Form is just as important as substance, and the work of activists like Cixous is pervaded by openness, non-linearity, fluidity, polysemicness, disconnection.

95. See *Moi*, *supra* note 2 at 108. For example, at one point she indicates that Jean Genet's work indicates traits of "feminite". See "Laugh" *supra* note 89 at 855.

96. Sandra Gilbert, "A Tarantella of Theory" Introduction, *The Newly Born Woman*; (1986) (Betsy Wing trans.).

97. Domna N. Stanton, "Difference on Trial" in *The Poetics of Gender*, *supra* note 34 at 169.

98. In *La venue à l'écriture* 37 (1977). For similar invocations of the "white ink of mothers milk" see "Laugh" *supra* note 89. At times, Adrienne Rich also appears to accept that women's difference is related to their biological capabilities. See for example *Of Woman Born* 11, 62 (1977).

all women. Her political strategy for the empowerment of women leads her onto the treacherous ledge of the transcendental, metaphysical “universal woman subject”,<sup>99</sup> the mythical earth-mother, and perhaps back to the masculinist and/or conservative identification of woman with nature, only now it is “anatomy is textuality”.<sup>100</sup>

Moreover, despite, or perhaps because of, her metaphorical<sup>101</sup> and “utopian”<sup>102</sup> predilections and her over-emphasis on the maternal location, Cixous never provides her audience with an account of the substance of difference. Indeed, on the contrary, in her celebrated (wo)manifesto “Laugh of the Medusa”, she goes so far as to deny the possibility of defining the feminist practice of writing:

For this practice can never be theorized, enclosed, encoded — which doesn't mean that it doesn't exist. But it will always surpass the discourse that regulates the phallogocentric system; it does and will take place in areas other than those subordinated to philosophico-theoretical domination.<sup>103</sup>

Thus, although Cixous goes beyond critique, her affirmative program remains disconcertingly indeterminate, disturbingly essentialist and tantalizingly suggestive, but ultimately underdeveloped to serve as an empowering, transformative strategy. Something more specific, although necessarily corrigible, is required.

### iii) *Julia Kristeva*

Julia Kristeva's work, although in certain ways significantly different from that of Cixous, also manifests some problems. She is explicit in her anti-biologism and anti-essentialism in so far as she argues that femininity is not necessarily related to sex, but is better understood in relation to marginality. Thus, femininity is understood in a relational rather than in an essentialist sense “as that which is marginalized by the patriarchal symbolic order”.<sup>104</sup> Developing her ideas through a fusion of pre-oedipal

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99. “Laugh” *supra* note 89 at 878.

100. Showalter, “Wilderness” *supra* note 51, at 187. For a French Canadian example see Jovette Marchessault, *Lesbian Triptych* (1985). The idea of the “Celtic Triptych” in Part A of this article was inspired, in part, by this book.

101. The point about metaphor is important. In “Laugh of the Medusa” *supra* note 89 at 881 she suggests that the invocation of “mother” is metaphorical and symbolic-inspirational, not biologically determined. However, when reading her texts I get the impression of a greater faith in the idea than merely the instrumental utilization of a concept for strategic purposes. For an alternative critique of the maternal metaphor which argues that revalorization through mimeticism remains within sameness, see Domna N. Stanton, “Difference on Trial” in *Poetics of Gender* *supra* note 34 at 170-173.

102. Moi, *supra* note 2 at 121-124.

103. Marks and de Courtivron, *supra* note 82 at 253.

104. Moi, *supra* note 2 at 166.



interpretations of mother-child interaction and semiotic theory,<sup>105</sup> she develops an interpretation that allows her to posit that men can also be "different" in so far as the patriarchal symbolic order considers them as marginal. Thus, she discusses the subversive difference of avant garde artists such as Joyce, Artaud, and Mallarmé. However, she is still very much a proponent of difference:

Woman is here to shake up, to disturb, to deflate masculine values, and not to espouse them. Her role is to maintain differences by pointing to them, by giving them life, by putting them into play against one another.<sup>106</sup>

Although Kristeva is keen to "remind us that any hope for a radically new ethics may be up to women",<sup>107</sup> she refuses to conjecture about the "female subject's potential liberation from patriarchy",<sup>108</sup> claiming only that the feminist project is one of critique and negation, subversion and dissidence. This becomes most apparent in her *On Chinese Women* when she opines:

On a deeper level [than advertisements or slogans for women's demands], however, a woman cannot "be"; it is something which does not even belong in the order of *being*. It follows that a feminist practice can only be negative, at odds with what already exists. . . . In "woman" I see something that cannot be represented, something above and beyond nomenclatures and ideologies.<sup>109</sup>

Kristeva also directly confronts the question of ethics. In *Revolution in Poetic Language* she develops her negative vision of political praxis even more explicitly. She claims that radical practice must take the stance that:

wherever a code (mores, social contract) [emerges it] must be shattered in order to give way to the free play of negativity, need, desire, pleasure and jouissance, before being put together again, although temporarily and with full knowledge of what is involved.<sup>110</sup>

And again she argues that women's strategy should be to assume:

a *negative* function: reject everything finite, definite, structured, loaded with meaning, in the existing state of society. Such an attitude puts women on the side of the explosion of social codes: with revolutionary movements.<sup>111</sup>

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105. *Revolution*, *supra* note 90.

106. *Polylogue*, *supra* note 90 at 498.

107. Alice Jardine, Introduction to "Womans Time" (1981), 7 *Signs* 5, 12.

108. Jardine, "Opaque Texts and Transparent Contexts" in *Poetics of Gender*, *supra* note 34, at 110.

109. *On Chinese Women*, *supra* note 90 at 137.

110. Cited in Jardine, "Opaque Texts and Transparent Contexts" in *Poetics of Gender*, *supra* note 34, 96 at 109.

111. Marks and de Courtivron, *supra* note 82, at 166.

Thus, by continually insisting “that a feminist praxis can only be negative, an opposition to what exists, in order to say that’s not it . . . that’s still not it”<sup>112</sup>, Kristeva’s is an ethics of subversion, a negative ethics, one that seeks to critique, but one that provides little guidance for reconstruction. Although it would be inappropriate to accuse her of nihilism, as an empowering political strategy, her preference for “eternal dissiden(ce)” is only of limited utility.

iv) *The Significance of the N.F.F.*

There is much to be said for the N.F.F. examination, reappropriation and affirmation of the specificity and difference of female experiences and body. Their inquiry highlights, in a crucial way, both the existence and importance of heterogeneity, and the potential not only for different ways of writing but also different social relations premised upon different value structures. Seen in this light, it must be admitted that their efforts have been successful in so far as they have gone a long way towards speaking “(m)otherwise”, while being imprisoned within a discursive structure not only alien, but actively hostile, to the articulation of that which they want to say.

