

DISSOLVING THE SAMENESS/DIFFERENCE DEBATE: A POST-MODERN PATH BEYOND ESSENTIALISM IN FEMINIST AND CRITICAL RACE THEORY

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I. A TALE OF TWO CONTROVERSIES

[The negro] is too radically different from the white man in his mental and emotional structure ever to be more than a spurious and uneasy imitation of him, if he persists in following this direction. His soul contains riches which can come to fruition only if he retains intact the full spate of his emotional awareness, and uses unswervingly the artistic endowments which nature has given him.

Paul Robeson¹

I have no wish to be the victim of the Fraud of a black world.

My life should not be devoted to drawing up the balance sheet of Negro values.

There is no white world, there is no white ethic, any more than there is a white intelligence.

Franz Fanon²

Are African-Americans basically the same or basically different from European-Americans? Are women basically the same or basically different from men? This Essay examines two controversies in an attempt to move beyond the parallel debates over sameness and difference

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This Essay is dedicated to the memory of Mary Joe Frug (1941-1991), whose path-breaking work on work/family conflict helped found feminist jurisprudence. We will miss her.

1. Robeson, *The Culture of the Negro*, SPECTATOR (London), June 15, 1934, at 916, reprinted in PAUL ROBESON SPEAKS 86 (P. Foner ed. 1978).

2. F. FANON, BLACK SKIN, WHITE MASKS 227, 229 (C. Markmann trans. 1967). These epigrams are quoted in Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990).

that have split feminists and African-Americans for much of this century.³ The first is the controversy among feminists precipitated by the testimony of Rosalind Rosenberg on behalf of Sears in the case of *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.*⁴ The second is the controversy among African-American law professors precipitated by Harvard law professor Randall Kennedy's critique of the body of work by minority scholars that posits a different minority perspective.⁵ Both controversies have generated tremendous depth of feeling. Rosenberg's testimony severely strained her relationships within the community of historians, of which she had long been an accepted member. One historian accused her of a "betrayal"; another spoke of the incident as a tragedy.⁶ "It causes me considerable pain to have so many people feeling that what I did was not in women's interest," said Rosenberg. "I've spent my whole career as a feminist and as a woman's historian."⁷ Kennedy, like Rosenberg, was immediately embroiled in controversy. Kennedy noted in his article that some minority scholars had urged him to refrain from publishing the piece.⁸ After publication, Kennedy and the scholars he had criticized faced off in highly charged and deeply felt exchanges.⁹

3. For an insightful analysis of sameness and difference argumentation in the context of race, see Peller, *Race Consciousness*, 1990 DUKE L.J. 758. Scott Brewer's quotations show that the sameness/difference split predates the integrationist/black nationalist split, which is the focus of Peller's article. See Brewer, *supra* note 2, at 1844.

Nineteenth-century feminists used sameness and difference arguments with no sense that they were inconsistent. See N. COTT, *THE GROUNDING OF MODERN FEMINISM 19-30* (1987). The formulation of sameness and difference as opposing viewpoints crystallized in the early twentieth century as part of the debate over protective labor legislation. *Id.* at 117-42.

4. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

5. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

6. Sternhell, *Life in the Mainstream*, MS. MAG., July 1986, at 48.

7. *Id.* at 91.

8. See Kennedy, *supra* note 5, at 1811-12.

9. See Bell, *Harvard Law Furor*, N.Y. Times, Jan. 26, 1990, at A30, col. 6 (letter to the editor); Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); DiLeonardo & Reed, *Academic Poverty-Pimping*, NATION, Oct. 23, 1989, at 442 (letter to the editor); Matsuda, *Critical Consciousness*, NATION, Nov. 27, 1989, at 622 (letter to the editor); *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) (commentary by Scott Brewer, Milner S. Ball, Robin D. Barnes, Richard Delgado, and Leslie G. Espinoza); Rothfeld, *Minority Critic Stirs Debate on Minority Writing*, N.Y. Times, Jan. 5, 1990, at B6, col. 3; Wiener, *Law Profs Fight the Power*, NATION, Sept. 4, 1989, at 246; Wiener, *Wiener Replies*, NATION, Oct. 23, 1989, at 442 (letter to the editor); Will, *At Harvard Law, Intellectual Gerrymandering*, Newsday, May 17, 1990, at 80. Patricia Williams has compared the debate to a scene in Ralph Ellison's *Invisible Man*, in which a prize-winning black student is compelled to wrestle other black students, and then to retrieve coins that spectators have thrown on an electrified rug. See R. ELLISON, *INVISIBLE MAN* 17-21 (1980). Williams suggested that Kennedy and those he critiqued are competing for the gold coinage of academic merit. Comments of Patricia Williams at 21st Annual Conference of Women and the Law, Mar. 23, 1990, quoted in Abrams, *Hearing the Call of Stories*, CALIF. L. REV. (forthcoming 1991).

What is going on here? At the simplest level, the attention of conscientious and talented outsider¹⁰ and feminist scholars is being diverted away from the issues of sexism and racism into bitter fights among themselves. Although these scholars' motivations have been challenged, I take no position on the various charges of greed and ambition. Instead, I explore an alternative interpretation: that these are mirror-image controversies over sameness and difference. Rosenberg argued that women are different from men because she felt that treating them the same would ultimately redound to their detriment.¹¹ Kennedy argued that blacks are basically the same as whites because he feared that treating them differently would reinforce stereotypes.¹² My reading of these controversies is that Rosenberg and Kennedy are caught on opposite horns of the "difference dilemma."¹³ As Martha Minow has noted, people who are different can be disadvantaged by treating them the same as others in contexts where they cannot live up to the accepted norm, as when a person in a wheelchair is treated as if she could walk. But they can also be disadvantaged if they are treated as different in a way that reinforces traditional stereotypes. Rosenberg has expressed the first concern; Kennedy, the second.

A close analysis of these controversies offers insights into a pernicious dynamic beneath sameness/difference debates. How do scholars whose goal is to highlight the deep structural factors that systematically disadvantage women and minorities get side-tracked into controversies over sameness and difference? What is it about the "sameness/difference" framework that causes scholars concerned with racial and gender injustice to turn that concern into arguments that the relative absence of women and minorities in desirable jobs results not from discrimination but from the "choice" or the failings of women and minorities themselves? What is the dynamic by which the sameness/difference approach

10. Mari Matsuda used this term because, taken as a group, the "minorities" in this country in fact comprise the majority. See Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1 n.2 (1988); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989) [hereinafter Matsuda, *Racist Speech*]. Although Matsuda notes her dissatisfaction with the term, it has the notable advantage when applied to outsider scholars of avoiding essentialism by stressing that they are bonded not by their biological status, but by the way they interpret their experience. I continue to use the term "minority" when referring to the general population of African-American and other non-Caucasian groups.

11. Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, at para. 1, EEOC v. Sears, Roebuck & Co. (No. 79-C-4373) [hereinafter Testimony] (available from author).

12. See *infra* note 102. Kennedy argues sameness by contesting the notion of a single minority perspective. Instead he stresses differences among minorities. See Kennedy, *supra* note 5, at 1778.

13. Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, LAW & CONTEMP. PROBS., Spring 1985, at 157, 159-60; M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-23 (1990).

causes advocacy of structural change to degenerate into a "blame the victim" argument that reinforces the status quo? These questions are discussed in Section II.

Section III examines how we can reformulate sameness and difference arguments to capture their potential for transformation while avoiding their potential vulnerabilities. To do so, we must reformulate both sameness and difference along the lines suggested by the strain of post-modern theory that celebrates the inevitability of different perspectives rather than mourning the loss of a single, absolute truth.¹⁴ This approach helps reformulate sameness based on the insight that no two people are truly "the same" in the sense of being *identical*. Instead, sameness rhetoric signals a societal choice to ignore a whole series of differences for strategic reasons. Claims of sameness are not mere assertions of pre-existing similarity; they are a way of carrying on discussions about social ethics.

A post-modern approach also offers a reformulation of difference that avoids essentialism by focusing on the multiple viewpoints available to any one individual. Post-modernism offers a description of difference in which the notion of a stable set of "essential" differences between men and women, European- and African-Americans—or, indeed, between any two groups—disappears.

