The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond

Jane Wong
THE ANTI-ESSENTIALISM v. ESSENTIALISM DEBATE IN FEMINIST LEGAL THEORY: THE DEBATE AND BEYOND

JANE WONG*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 274
   A. Goals of the Study ........................... 274
   B. Definition of Concepts ...................... 274
      1. Definition of Essentialism ................. 274
      2. Definition of Law Reform ................... 275
   C. Scope and Methodology of the Study .......... 276

II. FEMINIST LAW REFORM THEORIES IN THE 1980s .......... 277
   A. Robin West: Reconstructive Feminist
      Jurisprudence ................................ 277
   B. Catharine MacKinnon: The Man's Foot Is on
      Her Throat .................................... 279

III. THE PROBLEMS OF BEING ESSENTIAL ................. 280
   A. Problems with Essentialism: An Example ..... 281
   B. "theory" without "Theory" ..................... 281
   C. Deconstruction ................................ 282
   D. Multiple Consciousness ......................... 284
   E. Lesbian Legal Theory versus Feminist Legal Theory 285

IV. PROBLEMS WITH ANTI-ESSENTIALISM ............. 287
   A. A Critique of Drucilla Cornell .............. 287
   B. A Critique of Angela Harris ................. 288
   C. A Critique of Patricia Cain .................. 289

V. THE IMPLICATIONS OF THE ESSENTIALISM DEBATE .... 291
   A. Value of Studying the Debate ............... 291
   B. Is Essentialism Avoidable? ................... 292

VI. CONCLUSION: BEYOND THE ESSENTIALISM DEBATE ... 292

* B.A., Sociology, University of California at Berkeley, 1993; B.A., Law, University of
Cambridge, 1998. Currently training to be admitted as a solicitor in England and Wales. The
author would like to thank Dr. Matthew Kramer and Dr. Frances Olsen for commenting on
earlier drafts of the article.
I. INTRODUCTION

A. Goals of the Study

Christine Littleton asserts that the "underlying pragmatism of feminist jurisprudence develops from the requirements of good feminist methodology and theory. . . . [T]heory that does not work in practice is bad theory."\(^1\) If she is correct, then, to change our institutions, it is necessary to study effective ways to reform the law. In that endeavor, it is helpful to begin by studying how feminist legal theorists formulate their reform proposals.

In recent years, the debate over essentialism\(^2\) has become "a central problem in contemporary feminist theory . . . ."\(^3\) Because one can regard feminist legal theory as a sub-category of feminist theory, this debate can have an impact on feminist legal theory as well. By analyzing the anti-essentialism v. essentialism debate and its implications, this article will try to investigate the approaches that contemporary feminist legal theorists propose for law reform, whether these approaches can guide future research, and if so, in what sense. Of course, law reform is ultimately an empirical matter, the implementation of which can be affected by factors such as judicial decisions and the political nature of the legislature. Nevertheless, by studying law reform proposals under feminist legal theory, we can begin to identify many of the issues involved in formulating new law reform programs.

B. Definition of Concepts

1. Definition of Essentialism

Essentialism has been defined as: "the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type."\(^4\) To define a thing is to express its essence in words. Thus, definition involves two steps:
first, distinguishing the object from other objects by referring to certain parts of its characterization in order to capture its intuitive essence, and second, characterizing the object within a single concept so as to permit the definition to move to a discursive understanding. The result is that the characteristics used to define a thing are thought to inhere in its very essence and, thus, to be unchangeable.

The precise meaning of essentialism in feminist legal theory has not been fixed. It can, for example, be biologically based, in that “woman’s” essence is assumed to be given and universal, as a result of biology and natural characteristics. Alternatively, her essence can be seen as originating from psychological characteristics, such as nurturance, empathy, or supportiveness. Either way, essentialism assumes that all women share the same inherent characteristics. Naturally, anti-essentialists oppose such an assumption.

For instance, Drucilla Cornell argues that Robin West is an essentialist because she “maps the feminine onto femaleness,” meaning that West maintains that “women share a common biological structure which affects [their] psychic identity.” Anti-essentialists, then, challenge the use of fixed characteristics, such as biology and psychology, in defining women because they “limit the possibilities of change and thus of social reorganization.”

2. Definition of Law Reform

This article refers to “law reform” as an effort to change existing patriarchal law and to empower women and improve their position. Such efforts include providing women with the same status, opportunities, and legal rights as men, the right to reproduc-

5. See id. at 65.
7. See id.
8. See id.
9. See id.
10. See Daniel R. Ortiz, Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity, 79 VA. L. REV. 1833, 1848 (1993) (“Essentialists [in the feminist context] are those who ascribe certain qualities to all women, qualities that antiessentialists contest as to some women. The nub of their disagreement concerns the universalizability of particular descriptions across the category of all women.”).
12. Grosz, supra note 6, at 334.
tive health care, and the right to be free from gender-based violence.\textsuperscript{13}

Most, if not all, feminist legal theories carry a commitment to reform. Gary Lawson suggests that feminist legal theories can be divided into five categories: (1) studies of the relationship between women and the law; (2) scholarship that focuses on women alone; (3) distinctive analytic methods that apply theories of rational choice to legal problems; (4) ideas concerned with improving the condition or status of women; and (5) work on specific policy issues that reaches a particular set of normative conclusions.\textsuperscript{14} While all five of these categories arguably carry a commitment to law reform, the fourth one is most clearly in line with my definition of law reform. The theories of Robin West, Catharine MacKinnon, Deborah Rhode, Drucilla Cornell, Angela Harris, and Patricia Cain belong to the fourth category, and, for that reason, will be analyzed in this article.