However, unfortunately, in their attempts to unbury the repressed maternal, some N.F.F.’s come dangerously close to the simultaneously authoritarian and crippling impulses of essentialism,<sup>113</sup> the universal and exclusive, anatomically-based identity and experience of women as women. They suggest, both explicitly and metaphorically, that women’s writing “springs from a secret well of immanent femininity”.<sup>114</sup> In so doing, they deny the qualitatively different experiences of different women in favour of some putative metaphysical woman’s essence. Such essentialism is uncomfortably silent about differences of class, race, sexual orientation,<sup>115</sup> and physical or psychological ability. Although the same criticism cannot apply to Kristeva, she fails to capitalize on her own critical insights and unfortunately retreats into negation with its potentially paralysing political consequences.

Despite these rather serious difficulties, the N.F.F.’s contribution is important. As Spivak points out, within their inquiry there is “an implicit double program for women . . . *against* sexism, where women unite as a biologically oppressed caste; and *for* feminism, where human beings train

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112. *Ibid.* at 137.

113. Spivak, “Feminism and Critical Theory”, *supra*, note 84; Unger, *Politics*, (1987).

114. Jane Gallop, “Writing a letter with Vermeer” in *Poetics of Gender*, *supra*, note 34 at 150.

115. Annie Leclerc, “La lettre d’amour” in *La venue à l’écriture* (1977).



to prepare for a transformation of consciousness"<sup>116</sup> and, I would add, the practice of our social relations. This double vision is potentially empowering for it attempts to shift the focus of attention from negation to affirmation, while simultaneously remaining acutely conscious of the masculinist powers and structures that be, with their potential for both repressive imperialism and more subtle forms of delegitimation such as ridiculing feminist utopianism. The double vision is an encouraging attempt to develop the ground between self-defeating reformism and mythical revolution by exploring the transformative potential of language. It encourages the articulation and espousal of difference, but now it is an awareness of difference in all its social, political, historical and cultural contexts; difference as heterogeneity rather than determinative polarities.

Thus, despite serious and politically important differences, the N.F.F. are unambiguous in their belief that difference and otherness are of fundamental significance. At the same time, there has been an unwillingness and inability to provide an explicit content for that otherness. The reason for this is not difficult to locate. Men have monopolized the discourse and the words do not, as yet, exist. To say and write what needs to be said and written can, as yet, only be done through discourses and texts which are an anathema to that otherness. The contradiction is stark. Moreover, even if women could articulate a substance for otherness, they do not control the discursive means of production and reception and therefore to even speak or write runs the risk of co-option and appropriation. The French feminist response has been one of using the silences, the gaps, the margins, the spaces, in the hope that they can, even indirectly, communicate something of the significance of otherness. Although cautiously radical, I think that, on the continuum between negation and reconstruction, such tactics are situated a little too closely to the position of negation.

ii) *Feminist Psychoanalytic Theory and a Different Jurisprudence*

a) *Making it "Otherwise"*

"... women's development delineates a path not only to a less violent life but also to a maturity realized through interdependence of taking care."

Carol Gilligan<sup>117</sup>

The transdisciplinary interpretive turn and French detour indicate that there is merit in looking beyond the imprisoning confines of traditional

116. Spivak, "French Feminism in an International Frame" *supra*, note 84 at 145 and 150.

117. *In a Different Voice*, 172 (1982) [hereinafter cited as *Voice*].

North American legal discourse. The inquiry demonstrates that our formative contexts — intellectual, disciplinary, national and cultural — while constitutive may also be constraining. As lawyers we tend to understand social relations through a particularistic grid, but others may understand those same social relations through an alternative grid. The expansion of our cognitive juridical horizons so as to encompass how others experience and interpret social interaction can provide us with an opportunity to reflect upon our own deep structural assumptions, to ask new and different questions about the nature of law, and to contemplate alternative visions of law, and perhaps society more generally. To simply dismiss other viewpoints as utopian or naive is to uncritically buy into phallocracy, perhaps even reinforcing that which one hopes to transform. For feminism, knowledge itself is a crucial arena for critique and reconstruction.

We can continue feminism's context dislocating and repositioning approach by returning to North America, but by now focusing on some recent psychological theory as developed by feminist scholar, Carol Gilligan. The virtue of Gilligan's approach is that while it advocates both the existence and desirability of difference, it also attempts, in a tentative way, to articulate what difference might mean, what is substantively different about difference. In other words, it cautiously attempts to identify some of the central components of the notoriously ambiguous and multivalented concept of difference.

Gilligan's reflections on difference grow out of her ability to listen. When many of us listen we interpret what the other is saying in accordance with a plethora of assumptions, apparent truths, preconceptions. Consequently, when the other speaks, their discourse is not understood to have any essential meaning, but rather is encoded so as to "fit" with the interpretive matrix which pre-exists their discourse. If a discourse does not fit this pre-existing structure, it is understood as anomalous or, perhaps more accurately, as deviant, inferior, even senseless. Thus, the determining structure of discourse is simultaneously communication-enhancing and communication-exclusive, it is both facilitative and intolerant.

The starting point for Gilligan's work has been her ability to temporarily and partially suspend her socially constructed commitment to the conventional matrix of communicative assumptions and thereby to pick up on the "moral language which spontaneously appeared in women's narratives".<sup>118</sup> Her suggestion is that the moral discourse of

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118. I. Marcus and P. Spielgelman, "Feminist Discourse, Moral Values and the Law — A Conversation" (1985), 34 *Buffalo L.Rev.* 11 at 37 [hereinafter cited as *Discourse*].

women is "bilingual". More ambitiously, she has begun to develop a countervailing interpretive matrix which allows for the recognition of alternative discourses, those which were formerly understood to be anomalous, deviant and inferior. Every decoding is itself an encoding, and Gilligan identifies the different voice as the feminine voice.<sup>119</sup> This alternative matrix not only allows for recognition of that which had been traditionally excluded, but also validates, legitimates and affirms the integrity of that which it identifies.<sup>120</sup> It valorizes that which has been devalued, and reconstructs our understanding of "difference" to accept it as positive not negative, and perhaps even to encourage us to embrace it.

Gilligan's insights stem from her studies of the discourse of women who are confronted with moral choices which necessitate an evaluation of the relationship between self and other. Her basic claim is that the hierarchicalized stages of moral development created by Kohlberg et al.<sup>121</sup> are unjustifiably partisan in that they value certain types of moral decision-making over others, without seriously considering the merits of the alternatives. What is particularly problematic for Gilligan is that the other mode of moral decision-making, *prima facie*, appears to correlate more closely with the way women make moral choices. Rephrased, according to Kohlbergian assumptions and criteria of evaluation, women's moral decision-making patterns are less advanced — read inferior — than those of men.<sup>122</sup> Moreover, the disconnection between that which is publicly valued and that which better encapsulates the different moral worldview of some women, causes those women a significant degree of personal anguish and pain.<sup>123</sup> One important politico-cognitive consequence of Gilligan's work is that what had seemed to be scientifically neutral and objective, a structure of moral development, can now be understood to be premised upon, determined by and permeated through and through, with an androcentric bias. Gilligan's enterprise is an important feminist challenge to the fathers of

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119. *Voice*, 105. More recently, Gilligan has pointed out that "I deliberately called it a different voice, I did not call it a woman's voice." A few lines later she says that her project was not to compare women with men, but to "compare women with theory". "Discourse" at 38. This is important in that the analysis is not on the basis of sex, but on the basis of the evaluative and cognitive structures that underpin and channel our interaction.