Once sameness and difference are reformulated in this way, sameness dissolves into difference and vice versa. Both approaches can be seen as confusing ways of encoding discussions about which differences should matter in which contexts. Post-modern reformulations of sameness and difference can transform the controversy over whether blacks and whites, men and women are "essentially" the same, into quite a different set of debates. The first centers around how to proceed in the face of a standard loaded against outsiders: If a frontal attack on "male" or "white" standards is impractical, should outsiders ask for "special" treatment, or should they avoid doing so? A second source of disagreement is over divergent descriptions of difference. One need not adopt the essentialist notion that gender, or race, or some other single quality defines "the" one stable category of difference to acknowledge the existence of shared patterns of experience (often linked to oppression). Yet we need to describe difference in ways that avoid essentialism and stereo-

14. I use the term "post-modern" to refer to the range of problems and solutions stemming from the critique of absolutes that I have elsewhere called "the new epistemology." See J. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 436-64 (1987). I want to distinguish between the term "post-modern" as I use it and "post-structuralism," which is but one strand within the new epistemology. See *id.* at 457-64.

types. I argue that outsider jurisprudence¹⁵ and feminist narratives have far greater potential for offering trenchant and socially useful descriptions of difference than do those of relational feminists.¹⁶

II. SAMENESS AND DIFFERENCE AS EVASIONS OF THE NEED FOR TRANSFORMATION

A. *Sameness*

I found in my investigations of the lives of women lawyers that when faced with numerous demands, many did not feel a sense of strain or negative stress. Rather, these women found their lives exciting and dramatic. They developed greater energy when the demands proliferated, rather than feeling drained, and often did not define their situation as problematic.¹⁷

Last summer I went to the Berkshire Conference of Women in History, and was invited to an informal dinner at the house of a historian friend, along with an older woman who is one of the country's most established and prominent historians of women. After dinner, my friend and I were coping with three children in various stages of undress and exuberance, and the conversation eventually turned to our deep frustration at our disproportionate share of child care. On a societal scale, I argued, what is happening now is what has always happened: Women are ending up with careers subservient to the needs of their children, while their husbands perform as the kind of ideal workers men have always had the prerogative to be.

The older woman was shocked at our bitterness, and in particular by our sense that little has changed. As she spoke I became aware of my own historical amnesia. I thought back to my eighth-grade history teacher, a Yale Ph.D. who was no doubt relegated to teaching grade school because of the unavailability of academic jobs for women. My teacher used to tell this story: While at Yale in the 1930s, male undergraduates linked arms to block her from walking on the paths in the Old Campus, making her stumble through the snow to get on her way.

You do not understand just how much things have changed, older women remind me: We couldn't even get *jobs*. Professionals ten years older than I (now widely known and respected) could not get work because they were women. ("I don't want to be responsible for taking a woman from her children," said one solicitous rejection of a now-eminent historian).

15. Again, the term is Matsuda's. See Matsuda, *Racist Speech*, *supra* note 10, at 2323.

16. See *infra* text accompanying notes 117-23.

17. C. EPSTEIN, *WOMEN IN LAW* 323 (1981).

When these women finally did get jobs, I have no doubt that it was exhilarating to show at last what they could do—to show that they had minds as rigorous and spirits as dedicated as the men. I can see how their cry of “we are basically the same” felt vigorous, confrontative, empowering. This is the sense Cynthia Fuchs Epstein captures in her classic study of women lawyers. Her informants still felt the heat of the kitchen and the boredom of the laundry as fates narrowly escaped. From that context, I too would find the autonomy and power of a professional career exhilarating.¹⁸

Today, for many women, the exhilaration is gone. Work such as Arlie Hochschild's *The Second Shift*¹⁹ documents the mind-numbing exhaustion of women trying to perform as ideal workers while simultaneously performing for their husbands and children the kind of unpaid domestic labor that their fathers expected—and, to a substantial extent, that their husbands still expect. Studies consistently show that working wives continue to do a disproportionate amount of the child care²⁰ and virtually all of the housework.²¹ As a result, employed wives work an average of forty-four percent more hours than do housewives.²² They have less leisure, get by on less sleep, and show many signs of stress.²³ My generation of women also has to deal with the resentment engendered by promises unfulfilled. One study found that husbands of working wives spend only forty-five minutes longer each week with their kindergarten-aged children than did men married to housewives.²⁴ Another found that, on average, husbands in two-earner families barely contribute enough domestic labor to make up for the additional work that their presence in the household creates.²⁵

18. For a thoughtful article that analyzes the sameness/difference split as in some sense generational, see W. Williams, *Notes From A First Generation*, 1989 U. CHI. LEGAL F. 99.

19. A. HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

20. See Miller & Garrison, *Sex Roles: The Division of Labor at Home and in the Workplace*, 8 ANN. REV. SOC. 237, 240 (1982) (“All research confirms that husbands’ contributions are modest and delimited. Wives’ employment does not produce role equity in the household.”); Barnett & Baruch, *Determinants of Fathers’ Participation in Family Work*, 49 J. MARRIAGE & FAMILY 29, 33 (1987).

21. See Baruett & Baruch, *supra* note 20, at 33; Berardo, Shelhan & Leslie, *A Residue of Tradition: Jobs, Careers, and Spouses’ Time in Housework*, 49 J. MARRIAGE & FAMILY 301, 381 (1989) (wives do 79% of housework).

22. Heath & Ciscel, *Patriarchy, Family Structure and the Exploitation of Women’s Labor*, 22 J. ECON. ISSUES 781, 787 (1988). This percentage has increased since 1969, when the figure was 13%.

23. See A. HOCHSCHILD & A. MACHUNG, *supra* note 19, at 4-10.

24. See A. SZALAI, P. CONVERSE, P. FELDHEIM, E. SCHEUCH, & P. STONE, *THE USES OF TIME: DAILY ACTIVITIES OF URBAN AND SUBURBAN POPULATIONS IN TWELVE COUNTRIES* 668, Table B (1972), *quoted in* A. HOCHSCHILD & A. MACHUNG, *supra* note 19, at 3.

25. See Heath & Ciscel, *supra* note 22, at 788. This is an overall figure, and, of course, does not describe *all* husbands.

In this context the appeal of sameness feminism has waned. The divorce revolution confirms the message of the gender wars within the household: Women are *not* the same as men. They never will be as long as they lack men's access to the gender privilege that operates in work and family life. Richer women may have access to the domestic labor of poorer women to the extent to which they want to delegate domestic tasks, but (with no exceptions in my liberal, "enlightened" circle of acquaintances) no wife has access to anything like the amount of her husband's domestic labor as her husband has to hers.²⁶ Consequently, women are indeed different. Unlike men, they have to make trade-offs that often jeopardize their access to the two major forms of adult self-development: parenthood and work success. The key drawback of sameness arguments, as "difference" feminists point out, is that they fail to challenge the structural disadvantage for women built into "male" norms.

B. *Difference*

Difference feminists point out how sameness arguments can veil the underlying structural conditions that disadvantage women. Rosalind Rosenberg's experience shows how difference feminism can have the same effect. Rosenberg has stated that she began with a sense of outrage at women's structural disadvantage in the workplace.²⁷ From there she concluded that women need special help—inaternity benefits, child care—to perform as ideal workers. To make this point, she needed a description of difference. The one she chose attributes women's difference to their choice to eschew higher-paying jobs because of their relational values.²⁸ The response was obvious: If you can't take the heat, stay out of the factory. Rosenberg ran into problems when she described women's predicament as a problem stemming from their psychological make-up.

How about our intuitive sense that women *do* make different choices with respect to work and family? Again, a story. Kathleen Gerson tells us of Vicki, whose ambition was to join the police.²⁹ But then she got married, moved around to further her husband's career, and ended up working in unstimulating, dead-end jobs. Ultimately, she had children,

26. I am talking here only about families with children. Hochschild confirms my own experience, namely, that upper-middle-class childless households vary from traditional gender patterns much more frequently than do similar households with children. A. HOCHSCHILD & A. MACHUNG, *supra* note 19, at 33-58, 95-104, 127, 142-58.

27. Interviews with Rosalind Rosenberg and Alice Kessler-Harris, *Women's History and EEOC v. Sears, Roebuck & Co.*, 18 *NEW PERSPECTIVES* 21, 28 (1986).