C. Scope and Methodology of the Study

This study focuses on the influence of feminist legal theories that have shaped substantive laws and jurisprudence in developed countries. Although most of the available literature on essentialism and anti-essentialism in feminist legal theories comes from the United States, a discussion of other authors' works from other jurisdictions will be introduced whenever applicable.

This study begins by setting out the feminist law reform theories proposed in the 1980s by Catharine MacKinnon and Robin West,\textsuperscript{15} before discussing the anti-essentialist critiques of their work in Part III. Part IV examines the major pitfalls in the thinking of the anti-essentialists.

Part V questions whether there is any point in studying the essentialism debate at all and responds that by studying such a debate, we can, at the very least, question the validity of traditional feminist legal theories. Furthermore, instead of continuously generating criticisms about essentialism and anti-essentialism, efforts to reform the law for women should concentrate on studying

\textsuperscript{13} These are the goals established at the International Conference on Population and Development which was held in Cairo in 1994. See The United Nations Reports: The World's Women 1970-90, in SOURCEBOOK, supra note 1, at 3, 12.


\textsuperscript{15} The scope of this article is confined to the study of feminist legal theories. Therefore, I will not discuss the works of feminists in nonlegal fields who have also been criticized for being essentialist.
alternatives to this dichotomy. Because an anti-essentialist critique can be seen as essentialist itself, essentialism seems to be unavoidable. It is necessary, therefore, for alternative approaches to focus on how to avoid the problems of essentialism, the largest of which is privileging a particular group of "woman." At this point in time, the best way to achieve this goal is to define the category of "woman" as expansively as possible.

With this effort in mind, Part VI presents a number of alternative approaches proposed by contemporary feminist legal theorists. The limited research that has been conducted does not allow for a judgment as to which approach is more superior in addressing the problems of essentialism. Nevertheless, future research should focus on identifying the potential problems, uncovering and developing alternative approaches that will avoid those problems, and discussing the feasibility of the alternative approaches.

II. FEMINIST LAW REFORM THEORIES IN THE 1980s

Since the 1980s, some feminist legal theories that aim to reform the law have been criticized as being essentialist. Below are two major law reform theories that have been subject to such a critique.

A. Robin West: Reconstructive Feminist Jurisprudence

Robin West criticizes liberal and radical feminist legal theories and attempts to reconstruct feminist jurisprudence. First, she points out that the existing laws do not recognize women's injuries. Instead, the legal system trivializes or dismisses women's claims in some other way. For instance, father/daughter incest is seen as participatory, subconsciously wanted, or self-induced, and women's pain in childbirth is seen as natural or biological and, therefore, inevitable.

West argues that women's subjective lives are relational, not autonomous, because of their biological pregnability and their social training for their roles as primary care-takers. For instance, during a woman's pregnancy, her physical life sustains the life of another, and she anticipates the needs of her children when she

17. See id.
18. See id.
19. See id. at 140.
nurtures them. West further argues that it is motherhood that renders women vulnerable and materially unequal. The energy and resources a woman must give to motherhood leave her exposed to physical aggression and subsequently less able to feed herself. Thus, West sees mothers as caught in a web of dependency—relied upon by those weaker than they are and, at the same time, relying on those stronger than themselves. As a result, women's subjective lives are different from the traditional Western vision of human life, which assumes that humanity is grounded in autonomy.

West then analyzes the liberal and radical feminist approaches and concludes that their goals, which seek to accommodate the well-being of autonomous creatures, exclude women because women are relational creatures. Liberal legalism insists on choice as being the way in which autonomy must be exercised. This is reflected, for example, in the liberal advocacy of reproductive rights, as clearly evidenced by the terminology “pro-choice.” The liberal position is problematic, however, because it denies the differences between women. For instance, liberalism views non-consensual sex as a compensable assault but fails to recognize that fear can exist in “consensual” relationships. West argues that women enter into relationships in order to be protected from “violent male sexuality.” Such sexual transactions, however, are not actionable under the liberal’s conception of sexual harassment because they are deemed to be consensual. To West, the liberal strategy misconceives “woman’s” nature, and so legal reform based on liberal feminism “miss[es] altogether the real causes of women’s misery.”