120. *Voice*, at 3.

121. Kohlberg et al., *Essays in Moral Development: Vol. 1: The Philosophy of Moral Development: Moral Stages and the Ideal of Justice* (1981); *Vol. 2: The Psychology of Moral Development: The Nature of Validity of Moral Stages* (1986).

122. Similar processes of marginalization and devaluation of women permeate Freud's work. See for example his claim that women are "a dark continent for psychology". "The Question of Lay Analysis", Vol. XX *Complete Psychological Works of Sigmund Freud* 216 (Strachey ed. 1961).

123. *Voice*, at 71.

psychological, scientific orthodoxy, from Freud to Piaget, from Erikson to Kohlberg.

Gilligan's work, however, is more than simply a psychological version of the equalitarian critique of masculinist hegemony and sexism. She aspires to do more than simply demand that women be allowed to reach the same levels of moral development than men, because, once again, that would leave too much of the methodological and substantive structure of androcentricity in place. Her affirmative vision is that a consciousness of the different structure of moral decision-making should transform the very structures themselves. The different voice seeks to participate equally in defining and evaluating the process of moral development analysis itself. To do this she attempts to capture the substantive dissimilarities of these divergent — although not necessarily incompatible — structures of moral decision-making through the metaphors of "ladder" and "web".<sup>124</sup>

Gilligan posits that the dominant moral ideology and discourse is primarily hierarchical, ladder-like. It is premised upon a conception of the self as individuated, separate, autonomous, independent and essentially the same as other "selves". As a correlative of this conception of the self, community relationships, though real and essential, are considered primarily contractual, competitive and adversarial. These assumptions, in turn, privilege certain forms of decision-making — both personal and structural — rather than others. They favour abstraction, depersonalization and categorization, logic and rationality. They inscribe a legal system with the attribute of determining rules in order to facilitate equality, reciprocity, impartiality, fairness and rights. Finally, the ladder reflects and concentrates within itself an assumption of mutual aggression and a potential for violence.

Although dominant, the ladder is not all encompassing, it is modified, and circumscribed by the web. The web is premised upon a conception of the self as attached, interdependent, connected to other persons, and primarily relational. Consequently, community is experienced as a network or narrative of constitutive, co-operative and mutually vulnerable relationships. These assumptions also privilege certain forms of decision-making, rather than others. They favour contextual judgment, empathy, intimacy and sensitivity to the needs of both self and others. They imbricate the legal system with flexible principles in order to

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124. To be slightly more accurate, although Gilligan does explicitly use the metaphor of "the web", I cannot locate "ladder" in her writings. However she frequently counterposes "hierarchy" with "web" but I find this less balanced and coherent than "ladder". Ladder is also the gloss which many commentators have superimposed upon her propositions.



facilitate responsiveness, generosity, nurturance and concern. Finally, the web encompasses a sense of intimacy, a resistance to hurting others, and sponsors an ethic of care.

It is crucially important to remember that Gilligan distances herself from biological determinism. At the very beginning of her book she categorically asserts,

The different voice I describe is characterized not by gender but by theme. Its association with women is an empirical observation and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.<sup>125</sup>

Thus, despite the occasional identification of difference with "feminine",<sup>126</sup> difference is thematic and moral, not sociobiological, gender reductionist nor sex exclusive. Gilligan's project, in part, is to "yield a more encompassing view of the lives of both sexes",<sup>127</sup> and to challenge the "distortions"<sup>128</sup> perpetrated by our current atomistic worldview.<sup>129</sup>

Moreover, late in her book, Gilligan indicates that there already exists the experience of, and thereby the potential for, the expansion of difference in men's lives. She suggests that the intimacy which men sometimes experience in their post-adolescent years is the

critical . . . transformative experience for men through which adolescent identity turns into the generativity of adult love and work . . . the adult ethic of taking care.<sup>130</sup>

And, a few pages later, she posits that both women and men tend to incorporate elements from each of the different moral approaches in their decision-making processes, although she suggests that this is not necessarily in equivalent proportions.<sup>131</sup> Thus, difference is a question of degree, not of kind. Gilligan cannot be accused of the biological reductionism of "sex is destiny".<sup>132</sup>

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125. *Voice*, at 2; see also *Discourse* at 38.

126. See e.g., *Voice* at 105.

127. *Voice*, at 4.

128. *Discourse*, at 39.

129. Moreover, she also points out the methodological and empirical limitations of her research and that,

"such constraints preclude the possibility of generalization and leave to further research the task of sorting out the different variables of culture, time, occasion and gender,"

*Voice* at 126.

130. *Voice*, at 163-164.

131. *Voice*, at 166-167.

132. See also *Discourse*, at 47-49.

These are vitally important points. Her advocacy for difference is not based on an essentialist, reductionist vision of male/female nature, absolute, incorrigible, transcendental, reified. Rather, difference needs to be understood within a broader social context, as culturally<sup>133</sup> and psychologically<sup>134</sup> constructed rather than natural, as a deeply entrenched ideology, but an ideology nonetheless.<sup>135</sup> The recognition of difference as ideology — as a pervasive ideology — is itself therapeutic in that it indicates not only difference's constructedness but also its contingency,<sup>136</sup> mutability, plasticity and vulnerability to assessment and valorization. Moreover, it opens up the potential to ask: valued by whom and for what reasons? Difference, then, is artifactual, and relational. It does not inhere in essence of the person, it is not dependent upon maleness or femaleness. Rather, it is dependent upon the structure of social relations, it is a process. As such, since it has been made, it can also be re-made. Difference, when modernized, allows us to ask fundamental questions of human agency, questions of responsibility, questions of possibility.

The consequences of choosing one moral position over the other can be of fundamental importance. If one adopts a different version of moral development from that which currently prevails,

the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.<sup>137</sup>

Thus, for Gilligan, there do in fact exist, at least, two moralities, the "morality of rights" and the "morality of responsibility", because the

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133. C. Gould, "The Woman Question: The Philosophy of Literature and the Literature of Philosophy" in *Women and Philosophy* (C. Gould and M. Wartofsky eds. 1976); L. Finley, "Choice and Freedom: Illusive Issues in the Search for Gender Justice" (1987), 96 *Yale L.J.* 914, 932-933; R.W. Connell, *Gender and Power*, (1987).