28. Testimony, *supra* note 11, at paras. 16-22.

29. K. GERSON, *HARD CHOICES* 18-19 (1985).

and decided that staying home was better than working, which she had come to detest.

True, Vicki eventually "chose" family over work, but that formulation masks *why*. Vicki was barred from a potentially exciting job because preference "was given" to her husband's career.³⁰ She was relegated to low-paying, low-status, and uninteresting work. Vicki's disdain for wage labor should not be romanticized and cited as evidence that she "chose" to forego work. Rather, she was blocked from potentially rewarding work by her husband's exercise of gender privilege. Her resulting decision stemmed directly from her dissatisfaction with a work life constricted by structural disadvantage. It makes no sense to cite her "choice" as evidence that no structural disadvantage exists.³¹

With this as background, let us examine more closely how Rosenberg transformed evidence of structural disadvantage into evidence of choice. She started from a straw man: The EEOC's purported assertion that the disproportionately small number of women in commission sales jobs was due *solely* to intentional discrimination.³² There were several problems with this. One was that the EEOC did not, in fact, make the assertion she attributed to it.³³ More importantly, Rosenberg's testimony implied that the EEOC should lose unless it can prove that women's disadvantaged position at Sears was caused by discrimination *alone*. Rosenberg's crucial (and no doubt unconscious) step was in accepting this very pro-defendant version of Title VII law. It set her up to argue that rigor and honesty required her to admit that Sears should win because women's disadvantage was not attributable solely to discrimination. Sears' clever formulation used women's structural disadvantage as evidence against them.

To summarize, both sameness and difference can function as arguments that veil the structural disadvantages of women in the workplace, and for the same reason: both take that disadvantage as a given. Sameness arguments do so by asking only that women be allowed to partici-

30. Note the non-blaming passive; no doubt it was a "mutual decision."

31. Gerson's fascinating study explores the variety and complexity of women's work/family decisions. The pattern Vicki illustrates is only one of several that Gerson describes. K. GERSON, *supra* note 29, at 11-22.

32. The EEOC in fact acknowledged that proportionately fewer women than men were interested in the sales jobs at issue, and controlled for sex differences by isolating the subgroup of female applicants similar to the males on a number of different background characteristics. See Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1808-09 (1990).

33. For extended considerations of women's "choices" with respect to wage labor, see Schultz, *supra* note 32; J. Williams, *Gender Wars: Selfless Mothers in the Republic of Choice*, 66 N.Y.U. L. REV. (1991) (forthcoming).

pate in the current discriminatory system in which males have access to gender privilege that women lack; difference arguments do so when they turn evidence of structural disadvantage into evidence of women's "choice."

Kennedy, like Rosenberg, uses evidence of structural disadvantage against the victims of that disadvantage, through his argument that minorities do not meet "objective" standards. The "objective" standard Kennedy focuses upon is the notion of meritocracy, expressed in the context of legal academics as "excellent grades,³⁴ selection to law review, a law review note, and high-level clerkships."³⁵ Although Kennedy acknowledges that "[r]esults indicating that a given standard disadvantages the members of one group relative to others may indicate that the standard itself needs reform," this is not a possibility that arrests his attention.³⁶ Instead, in a manner characteristic of the sameness/difference debate, he continues: "On the other hand, statistics may indicate that those who failed to satisfy the criteria in question are themselves in need of reform."³⁷ Although Kennedy does not deny the existence of discrimination, he never explores the possibility that the traditional criteria for selecting law professors are flawed. He focuses instead on "other, probably more telling, explanations" for why minority applicants fail to meet these standards, notably "structural inequalities that produce racially disparate patterns of poverty, schooling, crime, and lifestyle decisions," minorities' choice, and a "tendency to avoid intellectual engagement."³⁸ Unlike Rosenberg, Kennedy kept evidence of structural disadvantage separate from choice; like Rosenberg, he used both as part of a blame-the-victim explanation that proceeded from his strategic decision to avoid challenging the structures that produce "merit" in academics.

In the context of both race and gender, scholars drawn into the sameness/difference debate often find themselves deflected from an anal-

34. Kennedy glosses over an additional qualification: "excellent grades" at an elite school.

35. Kennedy, *supra* note 5, at 1762. Studies link class and ethnicity with attendance at elite law schools, see Pipkin, *The Effects of Social Origin in the Allocation of Law Students*, J. LEGAL EDUC. 385, 386 (1984) ("if students came from families that were neither affluent nor professional, they were 59% less likely to attend an elite law school than someone from families with both those characteristics"), and with admission to law school generally, see Erlanger, *Toward a Sociology of Law School Admissions*, 34 J. LEGAL EDUC. 374, 378 (1984) ("freshmen identifying themselves 'pre-law students' are much more likely than other freshmen to come from families with incomes of more than \$35,000 [53% of pre-law students, compared to 32% of all students]). They also suggest that non-Caucasians are disadvantaged by law schools' reliance on the LSAT. See Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86, 93 (1984).

36. For an assessment of how law school hiring standards disadvantage women, see Abrams, *Hiring Women*, 14 S. ILL. U. L.J. 487 (1990).

37. Kennedy, *supra* note 5, at 1763.

38. *Id.* at 1768-69.

ysis of how minorities and women are pervasively and systematically disadvantaged by "neutral" standards. Scholars who argue from a sameness position, as well as those who argue from difference, ultimately concede the legitimacy of such structural disadvantage by arguing that outsiders can do as well as "anyone else" if only given the chance (the sameness position), or that they should be given special treatment because they can't live up to societal standards designed without them in mind (the difference position).³⁹

Both sameness and difference advocates act at times as if the opposite strategy will inevitably backfire. In fact, both sameness and difference are equally vulnerable to being used to reinforce the status quo, and for the same reason: neither formulates a direct challenge to the structures that disadvantage outsiders. Women will remain economically marginalized until wage labor is restructured,⁴⁰ and sexually subordinated until the eroticization of dominance and submission is replaced with a healthier sexuality.⁴¹ Minorities will be subject to racism until racism is disentangled from the "legitimate" power dynamic in this country.⁴² To join our society on anything like equal terms, minorities and women must demand neither mere entry nor special accommodation. Instead, they must demand transformation.⁴³ One crucial message of *Sears* and the *Racial Critiques* debate is that both sameness and difference arguments will be used to reinforce the status quo to the extent they are not used to challenge it.⁴⁴

39. C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 37 (1987).

40. See J. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-36 (1989).

41. See C. MACKINNON, *supra* note 39, at 127-213.

42. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

43. For Catharine MacKinnon's similar critique of the sameness/difference paradigm, see C. MACKINNON, *supra* note 39, at 32. Nevertheless, a high proportion of feminists (and women in general) still think of gender in terms of sameness or difference. The following section attempts to provide a narrative that *shows* such women *how* the sameness/difference dichotomy fails to capture their experience.

44. I suspect MacKinnon overestimates the possibility of getting women to adopt a language of dominance formed in the Marxist tradition. That language can jolt women to defensiveness about their intimate relationships and life choices as often as it moves them to agree. See Abrams, *supra* note 34, at 792-98. MacKinnon's highly confrontational style can play a vital role, but it needs to be linked with a more approachable language that meets women on their own terms: on the sameness/difference territory that they feel "naturally" captures their experience of gender.

MacKinnon also underestimates the extent to which sameness and difference arguments are inevitable to the extent that women or other outsiders choose to operate within the liberal tradition. Immediate deconstruction of the male standard is often not a possibility in litigation and a wide variety of other contexts. See *infra* text accompanying notes 57-58. Consequently, we are forced to claim either sameness or difference. Indeed, this is true of MacKinnon herself. The test she has advocated (allowing special treatment of women to the extent that such treatment challenges women's traditional subordination) is in a very real sense a difference position. See, e.g., C. MACKIN-

III. A POST-MODERN REFORMULATION OF SAMENESS AND DIFFERENCE

Although both sameness and difference arguments have potential as strategies of transformation, both need to be reformulated to avoid their potential to reinforce the status quo. Let me start the process of reformulating sameness and difference with a story. I was having lunch with a friend at the faculty club of my university. At the time, he and his wife had two children under three years of age, an experience that struck both of us as miserable. Yet the more he talked, the more I felt how "male" his reaction was. I am not sure why anymore, but it had something to do with his attitudes towards work and family. Then the topic shifted to birth control; his reaction struck me as shockingly Catholic. We proceeded through the lunch line and he bantered with the cashier—and I recognized a mixture of tension and camaraderie that I attributed to the complex dynamic between privileged and working-class blacks, complicated by a sexual flirtation that I had never seen before, though I had often been through the line with white male colleagues. (There was probably more camaraderie and less tension in the reaction I saw because my friend is handsome and personable.) Then we sat down, talked about scholarship for a while and he struck me as just another upper-middle-class academic like myself.