In contrast, radical feminist theories view autonomy in terms of gaining power. Women currently are disempowered, but, on gaining power, women can become more autonomous and, accordingly, more equal to men (read: human beings). West objects to

20. See id.
21. See id.
22. See id.
23. See id. at 141.
24. See id. at 140.
25. See id. at 141.
26. See id. at 139.
27. See id. at 139 n.88.
28. See id. at 141.
29. See id. at 108-10.
30. Id. at 108.
31. See id. at 109.
32. Id. at 108.
33. See id. at 139.
34. See id. at 141-42.
this approach because it disregards women's subjective experiences. For example, by defining pornography as the depiction of women's subordination, radical feminists ignore the fact that some women do find pornography pleasurable. West asserts that feminists should fight to eradicate only the pornography that results in the relinquishment of sexual control because of fear.

To West, a “truly feminist jurisprudence” is one that is “built upon feminist insights into women’s true nature,” as opposed to “human” nature. Such a jurisprudence is impossible until the patriarchy, which West defines as a political structure that values men more than women, is abolished and the conceptual definition of human being actually includes women. Thus, West calls for the adoption of a legal method directed at women’s subjective well-being, one which would measure the effectiveness of a law by its hedonic effect on women. In other words, a law that increases women’s happiness is good, and a law that ignores or increases women’s pain is bad. Such an approach would result in the following advantages: (1) freeing women from the false conception of their nature; (2) facilitating a clear articulation of the equality of women’s subjective lives; and (3) shifting legal discourse away from a focus on the domination of women and toward their pain. In the process of reconstructing feminist jurisprudence, feminist legal theorists should re-articulate rights in terms that will reveal and accommodate women’s distinctive state of being.

B. Catharine MacKinnon: The Man’s Foot Is on Her Throat

Catharine MacKinnon argues that the reason why sex equality laws have been so ineffective with regard to solving women’s problems is that the question of sex equality uses maleness as the reference point for analysis. MacKinnon asserts that equality presupposes sameness but sex presupposes difference, resulting in a built-in tension within the concept of “sex equality.” MacKinnon identifies the two approaches to equality that are typically invoked

35. See id. at 134-35.
36. See id. at 135-36.
38. See id. at 4.
39. See West, supra note 16, at 142.
40. See id.
41. See id. at 142-43.
42. See West, supra note 37, at 61.
44. See id. at 33.
by feminists—“be the same as men,” and “be different from men”—but explains that both are the same in that they both take men as the standard by which to judge women.\footnote{See id. at 33-34.} MacKinnon shows that the sameness standard has enabled men to get what women have traditionally had, e.g., custody and alimony, rather than giving women what men have traditionally had, e.g., equal pay and work.\footnote{See id. at 35-36.} The difference standard, on the other hand, does not renumerate women for their disparity.\footnote{See id. at 38.} Instead, MacKinnon argues it has led to the “protection” of women from jobs that might jeopardize their fertility or safety.\footnote{See id.} To MacKinnon, neither of these approaches leads to sex equality.

MacKinnon suggests that the alternative would be to recast the equality question in terms of the distribution of power, which she calls the “dominance approach.”\footnote{See id. at 40.} To bring about change, male dominance and female subordination should be explicitly recognized and exposed.\footnote{See id.} According to MacKinnon, however, the difference definition of sex equality has silenced the abuse that women suffer precisely because such abuse does not usually happen to men.\footnote{See id. at 41.} MacKinnon wants to provide women with equal power in social life so that what they say truly matters: “Take your foot off our necks, then we will hear in what tongue women speak.”\footnote{Id. at 45.}

III. THE PROBLEMS OF BEING ESSENTIAL

The theories of West and MacKinnon have been challenged as being “trapped by essentialism.”\footnote{See infra note 107 and accompanying text.} The next section will explore in depth four major critiques offered by the anti-essentialists. However, before delving into the theory, it may be helpful to offer a brief example of the problems in the law that result when women are construed as being the same.
A. Problems with Essentialism: An Example

In the United States, the Family and Medical Leave Act of 1993\(^{54}\) grants unpaid leave for up to twelve weeks in any twelve-month period to an employee who wants to take time off to care for a spouse, child, or parent who has a serious health condition.\(^{55}\) Nevertheless, the Act has been criticized strongly for being predicated on a standard of "woman" that is white and middle-class.\(^{56}\) For instance, it has been argued that the Act leaves marginally employed females unprotected because most cannot afford to take unpaid leave.\(^{57}\) Moreover, the Act does not protect lesbian families because its leave entitlements apply only to spouses of the opposite sex and to legally recognized children.\(^{58}\) Lesbians' entitlements to employer health insurance schemes and other family benefits are also not protected by the Act.\(^{59}\)

Thus, as shown in the above example, it is impractical to treat all women as being the same when working to effect social change through law reform.