134. See also Discourse, at 58. At times Gilligan indicates that she has some sympathy for Chodorow's proposition that identifies the socio-cultural conditions of early childcare as being important for personal gendered development.

135. N. Chodorow, "Gender Relation and Difference in Psychoanalytic Perspective" in *Future of Difference*, *supra* note 36, at 16. See also Alice Jardine, *Prelude to The Future of Difference* at xxv (1980), Monique Wittig, "Paradigm" in *Homosexualities and French Literature* 115 (G. Stambolian & E. Marks eds. 1974); Collette Guillaumin, "The Practice and Power of Belief in Nature: Part I The Appropriation of Women" (1981), 1 *Feminist Issues* 3-28; "Part II The Naturalist Discourse" *Ibid.* 87-109; Minow, "Justice Engendered" (1987), 101 *Harvard L.B.* 10 at 31.

136. M. Mead, *Male and Female* (1950); Talcott Parsons, *Family Socialization and Interaction Process* (1956); Simone de Beauvoir, *The Second Sex* (1972), all agree on this point despite their significant differences. See also R.W. Connell, *Gender and Power*, (1987).

137. *Voice* at 19.



former differs from the latter in its "emphasis on separation rather than connection, in its consideration of the individual rather than the relationship as primary..."<sup>138</sup> On a normative level, one can be understood as an "ethic of care",<sup>139</sup> and the other as an ethic of "indifference",<sup>140</sup> "the logic of justice".<sup>141</sup> Indeed, these different moral visions of rights and responsibilities condense within themselves implicit understanding of our nature as social beings, as "a self defined through separation" and "a self delineated through connection"<sup>142</sup> and where our priorities lie. Moreover, prioritization of one rather than the other has an impact not only on the results achieved, but also on the very "formulation of the problem"<sup>143</sup> and on the means chosen for its resolution. Preconceptions, comprehension, methodology, results and long term consequences are interconnected in fundamental ways which reflect and structure the social order in which we co-exist.

b) *Transcending bipolarism*

"... this problem of dealing with difference without constituting an opposition may just be what feminism is all about."

Jane Gallop<sup>144</sup>

Although much of Gilligan's analysis is structured by the counterposing of the web and the ladder, the distinctive moralities of "rights" and "responsibilities", her ambition is not to replace one exclusionary paradigm with another. Rather her aim is at once more modest and more ambitious, it is integrative rather than supremacist. She calls for a radical expansion,<sup>145</sup> and hence transformation<sup>146</sup> of conventional moral

138. *Voice* at 19.

139. Later she identifies "the ideal of care as an activity of relationship, of seeing and responding to need, taking care of the world by sustaining the web of connection, so that no-one is left alone" *Voice* at 62.

140. *Voice* at 22.

141. *Voice* at 30.

142. *Voice* at 35.

143. *Voice* at 32.

144. Jane Gallop, *The Daughters Seduction* 93 (1982).

145. *Voice* at 105 and 173.

146. *Voice* at 25. Similar distinctions between transformation and revolution can be located in the work of Adrienne Rich. For example in *Lies, Secrets and Silences* (1979) in discussing poetry, Rich opines,

"... As long as our language is inadequate, our vision remains formless, our thinking and feeling are still running in old cycles, our process may be "revolutionary" but not transformative ... When we speak of *transformation* [instead of revolution] we speak more accurately out of the vision of a process which will leave neither surfaces nor depths unchanged, which enters society at the most essential level of the subjugation of women and nature by men. We begin to conceive a planet on which both women and nature might coexist as the She Who we encounter in Judy Grahn's poems. Poetry is,

development theory with its predilection for equating maturity with separation, not its junking. Her strategy is deviationist<sup>147</sup> and heterogeneous, not revolutionary. Her vision is holistic rather than partial, seeking a fusion of “identity and intimacy”.<sup>148</sup>

As an example of her suggestion for the transformative potential of fusion, she provides the example of two children, a girl and a boy, wanting to play different games. The girl wanted to play next-door-neighbours, the boy wanted to play pirates. The resolution of the disagreement was not the mere addition of the two games, or the fair solution of taking turns, but an inclusive or “synergistic” solution,<sup>149</sup> “the pirate who lives next door”. In this scenario, Gilligan argues, a *new* game develops; different from what either of the children imagined separately.<sup>150</sup> She proposes that the articulation of the different voice allows *us* to identify elements of our moral characters that had been previously understood as inferior. Nor, at this point, does she distinguish between gender, both are encouraged to recognize the “other” in themselves.<sup>151</sup> What Gilligan is taking us towards is an emphasis on the substantive difference of difference, without exaggerating the differences between us as people.<sup>152</sup>

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among other things, a criticism of language . . . Poetry is above all a concentration of the *power* of language, which is the power of our ultimate relationship to everything in the universe. It is as if forces we can lay claim to in no other way, become present to us in sensuous form.”

Catharine MacKinnon, at least on occasion, prefers revolution. “Feminism, Marxism, Method and the State: An Agenda for Theory” (1987), 7 Signs 515 at 564 [hereinafter cited as Agenda].

147. For a discussion of deviationist strategy in the service of legal doctrinal praxis, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986).

148. *Voice* at 159.

149. Discourse, Carrie Menkel Meadow at 54.

150. Discourse at 45. There are strong parallels here with Miles’ “integrative” proposals; see *supra* note 21, and *infra* at 56-57.

151. Gilligan emphasizes that the transformation that she aspires to is not androgyny. (Discourse at 45 and 84.) The problem with androgyny, it seems, is that it does not challenge patriarchy adequately; it aspires to conjunction, not transformation. S.L. Ben, “The Measurement of Psychological Androgyny” (1976), 42 J. Consult. Clin. Psych. 155; Herbert Marcuse, “Marxism and Feminism” (1974), 2 Women’s Studies 279 at 287, and Olsen, *supra* note 8 advocate androgyny.

152. See also Joan Tronto, “Beyond Gender Difference To a Theory of Care” (1987), 12 Signs 644. The following capture Gilligan’s sense of the nature of post-conventional morality:

The reinterpretation of women’s experience in terms of their own imagery of relationships thus clarifies that experience and also provides a nonhierarchical vision of human connection. Since relationships, when cast in the image of hierarchy, appear inherently unstable and morally problematic, their transposition into the image of web changes an order of inequality into the structure of interconnection. But the power of the images of hierarchy and web, their evocation of feelings and their recurrence in thought, signifies the embeddedness of both of these images in the cycle of human life.

iii) *The Ethic of Care*

Can the decision "to experiment with love ... be reconciled with the decision to fight for equal power?"