For me, that lunch dissolved the sameness/difference debate. On the one hand, it dramatized the truth of anti-essentialism. My friend does not have "a" minority perspective, he has many different perspectives: male, Catholic, upper-middle-class black, upper-middle-class generic, upper-middle-class academic. Which one is relevant depends on the situation: what he is discussing or doing, and with whom. To reify his viewpoint as "black" (or "male") is to make a set of extremely troubling value choices by silencing all the ways in which his life is shaped by forces other than his race (or sex). Now, at some level, one can interpret every other category in terms of his race and say he reacted as a black Catholic, a black academic, etc. And sometimes I do feel that he is reacting as a black Catholic, but not always. Note that the only context in which I felt the need to use what I think of as "junction categories" was to describe his interaction with a fellow African-American of lower status.⁴⁵ This is a concrete way to illustrate my rejection of a single Afri-

NON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 100-41 (1979); C. MACKINNON, *supra* note 39, at 35-36. This analysis is spelled out in J. Williams, *supra* note 40, at 839-40.

45. Kimberlé Crenshaw calls this phenomenon "intersectionality." See Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 140.

can-American voice, much less one minority voice, because the interaction of two Hispanics or two Asian-Americans would have been unutterably different.

Yet if my analysis dramatizes the contingency of categories, and warns against reifying any one category as being always of interpretive importance, it also expresses certain value judgments about what are the most useful categories for interpreting this sequence of events. The categories that I chose do not strike me as controversial (though I am not the best judge of this; I chose them because they seemed ⁴⁶“obvious” to me). But it is useful to note that I focused on race, class, and gender—the traditional troika of American social commentary—with religion added, an overlooked but vital engine of American life. The traditional troika reflects the realities of power in American life, and thus dramatizes Foucault’s insistence on the links between knowledge and power.⁴⁶ My choice of those categories suggests a new way to interpret difference. Claims of difference simply mean that *in some contexts* gender or race may shape (or even determine) one’s outlook. This reformulation of difference, which we could call post-modern difference, avoids essentialism because it refuses to concede that race, gender—or, indeed, *any* given category—will always be determinative. It allows us to argue that, although race and gender may prove determinative *in some particular context*, this is a far cry from a reified “minority perspective” or “women’s voice” that determines how a given individual will react in every situation.

This post-modern approach starts from the notion of a fragmented and shifting self. Sometimes I feel like a white, sometimes a heterosexual, sometimes a Jew; sometimes a lawyer, sometimes an Episcopalian. Often I feel simply like my mother’s daughter. A post-modern approach to difference highlights that each person is embedded in a matrix of social and psychological factors that interact in different contexts.⁴⁷ Essentialism dissolves before the notion of a shifting, constantly reconfigured self,

46. M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS*, 1972-1977, at 109-33 (1980).

47. This theme has been movingly developed by Angela Harris, Mari Matsuda, and Patricia Williams. See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990) (“[W]e are not born with a ‘self,’ but rather are composed of a welter of partial, sometimes contradictory, or even antithetical ‘selves.’ A united identity, if such can even exist, is a product of will, not a common destiny or national birthright.”); Matsuda, *When The First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN’S RTS. L. REP.* 7 (1989); P. Williams, *Response to Mari Matsuda*, 11 *WOMEN’S RTS. L. REP.* 11 (1989). For a fascinating exploration of the theme of identity as shifting and strategic, see Minow, *Identities*, 3 *YALE J.L. & HUMANITIES* 97 (1991). Charles Taylor identifies the shift from the Enlightenment notion of a free, disengaged subject to a modernist notion of the self as partial and fragmentary. See C. TAYLOR, *SOURCES OF THE SELF* 106, 143-76, 462-63 (1989).

shaped but not determined by membership in sets of social categories that crystallize power relations in America.

A. *Reformulating Sameness*

The basic problem with sameness arguments is the claim that people who are as "obviously" different as men and women or blacks and whites are actually the same. This embarrassment is easy to solve if we stress not sameness but equal dignity. The basic claim ("I'm just as good as you!") need not entail a claim that I am the *same* as you. One only needs to say that "I will fulfill the conventional requirements for excellence in my own way—which, after all, is all anyone can ever do."

Once reformulated in this way, "sameness" entails not a claim that A and B are the same;⁴⁸ instead, it entails the assertion that the differences that exist should be irrelevant in this particular context. This approach links equality with questions of policy rather than biology.⁴⁹ Ultimately, one is left with disagreements not about who is similar to whom, but about which differences should matter in which contexts.

This approach to sameness reflects a post-modern sensitivity to the constructedness of categories. After all, no two people are truly "the same." Thus, when we call Person A the same as Person B we are constructing a category of "sameness" that ignores a whole series of differences for strategic reasons. The assertion that A and B are "the same" is not merely an assertion of *fact*. Instead, it is an argument that the characteristics that A and B share are more important for the purpose at issue than the ones they do not share.

Post-modern sameness makes it easier to see that, where women or minorities are not "the same," their failure often reflects their inability to measure up to a standard stacked against them. The "ideal worker" standard is stacked against women; elite schools' standards for law professors are stacked against those who lack access to cultural and class privileges that shape the usual path to academic "merit." This approach links sameness with power: We as outsiders are not the same because we are disinherited by our own tradition. Post-modern sameness cannot be

48. A number of feminist scholars have recently reformulated sameness in this way (including Wendy Williams, perhaps the leading "sameness" scholar among American lawyers). See, e.g., W. Williams, *supra* note 18, at 101-05; Minow, *supra* note 13, at 203 ("the myth of interchangeability or sameness"); Scott, *Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 44 (1988) ("Equality might well be defined as deliberate indifference to specified differences.").

49. Sameness/difference arguments often, but do not inevitably, occur in the context of biological differences. Race, sex, disability, ethnicity, and age are important biological differences; class, sexual orientation, and religion are important nonbiological differences. See Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

reversed for use against outsiders because it does not make misleading claims that people as "obviously" different as blacks and whites, women and men, are the same. Neither is it content to leave intact supposedly neutral standards such as that of the ideal worker. Post-modern sameness makes explicit outsiders' demand not to be disadvantaged by physical (or social) characteristics that should be irrelevant when it comes to distributing societal benefits.

B. *Reformulating Difference*

Because sameness feminism has been under siege for nearly a decade, the leading sameness advocate has reformulated sameness along post-modern lines.⁵⁰ Difference feminists have generally not done the same with difference, despite the growing anti-essentialist critique. Thus far, the leading anti-essentialists have generally focused on the fact that descriptions of women's "difference" tend to describe white women.⁵¹

Beyond critiquing existing descriptions of difference, how can we reformulate difference in ways that are true to outsiders' experience while avoiding essentialism? We begin once again with a post-modern sensitivity to the constructedness of categories. Traditional epistemology assumed the existence of a firm foundation, a "God's eye point of view," a truth not dependent upon human strivings.⁵² Non-foundationalists since the late nineteenth century have stressed the inevitability of different perspectives and different truths, starting from the axiom that things look different from different points of view.⁵³ Non-foundationalists argue that because every interpretation entails a viewpoint, no interpretation is final or objective. Different interpretations serve different purposes.

This outlook offers a way to dissolve difference in much the same way that it dissolved sameness. Post-modern sameness translated arguments about physical or cultural *similarity* into arguments about which differences are relevant in which contexts. Post-modern difference dissolves claims about *difference* into arguments about which differences should matter in which contexts. Once reformulated, difference dissolves into sameness and vice versa.

One advantage of this reformulation of sameness and difference is that it shows how one can be a sameness feminist, or a Randall Keunedy,

50. See *supra* note 48 and accompanying text.

51. See, e.g., E. SPELMAN, *INESSENTIAL WOMAN* 114-32 (1988); Harris, *supra* note 47.

52. "God's eye point of view" is Hilary Putman's term. H. PUTNAM, *THE MANY FACES OF REALISM* 70 (1987).