B. "theory" without "Theory"

Deborah Rhode criticizes MacKinnon's portrayal of all women as being one "woman," thus neglecting the dynamics among them.\(^{60}\) Rhode recognizes that one problem with the standpoint adopted by many contemporary feminists is that they ignore the inability of a single overarching framework to truly reflect social experience.\(^{61}\) Such theoretical stances are often too amorphous to explain the particular ideology and history behind each relationship.\(^{62}\)

More specifically, Rhode finds that MacKinnon's top-down analysis presents a limited view of relations both within and between gender groups. . . . Feminism gains its

\(^{55}\) See id. § 2612(a)(1)(C), (c), (d)(1).
\(^{57}\) See id. An employee can, of course, use any paid leave to which she is entitled under her employment contract. Beyond that amount, however, any leave she takes within the twelve week period will be unpaid. See 29 U.S.C. § 2612(c), (d)(1)-(2)(A).
\(^{58}\) See 29 U.S.C. § 2611(7), (12)-(13); see also Hunter, supra note 56, at 149.
\(^{59}\) See Hunter, supra note 56, at 149.
\(^{62}\) See id.; RHODE, supra note 60, at 316.
power from the claim to speak on behalf of women and to identify common values, perceptions, and interests growing out of women's experience. Yet that experience also teaches that gender is mediated by other patterns of inequality involving race, class, age, ethnicity, and sexual orientation. On a descriptive level, dominance-oriented paradigms that divide the world solely along gender lines ignore the ways that common biological constraints are experienced differently by different groups of women. On a prescriptive level, no theory adequate to challenge gender subordination can avoid addressing the other forms of inequality with which it intersects.  

In other words, a theory of gender dominance alone does not adequately address the mutual dependencies and complex power dynamics that exist between men and women. As an example, Rhode suggests that the relationship between a wealthy white woman and her non-white male domestic staff does not comport with MacKinnon's version of gender hierarchy. 

As an alternative to MacKinnon's essentialist approach, Rhode suggests that feminist legal theorists should develop a vision of the relations among men and women, not just between them. She therefore asserts that feminists need theory without imposing on themselves a universal Theory. In other words, they need to be more self-critical and aware; they must take pains to address the context of each situation and not to fall prey to vast generalizations.

C. Deconstruction

Drucilla Cornell attacks essentialist approaches in postmodernist terms. She argues that both West and MacKinnon succumb to essentialism and dérèlection in the approaches they take to law reform, and she argues that deconstruction can address those problems. Cornell's use of essentialism allows for a definition of "woman" that is based on biological and non-biological characteris-

---

63. RHODE, supra note 60, at 83-84.
64. See id. at 84.
65. See id.
66. See id. at 317.
67. See id. at 316.
68. See id. at 317 ("We need fewer abstract theoretical typologies and more historically and empirically grounded analyses. Detailed blueprints of the ideal structure are less important than strategies to engage more participants in the reconstructive enterprise.").
69. See CORNELL, supra note 11, at 4-6.
Cornell defines dérélection as a state of being “in which feminine difference cannot be expressed except as signified in the masculine imaginary or the masculine symbolic.” Basically, dérélection occurs when women define themselves through the male conceptual order.

Cornell criticizes West for “collaps[ing] woman’s essence into her nature.” She agrees with West that women’s experience must be expressed, however, she asserts that one cannot rely on some universal concept of “woman” to ground this experience. It is in the reliance on the “masculine fantasy of woman as mother” where Cornell finds West’s dérélection. By locating the feminine in the maternal, West ignores the fact that some women will never be mothers, and those who do will not all experience motherhood in the same way. The result of such a stance is to preclude the possibility of formulating new bases for sexual difference.

To Cornell, MacKinnon is also an essentialist. Under MacKinnon’s theory, female sexual difference causes women’s subordination. Unlike West, however, MacKinnon’s essentialism has nothing to do with biology. Rather, MacKinnon sees gender definitions as being complete products of “social reality.” Still, MacKinnon is also a victim of dérélection because this social reality that defines femaleness is constructed through the male gaze and reinforced by men’s power. Thus, under MacKinnon’s rubric, any celebration of the feminine is actually an affirmation of the male’s vision of the feminine and thereby furthers women’s complicity in their own subordination.

Cornell rejects such a view and proposes the use of Derridean deconstruction as the solution. Cornell believes that the feminine must and should be affirmed. It is only through the writing and

References:
70. See Williams, supra note 3, at 290.
71. CORNELL, supra note 11, at 7.
72. See Williams, supra note 3, at 292-93.
73. CORNELL, supra note 11, at 26.
74. See id. at 57, 59.
75. Id. at 6-7.
76. See id. at 57-59.
77. See id. at 63; Williams, supra note 3, at 293.
78. See CORNELL, supra note 11, at 126.
79. See id. at 119; Williams, supra note 3, at 293.
80. See CORNELL, supra note 11, at 119.
81. See id. at 120.
82. See id.
83. See id. at 126.
84. See id. at 18 (“Derridean deconstruction exposes . . . any system of ideality established as reality . . . .”).
85. See id. at 20.
re-writing of feminine "reality," which hopefully encompasses all of
the different realities that women experience, that feminists have
the opportunity to present different versions of sexual difference.96
Cornell advocates using myth to propel this writing, for it is
through the reinterpretation of mythical figures that women can
create the "dream of an elsewhere" that escapes the established
patriarchy.87