V. Held<sup>153</sup>

Even more significant than her espousal of difference are Gilligan's suggestions as to what she understands to be the correlative of the consciousness of difference: the ethic of care. "Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility and the origins of aggression in the failure of connection."<sup>154</sup>

Gilligan's discussion of the ethic of care is not developed in any autonomous or comprehensive sense. Rather, it surfaces in her work as a corrective or complement to "the logic of justice", "the premise of equality", as a resisting countermorality to the morality of rights. However, I think it is possible to distill from her reflections some of its interlocking components. Its central insight is an awareness of the constitutive interconnection and interdependence of the self and other. This consciousness of mutuality militates against isolation and separatism, the "pact of withdrawn selves"<sup>155</sup> with its correlative potential for selfishness, aggression and violence. The ethic of care encourages a recognition of, and enthusiasm for, the needs of others and a willingness

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The experiences of inequality and interconnection, inherent in the relation of parent and child, then give rise to the ethics of justice and care, the ideals of human relationship — the vision that self and other will be treated as of equal worth, that despite differences in power, things will be fair; the vision that everyone will be responded to and included, that no one will be left alone or hurt. These disparate visions in their tension reflect the paradoxical truths of human experience — that we know ourselves as separate only insofar as we live in connection with others, and that we experience relationship only insofar as we differentiate other from self,

*Voice* at 62-63.

Development for both sexes would therefore seem to entail an integration of rights and responsibilities through the discovery of the complementarity of these disparate views. For women, the integration of rights and responsibilities takes place through an understanding of the psychological logic of relationships. This understanding tempers the self-destructive potential of a self-critical morality by asserting the need of all persons for care. For men, recognition through experience of the need for more active responsibility in taking care corrects the potential indifference of a morality of noninterference and turns attention from the logic to the consequences of choice ... In the development of a postconventional ethical understanding, women come to see the violence inherent in inequality, while men come to see the limitations of a conception of justice blinded to the differences in human life,

*Voice* at 100.

153. In "Marx, Sex and the Transformation of Society" in C. Gould, M. Wartofsky *Women and Philosophy* (1976), 168, 180.

154. *Voice*, 173.

155. I take this phrase from Peter Gabel, "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves" (1984), 62 *Texas L.Rev.* 1563.

to respond compassionately and responsibly to those needs,<sup>156</sup> to participate in the lived experiences and reality of others.<sup>157</sup> It identifies “a world of mutuality” that “creates and sustains the human community”.<sup>158</sup> It reconceptualizes and reconstructs moral dilemmas to be issues of competing responsibilities of the self because of its connection with and responsibility for others, rather than a conflict between self and other in which the only options are assertion of the self’s trumping rights, or martyred self-sacrifice on the pyre of altruism.<sup>159</sup> Moreover, it proposes that moral decisions be made on the basis of specific, contextual and particular<sup>160</sup> problems and not *a priori*, hypothetical abstractions. Finally, and of particular importance for this essay, not only does it encourage a discourse and praxis that rejects domination, it strives to resolve moral dilemmas without recourse to violence as that would counteract “the injunction not to hurt others”.<sup>161</sup> In so far as the ethic of care is premised upon “nonviolence”<sup>162</sup> it aspires to “a more generative view of human life”,<sup>163</sup> and even more ambitiously, an affirmative transformation of the polity.

It is important to point out, though, that the ethic of care is distinct from the traditional masculinist stereotype of “female self-abnegation and moral self-sacrifice”,<sup>164</sup> that Virginia Woolf has described as “The Angel

156. *Voice* at 62 at 74-98.

157. *Voice* at 79. A similar theme can also be located in Minow, “Justice Engendered” *supra* note 135 at 14, “... the perspective to seek out and appreciate a perspective other than ones own ...”.

158. *Voice* at 156.

159. *Voice* at 114.

160. *Voice* at 101.

161. *Voice* at 73, 102, 134, 149, 174.

162. *Voice* at 174.

163. *Voice* at 174.

164. *Voice* at 90, *Discourse* at 46. Deborah Kearns suggests that even the most sophisticated and progressive liberal of the late twentieth century incorporates a vision of women as self-sacrificing into his work, “A Theory of Justice — and Love; Rawls on the Family” (1983), 18 *Politics* 2, 36. For a powerful critique of this “denial” interpretation of women’s identity see Robin West’s groundbreaking article, “The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Liberal and Radical Feminist Legal Theory” (manuscript; forthcoming 1 *Wisconsin Women’s Law Journal*, hereinafter cited as “Hedonic Lives”). West argues that if women are accurately understood as “giving selves” this has come about because of the “pervasive threat of violent and acquisitive male sexuality” which has resulted in women, driven by fear, “re-constructing themselves in a way that controls the danger and suppresses the fear. ... This does not make her an altruistic person, it makes her a negative”. *Ibid.* at 15 and 22. In other words, women’s identity as “giving selves” is a “coherent, understandable” defence mechanism to survive patriarchal oppression, not authentic feminism. As the text makes clear, the ethic of care approach does not reduce to an interpretation of women as “giving selves”, it is not a servile interpretation of women’s moral character and promise. Indeed, later in her paper West also considers the possibility of an ethic of care absent the dangers of patriarchy. *Ibid.* at 38; See also her reflections on the importance of trust in human relations. *Ibid.* at 61-62.



in the House".<sup>165</sup> It should not be confused with passivity or delicacy, submissiveness or obedience, dependence or domesticity; it is not what Irigaray has posited to be a 'phallic feminine',<sup>166</sup> nor "a romantic prescription for chaining women to the classical definition of femininity".<sup>167</sup> Indeed, Gilligan's own example refutes such self-negation, for at least some of the women to whom she listened decided to have abortions, thereby demonstrating that care does not necessarily prioritize the other over the self. Rather, care attempts to consider the interests of the other in a responsive and responsible manner. The ethic of care includes care for oneself.<sup>168</sup> It denies the absolutist,<sup>169</sup> formalistic recourse to individual autonomy by favouring an "injunction against hurting"<sup>170</sup> so that we have to seriously and contextually make moral decisions and, at the same time, bear responsibility for that choice, and its consequences for others as well as ourselves. The ethic of care necessitates a keen consciousness of the "social consequences of action".<sup>171</sup>

If we relate the ethic of care to the arena of legal relations, to inquire into the possibility and direction of a "feminist contribution to justice,"<sup>172</sup> a fundamental question becomes,

whether or not (law) is hurting society and whether or not it puts a barrier in the way of compassion and respect.<sup>173</sup>

When you are inside the barrel with the lid sealed, it is difficult to know that it is a barrel you are imprisoned in. What the ethic of care may do is to provide a *corrigible and provisional* benchmark or vantage point by which to understand law, to interpret law, to question law, to evaluate law in the politico-historical conjuncture in which we now find ourselves.<sup>174</sup> As Kathy Ferguson notes, "Any thorough-going critique

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165. *Women and Writing* 59 (1979).