53. For a discussion of the history of this idea, see J. Williams, *supra* note 14, at 436-64.

and still acknowledge difference.⁵⁴ One can believe that gender or race is not the operative category in a range of contexts without claiming that gender or race is *never* determinative. This is an important point because of the widespread sense that sameness feminism has been discredited because "women and men obviously aren't the same."

A second advantage of a post-modern reformulation of sameness and difference is that it suggests that sameness advocates acknowledge differences and that difference advocates acknowledge sameness. The basic claim of post-modern sameness feminism is not that men and women (or whites and blacks) are *identical*, but that the importance of gender is at times overshadowed by race, class, personality, or any of a number of other factors.⁵⁵ This is a position with which, I suspect, most difference advocates would agree.

If sameness and difference feminists agree to this extent, are their disagreements illusory? Alas, no. Two important areas of contention remain.

1. *Disagreement Over Strategy.* One important disagreement is over strategy. Here I will limit my discussion to the feminist context, although many of the same issues arise in the context of race.

Both sameness and difference advocates advocate dismantling of facially-neutral standards that are in fact molded around the life patterns and self-image of males.⁵⁶ Yet sameness and difference advocates disagree on how to proceed if an immediate change of the male standard is unattainable. Difference advocates opt for "special treatment"; sameness advocates opt for identical treatment. Sameness advocates charge that "special treatment" reinforces women's traditional disadvantage; difference advocates charge that denying women special treatment hurts women even more. In fact, both positions reinforce women's marginalization. Special treatment reinforces the message that "real"

54. See, e.g., Kennedy, *supra* note 5, at 1816; W. Williams, *supra* note 18, at 104-05 (sameness advocates acknowledge difference).

55. Sameness feminists traditionally claim that "differences among women—differences of race, ethnic and religious heritage, class, age, values, personal style, sexualities, and experience—are the most salient differences." W. Williams, *supra* note 18, at 105. Conversely, difference feminists assume that gender is the most salient difference. Consider, for example, that Gilligan's discussions omit all reference to race and class, and describe women's outlook as if gender were the only determinative fact. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). I suggest that whether gender or some other combination of factors is the operative category of analysis (or whether the operative category is gender in combination with other factors) depends on the particular context involved. The assumption among the "sameness" feminists that gender is *never* the determinative factor seems as unconvincing as the assumption among the difference feminists that it virtually *always* is.

56. See W. Williams, *supra* note 18, at 108-10. A notable example is the ideal worker. See J. Williams, *supra* note 40, at 822.

workers do not need pregnancy benefits; only "special" (more expensive, and therefore less desirable) workers do. Equal treatment reinforces women's marginalization to the extent it silences and privatizes the costs of a standard designed to privilege men.

What I have been describing, of course, is the *California Federal* debate.⁵⁷ That decision has been widely considered a crisis for sameness feminism, because it revealed that women were "really" different. In fact, it showed the deep split among feminists about what to do when they are forced to settle (as they often must) for half a loaf. I strongly suspect that the sameness and difference proponents could have agreed that the *optimal* solution entailed redefining the ideal worker as one who shoulders simultaneous parental and job responsibilities. The disagreement emerged because that solution was perceived as unattainable. In that context sameness proponents argued that employers, to meet the requirements of the law, had to offer disability benefits (including, but not limited to, maternity leaves) for both men and women. In effect, they argued that a change in a "male" standard was the only acceptable solution. Presumably, difference advocates disagreed because they felt that the courts were too likely to treat women "the same" not by giving disability benefits to *both* men and women, but by giving them to *neither* (thereby leaving women without maternity leaves).⁵⁸

Which position is more persuasive? This is a thorny issue. But it is a very different issue than deciding whether men and women are "really" alike or "really" different. Dissolving the difference debate allows us to focus on issues of strategy instead of on fruitless discussions about the essential nature of outsiders.

2. *Disagreement Over Descriptions of Difference.* Although sameness and difference advocates agree on the existence of differences be-

57. *California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). *California Federal* is the topic of an immense amount of literature. The two most famous examples are probably Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) (women should be treated differently than men), and W. Williams, *Equality Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (women should *not* be treated differently than men).

58. The "difference" brief argued that maternity leaves should be required for women under the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k) (1988), even if disability benefits were unavailable for men. Brief Amici Curiae of Coalition for Reproductive Equality in the Workplace, *California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987) (No. 85-494). The "sameness" brief argued that maternity leaves could not be treated as a special case. Instead, it argued that the only way employers could meet the requirements of both the PDA and California state law was to offer disability leave to all workers for conditions including, but not limited to, pregnancy. Brief Amici Curiae for National Organization for Women, *California Federal* (No. 85-494).

tween African- and European-Americans, and also between men and women, disagreement exists over what those differences entail. In this section, I critique one description of difference (relational feminism), and argue in favor of the descriptions of difference by outsider-scholars and feminist narrative scholars.⁵⁹ In the process, I challenge the widely-held assumption of close parallels between outsider scholarship and relational feminism.

a. Relational feminism. Carol Gilligan describes men and women as a matched set of mutually exclusive characteristics.⁶⁰ The essentialism of her work stems from this description. Gilligan argues that men are more focused on a hierarchy of abstract rights (the "ladder"), whereas women tend to make contextualized arguments premised on the importance of relationships (the "web"). Men, she asserts, view maturity as involving separation and view intimacy as threatening; women view maturity in terms of connection and responsibility and view separation as the failure of their ethic of care.⁶¹

Gilligan's description reflects a tradition of gender ideology in which men are associated with characteristics celebrated in the liberal tradition. Gilligan starts from the work of Lawrence Kohlberg, which identifies the "reflective understanding of human rights" as the highest stage of human moral development.⁶² Gilligan continues this association of men with liberalism when she contrasts women's morality with a "morality of rights and noninterference" that celebrates "separation, autonomy, individuation and natural rights" and equates "maturity with personal autonomy."⁶³ These words reflect the liberal image of society as a set of free-standing individuals who produce the greater good by pursuing their own self-interest. What the liberal tradition celebrates as the legitimate pursuit of self-interest, however, Gilligan considers merely selfish. "You go about one-fourth to the others and three-fourths to yourself," says Jake, Gilligan's paradigm male.⁶⁴

59. Note that these categories are somewhat artificial. For example, Patricia Williams is an outsider-scholar who writes feminist narratives. See P. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) [hereinafter P. Williams, *Alchemical Notes*]; P. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) [hereinafter P. Williams, *The Obliging Shell*].

60. C. GILLIGAN, *supra* note 55, at 160.

61. *Id.*

62. *Id.* at 19; see also *id.* at 72-73 (describing the highest level of moral development, what Kohlberg calls "postconventional," as when people embrace a "reflexive perspective on societal values").

63. *Id.* at 17.

64. *Id.* at 35.

In contrast to autonomous and self-interested males, Gilligan depicts women as selfless, compassionate, and caring. Her informants rely heavily on the theme of selflessness. "[T]he moral equation of goodness with self-sacrifice," she notes, "is one of the conventions of femininity."⁶⁵ One informant described "[t]he moral person [as] one who helps others; goodness is service, meeting one's obligations and responsibilities to others, if possible without sacrificing oneself."⁶⁶ Her subjects often refer to the influence of their mothers: "endlessly giving";⁶⁷ "selfless";⁶⁸ "her mother's example of hard work, patience, and self-sacrifice."⁶⁹ This focus on selflessness shows the influence of the "moral mother" of Victorian gender ideology.⁷⁰ Domestic ideology defined motherhood as the central and defining female role,⁷¹ and linked motherhood with selflessness. By "living for others," women achieved the purity that allowed them to establish moral reference points for their families and for society.⁷²

Relational feminists use the different voice to express caring and communal values in counterpoint with the individualistic, self-interested focus of liberalism. In so doing, they mobilize a gendered critique of possessive individualism integral to domesticity since its inception.⁷³ Nancy Cott has called domesticity a "cri-de-coeur against modern work relations";⁷⁴ I have called it a Marxism that you can bring home to mother.⁷⁵ Domesticity from the beginning has linked gender ideology to political discourse, and has offered a native American language to critique the ceaseless pursuit of self-interest in "that bank note world."⁷⁶ Gilligan's modern relational feminists carry on a long tradition stretch-

65. *Id.* at 87.