D. Multiple Consciousness

Angela Harris also attacks West's and MacKinnon's versions of
essentialism because they ignore factors, such as race, class, sexual
orientation, and modes of production, that can influence women's
experience.88 She believes that black women possess "a self that is
neither 'female' nor 'black,' but both-and."89

According to Harris, West makes three basic assumptions:
everyone has a "self," that "self" is stable and unchanging, and it
differs between men and women solely along the lines of gender.90
Implicit in West's dichotomy is the insistence that women's
experiences vis-à-vis men are uniform and, more importantly,
white—for only white people have the "luxury" of being able to
ignore their racial identity.91

MacKinnon also "introduces [white women] as universal
truth."92 MacKinnon uses what Harris terms a "nuance theory"—
using white women as the norm. Thus, black women's difference
becomes only a matter of degree.93 Furthermore, those degrees of
difference vanish altogether when women are constructed as
"woman" under the male gaze.94 Subsequently, MacKinnon is able
to blame the dominant discourse for her own essentialism.95

Harris faults MacKinnon for failing to listen to women's
stories.96 She uses MacKinnon's treatment of rape as one such
example.97 To MacKinnon, black women experience rape the same

86. See id. at 2.
87. See id. at 173.
88. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L.
89. Id. at 604.
90. See id. at 603.
91. See id. at 604-05.
92. Id. at 592.
93. See id. at 595.
94. See id. at 592.
95. See id.
96. See id. at 601.
97. See id. at 598-601.
way that white women do, “only more so.” Rather, Harris counters, for black women, race has as much to do with rape as does gender and, thus, renders rape a very different experience. For black women have not just feared “the strange black man in the bushes,” they also have had to guard against “the white employer in the kitchen.” In addition, unlike white women, black women’s chastity has not been protected by the state; in fact, for most of American history, the law did not even acknowledge the possibility that black women could be raped.

Like Cornell, Harris also turns to storytelling as the solution. Harris believes that it is through women speaking of their experiences—experiences that, for women of color, reveal a multiple consciousness—that feminist legal theory can be re-energized. A “multiple consciousness,” consists of a combination of a universal perspective, a specific perspective, and all points in between. It is relational and it changes according to individuals’ wills and the institutions within which they exist. In using a model of multiple consciousness as the feminist jurisprudential method, according to Harris, women can begin to identify the many, often conflicting, voices within themselves and overcome the temptation to speak for all women in one universal voice.

E. Lesbian Legal Theory versus Feminist Legal Theory

Patricia Cain suggests that most feminist legal theorists fall into the “essentialist trap” because they focus on women’s sameness and ignore any differences. As with Cornell and Harris, Cain agrees that feminist methods that listen to women and believe their stories in order to glean women’s experiences must be the basis for an accurate feminist legal theory. Cain notes, however, that

98. See id. at 598.
99. See id.
100. Id.
101. See id. at 598-99.
102. See id. at 590.
103. Harris does recognize the need to avoid racial essentialism. See id. at 588-89. However, she asserts that black women, specifically, are in the best position to express a multiple consciousness. See id. at 608.
104. See id. at 608, 615-16.
105. See id. at 581-84.
106. See id. at 608-09, 615.
108. See id. at 195 (“If we are careful to listen to women when they describe the harms they experience as women, we are likely to get the legal theory right . . . “).
existing feminist legal theories clearly have not used these methods sufficiently because they have excluded lesbian experience.\textsuperscript{109} Thus, Cain first posits that because the lesbian experience uncovers that a core element of patriarchy is heterosexuality, it is integral to and must be incorporated into the formulation of feminist theory.\textsuperscript{110}

Cain maps out two common critiques of male-centered reality—the "woman as mother" standpoint and the "woman as sexual subordinate" standpoint—that reflect West's and MacKinnon's views, respectively.\textsuperscript{111} While she concedes that both stances are valid approaches in that they expose experiences that are vastly different from those of men,\textsuperscript{112} she warns against confusing the reality of \textit{many} women with that of \textit{all} women.\textsuperscript{113}

Cain contends that a "lesbian standpoint," in contrast, enables one to see both the mainstream and the minority versions of reality at the same time.\textsuperscript{114} Through the lens of the dominant perspective, "lesbians are not mothers, all women are dominated by men," and "lesbians don't have families . . . \textsuperscript{115} Yet in the reality that Cain lives, "some mothers are lesbian, many lesbian women are not dominated by men, . . . all lesbians are born into families, lesbians are family."\textsuperscript{116} Thus, while West tells us that not all people are separate, Cain reminds us that not all women are connected,\textsuperscript{117} and when MacKinnon claims that all women are subordinate to male dominance, the lesbian experience shows us that some women are able to escape the patriarchy for a sufficient amount of time in which to develop a genuine sense of self.\textsuperscript{118} Because a lesbian standpoint can reveal a different kind of oppression than a nonlesbian experience would, it can empower women as a group to end all oppressions.\textsuperscript{119}

Nevertheless, in her later work, Cain changes her argument from one urging the incorporation of a lesbian perspective into current feminist legal theory to one advocating for the development