166. Cited in Duchon, *supra* note 81, at 87.

167. K. Karst, "Women's Constitution" (1984), Duke L.J. 447, 480. Emphatically, although there is some verbal intersection, the ethic of care is not what MacKinnon has described as "contemporary industrial society's version of women ... docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic and domestic, made for child care, home care and husband care". "Agenda" *supra* note 146 at 530. Moreover, lest there be any confusion, I want to stress that nothing in my suggestions is premised upon the idea that the ethic of care grows out of the rosy private family life of women. For many women the family is anything but a haven in a heartless world; it is, in many instances, the locus of extreme domination, subordination, inequality and violence.

168. *Voice* at 139.

169. *Discourse*, at 46.

170. See *supra* note 161.

171. *Voice* at 167.

172. Dunlap, *Discourse* at 13.

173. *Voice* at 123.

174. For a useful discussion of why it is important to provide normative authority for legal praxis, see D. Cornell, "Two Lectures on the Normative Dimensions of Community in the



rests, ultimately, on a vision of an alternative possibility".<sup>175</sup> The discourse of care helps provide such a "critical ethical perspective".<sup>176</sup> If my earlier suggestions as to the relationship of contemporary law and violence are accurate then law, when measured against the ethic of care, is clearly found wanting. If difference, feminism and the ethic of care are connected, then the feminist recourse to law, as currently constituted, is problematic. The critique may not be sufficiently extensive, and the reconstruction may not go far enough.

But law itself should not be abandoned or abdicated because, in my opinion, feminists simply cannot afford to vacate the field. Rather it should be transformed, reconstructed, remade so as to come closer to the ethic of care, to be the socio-political concretization of the ethic of care, "to become more of a healer, less of a slayer".<sup>177</sup> Indeed, as Gilligan herself suggests, law is not monolithic, for inscribed within contemporary law there exist traces of a different voice in "the concept of equity, the recognition of differences in need".<sup>178</sup>

### c) *Equality Revisited*

#### i) *MacKinnon's Response to Difference*

It is true that in our history, stereotypical differences, both real and imagined have served primarily as convenient, "natural" justifications for impositions of burdens. It does not follow, however, that we cannot use differences progressively. Injustice does not flow directly from recognizing differences; injustice results when those differences are transformed into social and economic deprivation.

Ann Scales<sup>179</sup>

Gilligan's work has received a mixed response from the feminist legal academic community. Some commentators have accepted the idea but not necessarily the substance of a different voice.<sup>180</sup> Others have been enthusiastic about the substance of the different voice and have attempted to apply it to their legal practice.<sup>181</sup> Others have been skeptical.

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Law" (1987), 54 Tenn. L.Rev. 327; "Toward a Modern/Post Modern Reconstruction of Ethics" (1985), 133 U. Pa. L.Rev. 291. See also K. O'Donovan, "Women's perspectives on the Rule of Law" (unpublished manuscript).

175. *The Feminist Case Against Bureaucracy* (1984).

176. Gilligan, "Reply to the Critics" (1986), 11 Signs 324, 327.

177. Dunlap in Discourse at 20.

178. *Voice* at 164.

179. "Feminist Jurisprudence" (1986), 95 Yale L.J. 1373, 1396.

180. See e.g., Suzannah Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986), 72 Va. L.Rev. 543; but see also her, "The Gender of Judges" (1986), 4 Law and Inequality 159.

181. Minow, "Justice Engendered" *supra*, note 135; Menkel-Meadow, "Toward Another View of Legal Negotiation" (1984), 31 U.C.L.A. L. Rev. 754, 763 fn. 28; "Portia in a Different

It has become commonplace within the legal academy to identify the work of Catharine MacKinnon as the most trenchant critique of difference, and particularly difference as articulated by Gilligan. The reasons for this widely held belief are not difficult to identify: MacKinnon has publicly challenged Gilligan's work<sup>182</sup> and specifies that the critique of difference is one of the organizing themes for her book, *Feminism Unmodified*.

In this section I want to suggest that the first blush impression of Gilligan and MacKinnon as being locked in incorrigible conflict is oversimplistic. Although MacKinnon certainly does speak out against the espousal of difference, there remains within her work traces of an affection for difference, desirable if only the circumstances could be made appropriate. I want to suggest that the Gilligan-MacKinnon controversy, though very real, is not as irremediably polarized as it has been understood and that there is scope for compatibility between these two extremely important feminist theorists and practitioners.

In the introduction to *Feminism Unmodified* MacKinnon makes clear her critical concerns about the tendency to connect gender with difference on any level:

The second theme is a critique of the notion that gender is basically a difference rather than a hierarchy. To treat gender as a difference (with or without a French accent) means to treat it as a bipolar distinction, each pole of which is defined in contrast to the other by opposed intrinsic attributes. Beloved of left and right alike, construing gender as a difference, termed simply the gender difference, obscures and legitimizes the way gender is imposed by force.<sup>183</sup>

Lest there be any doubt, she emphasises that her criticism is not aimed solely at biologically reductionist versions of gender as difference, but at all efforts to connect gender and difference:

It hides that force behind a static description of gender as a biological or social or mythic or semantic partition, engraved or inscribed or inculcated by god, nature, society (agents unspecified), the unconscious or the cosmos. The idea of difference helps keep the reality of male dominance in place.<sup>184</sup>

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Voice" (1985), 1 Berkley W.L.J.; Linda Krieger, "Through a Glass Darkly: Paradigms of Equality and the Search for a Woman's Jurisprudence" (1987), 2 Hypatia 45; Karst, "Women's Constitution" (1984), Duke L.J. 447; Mahoney, "Obscenity, Morals and the Law" in *Justice Beyond Orwell* 77 (Abella ed. 1985); Spiegelman, "Court Ordered Hiring Quotas After Stotts" (1985), 20 Harvard C.L.C.R.L.Rev.; E. Schneider, "The Dialectic of Rights and Politics" (1986), 61 N.Y.U.L.Rev. 589; F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harvard L.Rev. 1497; J. Rifkin, "Mediation from a Feminist Perspective; Promise and Problems" (1984), 2 Law and Inequality 21.

182. Discourse.

183. *Feminism Unmodified* at 3.

184. *Feminism Unmodified* at 3.

It is difficult to imagine a more total rejection of difference, or any of its potential justifications or foundations. Difference, for MacKinnon, is not about gender, but about power, force and the continued supremacy of men over women. Difference is a rationalization and legitimation of an illegitimate hierarchy which disadvantages women thereby reinforcing, rather than challenging, their status as "second class citizens".<sup>185</sup>

Difference, for MacKinnon, is a second order concept and experience. Power, or more precisely, the inequality of power, is the primary building block for a feminist analysis of social and legal relations. The meaning of gender and difference are predetermined by power relations between men and women, which are relationships of fundamental inequality. Consequently,

a discourse of gender difference serves as ideology to neutralize, rationalize, and cover disparities of power, even as it appears to criticize them. Difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged, when women are punished or when they are protected in their name.<sup>186</sup>

Thus, for MacKinnon, difference is a repressive dead end, "one strategy in keeping women down".<sup>187</sup> Because it is a "conceptual tool of gender inequality, it cannot deconstruct the master's house. Especially when it has built it."<sup>188</sup> Difference cannot be salvaged for the feminist critique of patriarchy, and its espousal is "one of the most deceptive antifeminisms in society, scholarship, politics and law . . ."<sup>189</sup> An unmodified feminism rejects difference.