66. *Id.* at 65-66.

67. *Id.* at 54.

68. *Id.* at 136.

69. *Id.* at 93.

70. Bloch, *American Feminine Ideals in Transition: The Rise of the Moral Mother, 1795-1815*, 4 FEMINIST STUD. 101, 191 (1978).

71. *Id.*

72. *Id.*

73. See N. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977).

74. N. COTT, *supra* note 73, at 70.

75. J. Williams, *supra* note 40, at 820.

76. N. COTT, *supra* note 73, at 68.

ing back to Frances Willard and Jane Addams⁷⁷ when they launch critiques of mainstream institutions in the name of women's voice.⁷⁸

This native language of critique presents two interlocking problems. One is its essentialism.⁷⁹ Its description of men and women assumes that gender alone determines the way men and women feel about a very broad sweep of issues.⁸⁰ The second problem is that its tracking of traditional stereotypes operates to marginalize women: the *Sears* case is a dramatic example. By linking rejection of mainstream values of competition and self-interest with a description of women's personality, Gilligan's modern reformulation of domesticity opened the way to the argument that women at Sears were too "different" to succeed in the competitive, "bank note world" of commission sales.⁸¹ The *Sears* case is important because it dramatized how relational feminism failed to change existing stereotypes enough to avoid the traditional pitfalls of domesticity.

b. Outsiders' different perspective. Both Randall Kennedy and the outsider-scholars he critiques have noted the parallels between relational feminists and what Kennedy calls the "racial distinctiveness thesis."⁸² At one level, indeed, the parallels are striking. Each group posits a "different perspective" or "different voice," and both use that difference to launch critique.

The parallels between the two literatures seem most pronounced when Kennedy focuses on Mari Matsuda's *Looking to the Bottom: Criti-*

77. Notable nineteenth-century examples of reformers who used the language of domesticity are Frances Willard (of the Women's Christian Temperance Union), see B. EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA* 136-37 (1981), and Jane Addams, see N. WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE* 253-69 (1984). For an accessible discussion of female reformers who have used the language of domesticity, see F. GINSBURG, *CONTESTED LIVES* 227-47 (1989).

78. See, e.g., K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984); Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741 (1988); Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987); Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Menkel-Meadow, *Portia in a Different Voice: Speculations on Women's Lawyering Process*, 1 BERKLEY WOMEN'S L.J. 39 (1985).

79. The best-known critiques of essentialism in feminist theory include E. SPELMAN, *supra* note 51, and Harris, *supra* note 47; see also Hewitt, *Beyond the Search for Sisterhood: American Women's History in the 1980's*, 10 SOC. HIST. 299 (1988) (influential early anti-essentialist critique by historian of women).

80. For example, Carol Gilligan described the outlook of her informants with the sense that neither their race, class, or other characteristics mattered. They spoke with women's voice because they were women; gender apparently determined their outlook. See C. GILLIGAN, *supra* note 55, at 2.

81. For a fuller development of this argument, see J. Williams, *supra* note 40, at 813-21.

82. Kennedy, *supra* note 5, at 1746.

*cal Legal Studies and Reparations*⁸³ in his consideration of the racial distinctiveness thesis. Matsuda argues that "those who have experienced discrimination speak with a special voice to which we should listen."⁸⁴ She claims not only that outsiders have a distinct perspective, but that "victims of racial oppression have distinct normative insights. . . . Those who are oppressed in the present world can speak most eloquently of a better one."⁸⁵ She argues that critical legal scholars should turn to minority perspectives to ground normative principles in a world without absolutes.

Matsuda's article states that she does "not intend to speak for the minority community,"⁸⁶ and notes the risks entailed in "writing about the experiences of other races in ways that may not ring true for some members of that race."⁸⁷ Yet these qualifications, some of which appear only in footnotes, belie the sweeping nature of her claims.⁸⁸ Ultimately, like relational feminists, Matsuda veers into essentialism as a means of establishing her credentials to offer virtue to a fallen world.

Just as Gilligan ignores class and race divisions, and so implicitly argues that gender is what "essentially" defines a person's outlook, Matsuda ignores class and gender, and implicitly argues that race defines a person's perspective. "A minority perspective cuts across class lines. . . . [T]here is something about color that doesn't wash off as easily as class."⁸⁹

Kennedy's critique of Matsuda's essentialism is an important contribution. Kennedy joins anti-essentialist critics such as Elizabeth Spelman,⁹⁰ Martha Minow,⁹¹ Angela Harris,⁹² and myself⁹³ who have criticized essentialist claims. Not only does Kennedy extend these claims

83. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

84. *Id.* at 324.

85. *Id.* at 326, 346. Compare what Katharine Bartlett calls "standpoint epistemology." See Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 873 (1990).

86. Matsuda, *supra* note 83, at 331.

87. *Id.* at 331-32.

88. Matsuda has recently protested against critics who, she charges, "created an essentialist voice where there is none." Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1775 n.46 (1990). As the text notes, I think the essentialism problem was there in *Looking to the Bottom*, *supra* note 83, though Matsuda's later work strives to avoid essentialism.

89. Matsuda, *supra* note 83, at 361.

90. See E. SPELMAN, *supra* note 51.

91. See, e.g., Minow, *Feminist Reasoning: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

92. See Harris, *supra* note 47.

93. See J. Williams, *supra* note 40.

from the feminist to the racial context, he also formulates the anti-essentialist critique in a new and insightful way.

In the feminist context, perhaps the key thrust of anti-essentialism is to remind feminists of the existence of *race*. Thus, Spelman and Minow explore how the search for sisterhood has privileged the voice of white women.⁹⁴ Harris,⁹⁵ as well as Kimberlé Crenshaw⁹⁶ and Judy Scales-Trent,⁹⁷ have explored how claims to speak for "women" overlook the experience of women of color.

The importance of race in American life is so obvious that it has proved to be an important heuristic for feminists. For Kennedy, no such heuristic exists, which leads him to formulate the anti-essentialist critique in different, more abstract terms. His central point is that one's "perspective" does not flow inevitably from minority status.⁹⁸ Instead, the determinative factor is how one chooses to interpret one's experience.⁹⁹ Kennedy documents the richly varied responses of minorities to American life, and stresses that the deep commitment of a Frederick Douglass or a Harriet Tubman was not compelled by skin color or social experience; it was, rather, the product of personal courage based on one interpretation of the moral significance of race in American society.¹⁰⁰

Kennedy's insight is a major contribution to the ongoing anti-essentialist critique. Yet the strength of Kennedy's critique of outsider-scholarship is limited by his virtually exclusive focus on Matsuda's *Looking to the Bottom*. In fact, the bulk of outsider-scholars' work (including later work by Matsuda herself) differs from Matsuda's initial article in both tone and content.¹⁰¹ As a result, most outsider-scholarship is not marred by the essentialism that characterizes both relational feminism and Matsuda's early work. In fact, outsider-scholars' work differs from that of relational feminists in two significant ways.

94. See E. SPELMAN, *supra* note 51, at 3-5; Minow, *supra* note 91, at 49-51. Both Spelman and Minow note the importance of factors other than race and sex. See E. SPELMAN, *supra* note 51, at 80-113; Minow, *supra* note 91, at 47. Spelman in particular, however, focuses on race.

95. See Harris, *supra* note 47.

96. See Crenshaw, *supra* note 45.

97. Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

98. See Kennedy, *supra* note 5, at 1799-801.

99. See J. Williams, *supra* note 40, at 800 (challenging Robin West's claim that women identify with "connection" because of birthing and other biological experiences: "[I]sn't [West's thesis] true only if [all women] interpret the biological experiences West discusses in the same way she does?").

100. See Kennedy, *supra* note 5, at 1800.

101. See Matsuda, *supra* note 47. I am not sure how much access Kennedy had to Matsuda's later work before *Racial Critiques* was published. For example, Matsuda's least essentialist work was published the same year as Kennedy's article. See Matsuda, *supra* note 47; Kennedy, *supra* note 5.