\textsuperscript{109} See id. at 205, 213.
\textsuperscript{110} See id. at 191-92.
\textsuperscript{111} See id. at 210-13.
\textsuperscript{112} See id. at 210.
\textsuperscript{113} See id. at 213 ("Feminist legal theorists must be careful not to confuse 'standpoint critiques' with existential reality.").
\textsuperscript{114} See id. at 213-14.
\textsuperscript{115} Id. at 213.
\textsuperscript{116} Id. at 214.
\textsuperscript{117} See id. at 213.
\textsuperscript{118} See id. at 212.
\textsuperscript{119} See id. at 213.
of a separate lesbian theory altogether. Although she acknowledges that a lesbian legal theory could be vulnerable to essentialism, Cain argues that it is nevertheless needed because lesbians and feminists are not interchangeable. The goals of legal theorists from both groups may overlap, but yet they are distinct: feminists seek only to reform heterosexuality while lesbians seek to dismantle it. Thus, a separate lesbian legal theory is necessary, according to Cain, to help lesbians realize lesbian ideals within a heterosexual world. At the same time, however, lesbian theorists must strive to avoid essentializing all lesbians when formulating such ideals.

IV. PROBLEMS WITH ANTI-ESSENTIALISM

These critiques of essentialism identify problems with the theories of West and MacKinnon. Nevertheless, the critiques are not without problems themselves. The theories of Harris, Cain, and especially that of Cornell, have generated their own set of criticisms. Because each of the feminist legal theorists previously mentioned defines essentialism in a slightly different manner, a separate discussion of the critiques of their theories will follow.

A. A Critique of Drucilla Cornell

It is unclear how Cornell's approach can avoid the problems of essentialism and dérèlection itself. As an alternative to the essentialism in the theories of MacKinnon and West, Cornell urges women to affirm the feminine, which, according to her, can be found only in writing. Cornell suggests the use of myth and allegory in writing about women for two reasons. First, as already mentioned, the reinterpretation and re-creation of mythical figures can help women become aware of a dream beyond the patriarchy. Second, the constancy of myth offers women touchstones for an identification of the feminine.
Nevertheless, the possibility remains that attempts to write the feminine may be used as an "essentialist weapon" against women.\textsuperscript{127} As Susan Williams points out, "[a]ny theory with enough power to be useful can also be misused."\textsuperscript{128} Furthermore, despite the two advantages that the use of myth could bring, Cornell does not specify whether she is referring to myths in the mainstream culture or myths from all cultures.\textsuperscript{129} If she intends the former, she will put all women in the position of expressing their reality through the myths of Western culture.\textsuperscript{130} Alternatively, if Cornell means to include myths from all cultures, she has not discussed how myths from foreign cultures would have meaning to a Western audience.\textsuperscript{131}

Finally, to avoid d\textsuperscript{\textregistered}r\textsuperscript{\textregistered}t\textsuperscript{\textregistered}ction, Cornell suggests that deconstruction can provide the way out of the current gender identity system.\textsuperscript{132} However, deconstruction requires alternative perspectives.\textsuperscript{133} Yet, Cornell suggests that the source of these perspectives originates in people who are confined by the current conceptual system.\textsuperscript{134} Cornell does not tell us how one can create a new conceptual framework from the old.\textsuperscript{135} Furthermore, "what exists beyond [one conceptual system] is just other conceptual systems."\textsuperscript{136} A new conceptual system may thereby create the same problems of d\textsuperscript{\textregistered}r\textsuperscript{\textregistered}t\textsuperscript{\textregistered}ction as the current system. Thus, Cornell's theory does not give us a way to escape d\textsuperscript{\textregistered}r\textsuperscript{\textregistered}t\textsuperscript{\textregistered}ction.

\textbf{B. A Critique of Angela Harris}

As an alternative to West's and MacKinnon's essentialist methods, Harris suggests that feminists should use the concept of multiple consciousness to develop a jurisprudential method.\textsuperscript{137} Archana Parashar has argued that Harris' critique does not go far enough.\textsuperscript{138} First, Harris does not show how analyzing the distinct

\textsuperscript{127} See Williams, supra note 3, at 306.
\textsuperscript{128} Id. ("The most that we can ask, up front, is that the misuse not be inevitable—necessary to the very benefit we hope to gain from the theory—and that the benefit appear to be worth the risk.").
\textsuperscript{129} See id. at 306-07.
\textsuperscript{130} See id. at 306.
\textsuperscript{131} See id. at 307.
\textsuperscript{132} See supra note 84.
\textsuperscript{133} See Williams, supra note 3, at 308.
\textsuperscript{134} See id. at 309.
\textsuperscript{135} See id.
\textsuperscript{136} Id.
\textsuperscript{137} See supra notes 88-89, 105 and accompanying text.
\textsuperscript{138} See Archana Parashar, Essentialism or Pluralism: The Future of Legal Feminism, 6 CANADIAN J. WOMEN & L. 328, 337 (1993).
experience of black women can help develop a better critique of the law. Second, Harris does not offer any justification as to why black women's experiences should be valued more than other oppressed groups.