MacKinnon expands her critique of difference in "On Difference and Dominance: On Sex Discrimination",<sup>190</sup> and discusses Gilligan's work explicitly. Her basic disagreement with Gilligan is that the latter accepts and valorizes those values which men have either permitted women to have or have valued women for. Thus, she accuses Gilligan of failing to challenge at its core the male construction of gender relations — which are hierarchical and unequal — and worse, of legitimizing those relations through an affirmation of the "qualities and characteristics of powerlessness":<sup>191</sup>

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185. *Feminism Unmodified* at 4.

186. *Feminism Unmodified* at 8. Similar criticisms have been levelled against the N.F.F.'s. See for example Emmanuelle de Lesseps, "Le Fait Féminin: et moi?" in (1979), 5 Questions féministes 4, cited in Duchon *supra* note 81 at 21.

187. *Feminism Unmodified* at 22.

188. *Feminism Unmodified* at 9.

189. *Feminism Unmodified* at 8.

190. *Feminism Unmodified* ch. 2.

191. *Feminism Unmodified* at 39.

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 their 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.<sup>192</sup>

The discourse of difference, for MacKinnon, is insufficiently cognizant of power relations to be a fruitful strategy for feminism. The better approach is to view feminism through the prism of power, and to indentify the conditions of inequality perpetrated by male supremacy. If difference is real it is because dominance pre-exists and determines the nature that difference, structuring it to men's advantage and women's disadvantage. The "dominance approach", as MacKinnon calls it,<sup>193</sup> provides an alternative, power-conscious, perspective from which to identify and challenge women's continued oppression and subordination. From this perspective difference is understood as problematic rather than emancipatory, mapping inequality rather than challenging it.

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 or "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.<sup>194</sup>

The gist of MacKinnon's critique, then, is that the espousal of difference sounds uncomfortably reminiscent of the old stereotypes<sup>195</sup> and clichés that have been traditionally used by men to confirm the inferiority

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192. *Feminism Unmodified* at 39 (footnotes omitted).

193. *Feminism Unmodified* at 40.

194. *Feminism Unmodified* at 42-43.

195. For a particularly useful analysis and critique of the dangers of stereotyping which has reinforced the inequality of women, blacks, Jews and the lower classes, see Sander L. Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985).

of women, to legitimize inequality and to maintain the relations of domination and subordination. MacKinnon argues that the affirmation of difference does nothing to empower women, and indeed, because the foot is on the neck<sup>196</sup> it is more like masculinist ventriloquism. The authentic, unmodified voice of feminism is the dominance approach, because only it "strives towards equal power in the social life".<sup>197</sup> For MacKinnon, difference may be feminism's double-cross.<sup>198</sup>

## ii) *Reflections on MacKinnon*

Far too often, however, feminists appear too confident that we have successfully freed ourselves from the constraining categories and norms of the male-stream thought within which all of us in this generation were trained . . . It is hard to know what to save and what to discard from male stream thought as we proceed forward on our journey. Some of us have clearly saved too much and are overburdened with antique baggage which slows our progress. Others have, perhaps, discarded rather too much too early.

Jill McCalla Vickers<sup>199</sup>

MacKinnon's comments are both timely and important. They are timely in that they provide an important counterbalance to some of the more euphoric elements within feminism whose faith in difference was perhaps leading them towards romanticism and idealism,<sup>200</sup> and was insufficiently cognizant of the structures and actors of resistance. Her insights are important in that they remind us, once again, that there is "no such thing as 'keeping out of politics'"<sup>201</sup> and that gender, like morality, has as a constitutive element questions of power and powerlessness. For example, if we return to Gilligan's suggested transformation of the girl/boy, neighbour/pirate game the problem is even more serious than the boy opting out. The very real danger may be bringing the pirate home . . . for if pirates rape and pillage, then the new game may be the pirate raping the girl next door!<sup>202</sup>

MacKinnon reminds us that, historically, difference has been perceived as deviant, inferior, invalid; that it has inscribed within it an ideological weight that disadvantages women. Her concerns about the danger of

196. *Feminism Unmodified* at 30.

197. *Feminism Unmodified* at 45.

198. Elizabeth Meese, *supra* note 57 at 75-76.

199. In *Feminism in Canada*, *supra* note 14, at 44-45.

200. See for example, Sara Ruddick, "Maternal Thinking" and "Preservative Love and Military Destruction" in *Mothering*, *supra* note 18 at 213, 231; Barbara Love and Elizabeth Shinklin, "The Answer is Matriarchy", *ibid* at 275.

201. George Orwell, cited in W. Mitchell, *The Politics of Interpretation* 3 (1983).

202. I wish to thank Colleen MacKay for suggesting this response to Gilligan's proposal.



difference, with its tendency to reconfirm the traditional stereotypes,<sup>203</sup> thereby entrenching rather than dislocating hierarchy and inequality, are made the more real when we realize that both anti-feminist women and contemporary Christian fundamentalists also espouse difference, claiming that men are "aggressive, dominant, logical, independent, active and task-oriented", while women are "submissive, intuitive, dependent, nurturant, supportive, patient and person-oriented".<sup>204</sup> No doubt such correspondences are a serious cause for concern for any progressive movement, and justify a critical skepticism towards invocation of difference. However, skepticism is not rejection, and MacKinnon appears to favour rejecting *in toto* the discourse of difference. But can feminism afford to surrender the ideology of difference to masculinist hegemony? In the past, antifeminists have used, and will continue to use, difference in support of their political agenda. Even if MacKinnon is correct that, historically, difference has contributed to the inferiorization of women, does that mean that difference is inherently incapable of being salvaged for feminism, reconstructed and revalued so as to be a positive, even emancipatory, ideology? As I understand her writings, MacKinnon disagrees. Her preference, I think, is for a "degendering"<sup>205</sup> of society, for gender is a construct of hierarchy, a product of the inequality of power between men and women. The validity of such a position depends upon the validity of MacKinnon's "dominance thesis" and its central concept, power. It is to a discussion of these issues that we can now turn.

#### a) *MacKinnon on Power*

... the pitfall of being reduced into joining the oppressor under the pretense of sharing power

Audre Lorde<sup>206</sup>

203. See for example Freud, "Some Psychical Consequences of the Anatomical Distinction Between the Sexes" in *On Sexuality* Vol. 7, 342 (A. Richard ed. 1977); T. Reik, *Of Love and Lust: On the Psychoanalysis of Emotional and Sexual Emotions* (1967).