First, at the simplest level, it is worth noting what outsider-scholars do not do. They do not seek to resuscitate existing cultural stereotypes, as do relational feminists. This is hardly surprising: The traditional stereotypes of African-Americans are so unambiguously insulting that they hold little conceivable attraction.¹⁰² Although this is an important distinction between outsider-scholars and relational feminists, the second difference goes even deeper. Unlike relational feminists, outsider-scholars do not generally posit a comprehensive set of perfectly-matched differences that parallel different political traditions. Instead, the bulk of their work explores in conscientious detail the ways that the experience of discrimination has shaped the outlook of its victims. One major thrust of their work is to explore why African-Americans have a deep emotional and strategic commitment to rights talk (while such talk seems stifling, indeed pernicious, to the white critical scholars working within the tradition of radical discourse).¹⁰³ Another is to communicate the outsiders' sense that civil rights gains occur only when they present no threat to the status of whites.¹⁰⁴ Finally, outsider-scholarship challenges the neo-conservative claim that affirmative action is no longer necessary because America (except for a few anomalous individuals) has become a color-blind society.¹⁰⁵ This is one major context in which outsider-schol-

102. Nonetheless, Kennedy fears that the "racial distinctiveness thesis" will resuscitate "archaic racial categories" by reasserting "the essentiality and virtue of a color line in the realm of legal academic thought." Kennedy, *supra* note 5, at 1803-04. Implicit in Kennedy's insistence on rigor and scientism may be a fear that outsider-scholars' explorations of fiction and personal narratives will reinforce the stereotype that blacks are good at art, but deficient in the kind of rigorous analytical thinking that our society takes most seriously.

Note that this "good at emotions, not good at rational thought" charge has traditionally been leveled at both blacks and women. For a discussion of the linkage between the development of scientific norms and seventeenth-century male gender ideology, see E. KELLER, REFLECTIONS ON GENDER AND SCIENCE 43-65 (1985).

103. For one of the earliest, and best, explorations of these themes, see *Alchemical Notes*, *supra* note 59. See also R. Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 LAW & INEQUALITY 103 (1987) (discussing the increasing tension between the attacks by CLS on rights theory and the political goals of people of color).

104. See, e.g., Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 17 (1979) (arguing that the *Bakke* decision furthers the interest of the white majority as much as it benefits minorities); Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579 (statistical analysis reveals that the promise of equality is not being fulfilled).

105. See, e.g., Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 11-12 (1985) (attacking the complacency of the Supreme Court and challenging the Court to address all racial discrimination, whether overt or covert); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) (maintaining that the discriminatory purpose standard does not adequately address unconscious racism); Matsuda, *Racist Speech*, *supra* note 10, at 2325 (arguing that only a focus on the effects of racist speech can provide an answer to eliminating it).

ars have told stories, which are a direct and effective way to support the claim that discrimination persists.

Outsiders' stories also serve to dramatize how experiences of discrimination anger and humiliate, with corrosive psychic effects; how discrimination is a form of "spirit-murder."¹⁰⁶ This scholarship tries to communicate the scope and urgency of the damage caused by racial animus, often in connection with demands for remedies far more vigorous than virtually anyone before them had seriously advocated (notably reparations and bans on racial hate speech.)¹⁰⁷ Outsider-scholars also have examined specific cases¹⁰⁸ or incidents¹⁰⁹ in which a person of color's reaction diverged from that expressed in the mainstream. These studies examine how the world looks from the perspective of black subcultures with distinctive attitudes toward unwed motherhood, law enforcement, and big-city politics.

We can distinguish in outsider-scholarship two quite distinct sorts of claims. One is that minorities' personal experience of discrimination yields a different perspective on rights talk, civil rights law, and other law that addresses issues of discrimination. Kennedy challenges this claim by redefining discrimination law as "race-relations law,"¹¹⁰ which implies that the law involves a dialogue between two groups about their relationship. Although I understand some of Kennedy's motivations, this move strikes me as unhelpful. Is Kennedy really claiming that minorities' experience of discrimination does not yield a different kind of knowledge about the impact and incidence of discrimination than the kind of knowledge a white person has?¹¹¹ If so, I disagree, because I know that to

106. P. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) [hereinafter P. Williams, *Spirit-Murdering*]; Matsuda, *Racist Speech*, *supra* note 10, at 2335-41; see also P. Williams, *On Being the Object of Property*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 5 (1988) (an autobiographical account of life as a black woman); P. Williams, *supra* note 47; P. Williams, *The Obliging Shell*, *supra* note 59, at 2132-37 (illustrating that racism persists, albeit in subtler forms).

107. See, e.g., Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Matsuda, *supra* note 83, at 373-99; Matsuda, *Racist Speech*, *supra* note 10, at 2361-74.

108. See Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539, 549-76.

109. See P. Williams, *Spirit-Murdering*, *supra* note 106, at 130-39; P. Williams, *Alchemical Notes*, *supra* note 59, at 406-08.

110. Kennedy, *supra* note 5, at 1777.

111. I think he is not. "I do not maintain that no appreciable differences exist in the prevailing opinions and sensibilities of various racial groups." *Id.* at 1816 (citing poll reporting that blacks and whites are "worlds apart" in their perception of race relations). Surely this difference in perspective leads to a different relationship to discrimination law. Although blacks have a unique perspective on discrimination law, Kennedy is right to stress that whites do as well. After all, race relations is a key moral problem for white America, and has been for over a century.

I sense that Kennedy's defense of whites' involvement in discrimination law reflects his response to the incident at Harvard Law School in which minority students objected to Harvard's invitation

describe to even a sympathetic man the operation of gender privilege at home and work requires such constant reinterpretation of the "obvious" as to make oneself an utter bore. Outsider-scholars convince me the same is true of being African-, Asian-, Native, or other-American. Those who experience the "victim perspective"¹¹² as part of their everyday life have a peculiar perspective and are entitled to ask society at large to listen.

Nor does Kennedy's rejection of this argument seem necessary to avoid essentialism. Outsider-scholars do not argue (as relational feminists often seem to do) that the "different perspective" yields an "outsider answer" on virtually any topic. Their claim is much more limited. They claim that blacks react *as blacks* when they see themselves being discriminated against *because they are black*. This proposition does not require a claim that race washes out less easily than class; only that one does not react as a Yale when someone taunts you as a nigger.

Scholarship limited in this way presents few problems of essentialism. Essentialist descriptions of difference assume uniform characteristics within the "different" group, and are thus vulnerable to the response that it is no wonder that outsiders can't meet our standards, given that they are so different. Outsider-scholars avoid this because the scope of commonality they posit is much narrower than that posited by relational feminists. Outsider-scholars claim for minorities a special insight into the dynamics and the effects of discrimination; relational feminists claim for women a critique of mainstream institutions that many women do not share.

Yet this is not the end of the issue, for what I have thus far presented as a clear-cut dichotomy actually involves more of a contin-

to Jack Greenberg (who is white) of the NAACP Legal Defense Fund to teach discrimination law. See Kennedy, *supra* note 5, at 1756-58. Was that fight, though, about whether minority scholars should have "proprietary claims over the study of race relations?" *Id.* at 1759. I would suggest it stemmed instead from the affront minority students felt in the face of Harvard's implicit decision that no black was as qualified to teach discrimination law as was Jack Greenberg. In addition, I suspect, Harvard students were outraged, particularly in view of the law school's very visible lack of commitment to hiring minority scholars, that a white scholar was hired to teach *discrimination* law, of all subjects. The message that blacks' experience of discrimination is not an important value—not even in a course about discrimination—could not have been more clear. Having been told in 1977—with no self-consciousness whatsoever—that Harvard had only two women law professors because no others were qualified ("not one in the whole country?," I asked), I can fully understand the strong emotions elicited by the "none are available" argument at Harvard Law School. See generally Flint, *Bell at Harvard: A Unique Activism*, Boston Globe, May 7, 1990, Metro/Region, at 1; Flint, *Jackson Offers to Mediate Harvard Dispute*, Boston Globe, May 3, 1990, Metro/Region, at 27.