In Harris' defense, Harris does delineate three advantages that black women's experiences can specifically offer to feminist theory, all of which can help avoid the problem of essentialism: namely, the recognition that a self is multiplicitous, that differences are always relational, and that wholeness and commonality are willful acts of creativity. Furthermore, Harris does point out that a multiplicitous self is not unique to black women.

Nonetheless, Harris' argument is problematic because she appears to suggest that only women of color possess a multiplicitous self and that a dividing line can be drawn between white and non-white women in terms of their race:

In this society, it is only white people who have the luxury of 'having no color'; only white people have been able to imagine that sexism and racism are separate experiences. The challenge to black women has been the need to weave the fragments, our many selves, into an integral, though always changing and shifting, whole.

Thus, by drawing such distinctions, Harris suggests that white women suffer from only one form of oppression—that is, gender oppression. Additionally, because she seems to have assumed that there can be a monolithic "White Experience," she uses a particular kind of experience to define white women and thus essentializes them.

C. A Critique of Patricia Cain

In her earlier work, Cain faults the theories of West and MacKinnon for excluding the lesbian experience because she believes that it exposes a core element of male-centered reality—heterosexuality. Although Cain shows that lesbians' oppression can be different from that of nonlesbian women, she

139. See id.
140. See id.
141. See Harris, supra note 88, at 608.
142. See id.
143. Id. at 604.
144. See supra note 110 and accompanying text.
145. See supra note 119 and accompanying text.
assumes that heterosexuality is a core element of male-centered reality. Her reliance on this assumption weakens her argument for the inclusion of lesbian experience into feminist theory because, as Cain herself acknowledges, society could theoretically eliminate patriarchy but still be heterosexist.\footnote{146}

In her later work, Cain suggests that, as an alternative to West’s and MacKinnon’s theories, the category of “lesbian” should be employed in a separate lesbian legal theory, rather than incorporated into feminist legal theory.\footnote{147} Cain objects to the use of the category of “woman” in feminist legal theory but nonetheless proposes the adoption of “lesbian” as a category within a separate lesbian theory for two reasons: first, “lesbian” is too new a category to withstand deconstruction,\footnote{148} and second, she believes a central experience exists for all lesbians that creates a lesbian identity.\footnote{149}

Even so, “[lesbian] identity, like most forms of human identity, is too variegated, contested, and complex for any single term to capture.”\footnote{150} Daniel Ortiz acknowledges that the temptation to create a single master description of homosexual identity largely stems from the need to develop a political argument that can overcome heterosexism.\footnote{151} He suggests that in \textit{Bowers v. Hardwick},\footnote{152} the advocates for gay rights sought to overturn a Georgia sodomy statute by desexualizing the description of gay identity—to wit, they characterized the defendant’s acts as “intimate associations” rather than as oral sex.\footnote{153} Yet according to Ortiz, the search for a uniform description of a group is self-defeating because “[a]s a group describes itself in thicker and thicker terms, disagreement within the group invariably appears over the content of the self-description.”\footnote{154} Similarly, under Ortiz’s analysis, the use of “lesbian” as a single category inevitably will generate disagreement among lesbians.

\footnotetext[146]{See Cain, \textit{supra} note 120, at 71.}
\footnotetext[147]{See \textit{supra} note 120 and accompanying text.}
\footnotetext[148]{See Cain, \textit{supra} note 120, at 56-61.}
\footnotetext[149]{See \textit{id.} at 61-68. Cain asserts that the moment a woman recognizes her emotional and erotic attachment to another woman constitutes a core experience for all lesbians, regardless of their other characteristics. \textit{See id.} at 66. In contrast, the experiences of motherhood and male domination are not always central to the construction of oneself as a woman. \textit{See id.} at 62-64.}
\footnotetext[150]{Ortiz, \textit{supra} note 10, at 1836.}
\footnotetext[151]{\textit{See id.} at 1850.}
\footnotetext[152]{478 U.S. 186 (1986).}
\footnotetext[153]{See Ortiz, \textit{supra} note 10, at 1851-52.}
\footnotetext[154]{\textit{Id.} at 1856.}
V. THE IMPLICATIONS OF THE ESSENTIALISM DEBATE

A. Value of Studying the Debate

The discussion presented in the preceding sections suggests that taking either an essentialist or an anti-essentialist stance toward law reform may be misplaced. A study of the different approaches is valuable nonetheless. Such a study can help identify critical obstacles that prevent feminists from achieving their goals. Furthermore, we can better question the validity of more traditional approaches to law reform for women once we are armed with knowledge of this debate.

Critics of essentialism, namely Cornell, Harris, and Cain, begin their analyses by opposing the use of a white, middle-class category of “woman” because such rigid gender identity excludes the experiences of many women. Instead, they suggest the use of more contextual analyses: deconstruction, “multiple consciousness,” and lesbian experience, respectively. Although the conclusions of these critics ultimately fall into the “essentialist trap” themselves, the starting point of their analyses is worth noting because it challenges the appropriateness of using the term “woman” in a generic way. Moreover, it is important to understand how essentialism functions, because the people it ignores are often located at the bottom of the social hierarchy. Thus, legal theories based on essentialist approaches may not be equipped to effect true social change.