204. See for example, W. Peter Blitchington, "God had A Purpose in Creating Two Sexes" *Sex Roles and the Christian Family* Ch. 3 (1985); Marabel Morgan, *The Total Woman* (1975).

205. I take this term from Nancy Chodorow, "Gender, Relation and Difference in Psychoanalytic Theory" in *Future of Difference* (1980) at 3. This claim is based upon my understanding of MacKinnon's argument. Her premise is that power, in the nature of hierarchy and inequality, domination and subordination, pre-exists. Gender is encoded with these pre-existing power relations, "the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them". *Feminism Unmodified* at 50. To challenge the conditions of inequality necessitates a challenge to the formative structures of powerlessness, including gender. Society has to be de-gendered, for gender is premised upon inequality. As the overall theme of this article might suggest, my preference is for a reconstitution of gender not its eradication. See also R.W. Connell, *Gender and Power*, 286-293 (1987).

206. *Sister Outsider* 118, (1984).

Si les femmes veulent prendre le pouvoir à la manière des hommes, ce n'est pas la peine, c'est ce que nous voudrions changer justement, toutes ces notions et ces valeurs.

Simone de Beauvoir<sup>207</sup>

An overview of MacKinnon's discussion of power leaves one dissatisfied, for her analysis is more assertion than analysis. Although, on occasion, she posits that feminism will transform power<sup>208</sup> she says very little on what that transformation might mean. Rather, as we have seen, MacKinnon filters her analysis of power through the prism of gender and its connection with hierarchy, authority and inequality; domination and subordination; force and violence.

Her argument is that male power is pervasive and systemic, not only in the public and private realms but also epistemologically, methodologically and philosophically. As she says elsewhere, male dominance is "metaphysically nearly perfect."<sup>209</sup> In short, women are both personally and structurally disempowered: men have power, women do not. Consequently, the goal of feminism must, first and foremost, be to enable women to have the same power as men, and then women can begin to articulate more authentically their aspirations.

Is this an adequate understanding and conceptionalization of the economy of power?

Although it is an instructive, readily accessible and critical approach to power, its totalistic viewpoint is a cause for concern.<sup>210</sup> MacKinnon appears to accept without question what elsewhere<sup>211</sup> she identifies as a male conception of power: domination. Her claim that male domination is all pervasive is a quantitative conception of power, but not a qualitative one. It does not address the issue of the nature of power. Moreover, it seems to me that her demand that women are entitled to equal power as men assumes a zero-sum conception of power: that more power for women will mean less power for men.

207. *Les écrits de Simone De Beauvoir* (1979), C. Francis, E. Gontier (eds.) at 589.

208. See for example, *Feminism Unmodified* at 23 and 53.

209. "Marxism, Feminism, Method and the State: Towards a Feminist Jurisprudence" (1983), 8 *Signs* 613 [hereinafter cited as "Feminist Jurisprudence"]. See also V. Held, "Feminism and Epistemology: Recent Work on the Connection between Gender and Knowledge" (1985), 14 *Philosophy and Public Affairs* 296; Jill McCalla Vickers, "Memoirs of an Ontological Exile", in *Feminism in Canada*, *supra* note 14 at 27.

210. For similar concerns about the prevalence of "generic" statements about power/powerlessness, shared by both sociologists and feminists see Ann Duffy, "Reformulating Power for Women" (1986), 23 *Can. R. Soc. and Anth.* 22.

211. "To us it is a male notion that power means someone must dominate" *Feminism Unmodified* at 23. Kathy Lahey appears to accept an essentialist conception of power: "the very concept of power is a male vision" and "the ultimate sources of power are violence and tyranny", "Equality and Women's Specificity in Feminist Thought" at 7 (unpublished manuscript).

I think such an approach manifests a unilateral conception of power. It understands power in the Weberian sense of "power over",<sup>212</sup> a negative and repressive approach, what Foucault identifies as a juridical conception of power.<sup>213</sup> But power is more than simply pervasive and systemic; it is also heterogeneous, polymorphous and multifaceted.<sup>214</sup> Power can also be understood in the sense of "power to" as well as "power over". "Power to" is power as a cognate of freedom, a progressive, emancipatory and potentially transformative conception of power, a conception which emphasizes the creative, capacity-enhancing, ability-encouraging variations of power.<sup>215</sup> This is a qualitatively different conception of power. Men may understand and use power in its imperialistic guise in order to crush women (other men, and nature) but that does not mean that "power over" is the immutable essence of power.

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212. Weber defines power as "... the chance of a man or a number of men (sic) to realize their will in a communal action even against the resistance of others who are participating in the action", in *From Max Weber: Essays in Sociology* 180 (H. Gerth and C. Wright Mills eds. 1958).

213. Foucault, *Power/Knowledge* (1972).

214. The following reflections on power are influenced, in part, by the work of Foucault although they aspire to a very different, that is optimistic, agenda than his. He suggests that traditional conceptions of power are based upon three assumptions: 1) power is possessed; 2) power is primarily coercive, it is a repressive prohibition backed by sanctions, and 3) power is centralized and tends to be hierarchical, it flows from the top down.

Foucault argues that these assumptions unduly constrain our understanding of power, that power has many variations beyond the juridical conception. Thus he argues that power is exercised rather than possessed, thereby emphasizing a more relational understanding of power. Second, we can understand power as productive as well as repressive. This claim becomes most apparent through his discussion of the connection between knowledge and power. Knowledge as power constructs, creates and moulds our understanding of ourselves, our relations and our world. Power, therefore, can be proactive and creative, rather than just sanction-determined. Third, and as a correlative of his first and second theses, if power is exercisable, relational and creative, then it can be located elsewhere than in centralized authorities. Put differently, power is a micro-phenomenon as well as a macro-phenomenon (although the two are inter-related), it can be exercised through our everyday relations, from the bottom up, as well as from the top down, as localized centres of resistance, reconstruction and empowerment, as well as domination, either on the micro or macro levels. See Foucault, *Power/Knowledge* (1972); *Discipline and Punish* (1979); *The History of Sexuality* (1980); Jana Sawicki, "Foucault and Feminism: Toward a Politics of Difference" (1986), 2 *Hypatia* 23; Irene Diamond, Lee Quinby, *Feminism and Foucault: Reflections on Strategies of Resistance* (1988).

Though I do not propose some meta-normative project, I am also more optimistic than Foucault who resists envisioning transformation, mostly because of his anti-humanism, his post-modern skepticism.

215. Yolande Cohen, in *Feminism in Canada*, *supra* note 14, at 236 and Geraldine Finn *ibid* at 302. For example, certain of the privileges of citizenship can be understood as "power to", rather than "power over". The Oxford English Dictionary also suggests these various conceptions, beginning with "power to" but ending with "power over": "The ability to do something ... possession of control or command over others; domination; government; sway; authority ... ability to compel obedience ... wage war. ..." See also Moi, *Supra* note 2 at 124-125 for a discussion of Cixous' conception of "power to".