112. The term is Alan Freeman's. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96, 98 (D. Kairys ed. 1982). I stress that victims are entitled to insist on others' attention not because they can offer virtue to a fallen world, but because they are experts on their own lives. Cf. Matsuda, *supra* note 83, at 326, 346.

uum. For (albeit less commonly than do relational feminists) outsider-scholars do at times discuss issues that do not involve discrimination directly. Some of these, such as Patricia Williams' discussion of the incident in which New York City police officers killed a sixty-seven year-old black woman in the course of evicting her from her apartment, involve discrimination just below the surface.¹¹³ But to reduce others to discrimination clouds an important issue. In Regina Austin's discussion of the *Chambers* case,¹¹⁴ in which a white-dominated charity fired an African-American arts and crafts instructor when she decided to become a single mother, Austin *is* arguing that the charity's action was discriminatory,¹¹⁵ but (as I read her) Austin's deeper message is that we need to work hard to understand what makes sense within the framework of life choices available to African-American women of modest circumstances in this country.¹¹⁶ Their world looks very different, she seems to be arguing, because of a whole series of race, class, and gender disadvantages that affect more than their experience of discrimination. They affect the pattern of their lives at a more basic level—how they decide when to have children, the names they choose, even their decisions about when and whether to buy life insurance.

This brings us back to Matsuda's point that all minorities do not share a single "different perspective." It also brings us back to the fact that women in this society differ from men in patterned ways. In the following section, I examine a strand of feminist thought that parallels the work of outsider-scholars much more closely than does relational feminism.

C. *Feminist Narratives*

Feminists have long argued that the personal is political. Current trends in legal scholarship also allow feminists to articulate the view that women's experience is so thoroughly silenced by dominant forms of discourse that de-privileged genres, such as personal narrative, may be necessary to enable women to communicate what they see as basic realities. From among the many examples of feminist narrative available,¹¹⁷ I will

113. See P. Williams, *Spirit-Murdering*, *supra* note 106, at 130-36.

114. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

115. See Austin, *supra* note 108, at 549-76.

116. *Id.* at 546; see also Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 518 (1983) (illustrating how insurance company classifications based on sex and race contribute to social stratification).

117. See, e.g. P. Williams, *Spirit-Murdering*, *supra* note 106, at 128 (relating her own experience of being denied entry into a store); Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (describing her personal experience as a victim of rape); AALS 1990 Annual Conference (Plenary Session on Outsider Per-

focus on the work of Marie Ashe, whose work highlights the parallels between feminist narrative and outsider-scholars, as well as the differences between the outsider-scholars and relational feminists.¹¹⁸

Ashe's *Zig-zag Stitching and the Seamless Web* intertwines discussion of a broad range of cases concerning reproduction with narratives of her own five live births and three abortions.¹¹⁹ Having undergone three pregnancies in the past six years, my reaction was deep and personal. In many ways, my reactions to pregnancy and birth differed markedly from Ashe's. Yet Ashe's achievement is to bring into law reviews the conversational aura of the obstetrician's office, the maternity hospital, and the birthing table. That done, she points out how little of that aura filters into courtrooms and cases in which the principal professional actors are often male—and, if not male, perhaps constrained (as Ashe is not) by the felt incongruity at bringing the realities of pregnancy, birth, and miscarriage into the law. We see Ashe standing in her kitchen in the middle of a miscarriage. She notes: "*Purple as sun-done plums, your fine remains. . . . I have learned through miscarriage the bloodiness of abortion—spontaneous or induced. Every abortion involves violence and bloodiness.*"¹²⁰

Is this woman's experience in the raw? No. As post-modern thought reminds us, we cannot think without using categories for thinking, and many of the categories Ashe uses to conceptualize her experience stem from the stereotype of womanhood that pre-dated domesticity, which associated women with sexuality, power, and danger. (A familiar surviving expression of this stereotype is the witch.)¹²¹

Yet for all that, Ashe's approach to difference avoids many of the pitfalls of relational feminism; her descriptions of difference ultimately resemble those of outsider-scholars. Like them, she avoids setting up matched pairs of stereotypical images that separate the mainstream from her "different" group. Like them, she focuses on contexts in which she clearly *is* defined by her outsider status: pregnancy, childbirth, fetal death. And, like outsider-scholars most of the time, Ashe meticulously

spectives); 21st Annual Women and the Law Conference (Panel Discussion on Feminist Narratives). I would like to thank Kathryn Abrams for bringing some of this literature to my attention, and both her and Martha Mahoney for sharing their articles with me before publication.

118. Because of its explicit reliance on narrative, I focus on Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) [hereinafter Ashe, *Zig-Zag Stitching*]. See also Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 N. ENG. L. REV. 521 (1988) [hereinafter Ashe, *Law-Language*].

119. Two of her abortions were spontaneous, one induced. See Ashe, *Zig-Zag Stitching*, *supra* note 118, at 376.

120. *Id.* at 379.

121. For a discussion of this stereotype in the law review literature, see J. Williams, *supra* note 40, at 804-05.

avoids overstatements about the scope of commonality she posits among women. (She is careful, for example, to note the wide divergence in women's reactions to their own abortions.)¹²²

Ashe's work and that of outsider-scholars suggest ways that we can begin to explore difference without falling into old stereotypes or essentialist thinking. One key is to remain thoughtful about the threshold issue of what is the relevant category of analysis in a given situation. Another is to be wary that our descriptions of difference do not posit commonality of too sweeping a scope. A third is to ask especially searching questions when we see descriptions of difference resonant of the traditional stereotypes of the moral mother or the witch, the mammy or the jezebel.¹²³

Descriptions of difference must pay close attention to context and to ideology. That should not be hard for feminists or fellow-riders, because challenge to stereotype is what feminism is all about, and contextualization is a key feminist methodology.

IV. CONCLUSION

A post-modern approach to the debate ultimately dissolves the traditional dichotomy between sameness and difference. Sameness claims are best viewed as policy arguments about which categories applicable to a given individual ought to matter in a specific context. This revamping of the sameness argument makes it easier to link assertions about sameness with the need for transformation. If I cannot be "the same" in a context in which equality depends on sameness, this means that the "neutral" standard that I cannot live up to is not, in fact, neutral.

Post-modern difference also begins from the notion that a myriad of possible categories are applicable to any individual. Assertions about difference are arguments that a given category—sex, race, class, etc.—is likely to yield powerful interpretive results in a particular context. The categories that crystallize power relations in America (race, sex, class) will often prove indispensable to analysis of sameness. This is not to say, though, that any category will always prove important, or even relevant.

122. Ashe, *Zig-Zag Stitching*, *supra* note 118, at 371-79; *see also* Ashe, *Law-Language*, *supra* note 118, at 546. Despite Ashe's careful qualifications, I sometimes question whether she is sensitive to the fact that her viewpoint reflects that she—far more, I suspect, than many contemporary American women—has chosen to make the experiences of pregnancy and birthing central to her adult identity (not only has she experienced eight pregnancies, she also writes extensively about maternity).

123. *See* D. WHITE, *AR'N'T I WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 27-61 (1985).

Women do not *always* react as women; sometimes they react as Democrats, lesbians, bigots, or blacks. This formulation of difference shows that any assertion of a unified outlook entails an interpretive decision to reify gender, or race, or some other characteristic, to assert that the particular characteristic *always* overrides all other possible characteristics in importance. Without a biological link to render such an interpretive decision "objective," this approach will normally prove repressive of the complex and changing forces that shape individuals.

This analysis helps us to understand that sameness and difference are not arguments about the essential nature of human beings. Instead, they are questions that stem from the fact that "neutral" standards systematically disadvantage outsiders: The "ideal worker" standard disadvantages women; conventional notions of merit disadvantage African-Americans; and both institutions and physical structures disadvantage the disabled.

If we insist on changing these standards, the need for outsiders to claim sameness or difference will disappear. Once the standard is designed with them in mind, they will simply meet it. Unfortunately, this solution is tidy in theory but difficult in practice, as Martha Minow's work has explored in such eloquence and depth.¹²⁴ Until we can teach the whole class sign-language, the difference dilemma will persist.

Although we will not soon escape the difference dilemma, we can try to avoid diverting our energy into arguments amongst ourselves over whether outsiders are "really" the same or "really" different. Reformulating sameness and difference along post-modern lines largely dissolves the divergence between these two positions. Such reformulations can help refocus our attention onto two topics of abiding concern. The first is how to describe differences between outsiders and the mainstream in ways that do not reinforce stereotypes. The second is to forge working agreements on the most effective strategies to pursue in the face of the supposedly "neutral" standards of a tradition that disinherits us.¹²⁵

124. See M. MINOW, *supra* note 13.

125. See P. Williams, *On Being the Object of Property*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 5, 6 (1988).