The critiques presented in Parts III and IV suggest that alternative approaches to essentialism and anti-essentialism should be adopted when formulating feminist legal theories that seek to reform the law. This raises questions as to the minimum criteria such theories should meet and what form they might take. To answer such questions, one must first consider whether essentialism is avoidable. If it is avoidable, then the alternative approaches should at least be able to address the problems identified with anti-essentialism. On the other hand, if essentialism is in fact unavoidable, it is necessary for the alternative approaches to be aware of,

155. See supra Parts III.C-E.
156. See supra Part III.C.
157. See supra Part III.D.
158. See supra Part III.E.
159. See Harris, supra note 88, at 589.
and to strive to avoid, the problems that it raises, which, at the very least, include the privileging of a particular group of "woman."

B. Is Essentialism Avoidable?

If essentialism is avoidable, the critiques offered by the anti-essentialists should not themselves fall prey to essentialism. However, the critiques of the anti-essentialists suggest that they do. Cain argues that a core lesbian experience exists that is shared by all lesbians.160 Such experience does not change, regardless of variations in race, class, or other factors.161 Cain thus essentializes lesbians. Harris, in drawing a distinction between the experiences of white and nonwhite women,162 essentializes women on both sides of the color line. She ignores the differences among white women that are informed by class and ethnicity, and she assumes that all nonwhite women have a multiplicitous, relational conception of the self.163 Finally, if Cornell uses myths from a specific culture to affirm the feminine, she risks attributing a fixed set of characteristics to all women.164

Thus it would seem that essentialism is unavoidable because there is always a need to define the category of "woman," whether as white and middle-class, lesbian, or racial minority. Yet, alternative approaches may exist that can avoid the corresponding problem of privileging one group of "woman" over all others.

VI. CONCLUSION: BEYOND THE ESSENTIALISM DEBATE

Given that the act of defining a category of people will necessarily include some and exclude others, feminists should acknowledge that almost any definition of "woman" will be vulnerable to the attack that it essentializes women. Diane Brooks warns, however, of the danger of political paralysis feminists will face if they are unable to adequately define the group they seek to promote.165 Thus, to move beyond the essentialism debate, feminist theorists should try to avoid the problems of essentialism as much as

160. See supra note 149 and accompanying text.
161. See supra note 149.
162. See supra notes 91, 98-101 and accompanying text.
163. See Harris, supra note 88, at 608.
164. See supra notes 130-31 and accompanying text.
possible. Several commentators have suggested different methods for doing so.

By presenting these methods as follows, I am not suggesting that they are the only alternatives to taking either the essentialist or the anti-essentialist stance, nor that my analysis of these approaches is conclusive. Nevertheless, given that essentialism is unavoidable, as discussed in Part V.A, alternative approaches should strive to avoid the problems that essentialism raises, which, at the very least, include the privileging of a particular group of “woman.” By analyzing alternative approaches in light of such minimum criterion which they must meet in order to achieve their goal of law reform, I aim to offer a framework for future research in feminist legal theories.

Rosemary Hunter catalogs several approaches that seek to avoid essentialism. In a spirit of post-essentialism, she refuses to privilege one strategy over any other. The possibilities include: using research and consultation with underrepresented women; developing feminist strategies in response to particular experiences rather than particular groups; building coalitions that address intersectionalities; and continually deconstructing identity categories so that women can expand the types of legal claims they can make.

Specifically, by researching issues important to underrepresented women and consulting with such women regarding their views on these issues, Hunter asserts that mainstream feminist legal theorists can identify different perspectives, frame issues, and set agendas in an all-inclusive manner. For instance, in an attempt to develop an analysis of gender, mainstream feminist legal theorists should not merely identify minority women’s experiences, they should also take into account what gender means to them.

Nevertheless, the notion of “consultation” by the mainstream feminist legal theorists presupposes their dominant position over the “other” theorists. Moreover, even if groups are consulted, there are likely to be irreducible differences of views among them.

166. See Hunter, supra note 56.
167. See id. at 162.
168. See id. at 158-59.
169. See id. at 157.
170. See id. at 159-60. Intersectionality refers to the intersection of multiple oppressions—e.g., racism and sexism. See id. at 141-42.
171. See id. at 160-61.
172. See id. at 158.
173. See id. at 158-59.
174. See id. at 158.
Thus, if one position is adopted over the others, a theorist may still privilege the views of one group of "woman" over another.

Kimberlé Crenshaw, another theorist, favors moving away from characterizing women's struggles as single issues because doing so merely reinforces the status quo and further marginalizes those who experience discrimination on different levels. She points out that to address the concerns of those who are singularly disadvantaged, a solution must first be found for the problems of multiply oppressed people. In making marginalized women central to the definition of "woman," feminists can begin to build a collective and unifying movement.

An intersectional analysis could indeed avoid the problem of privileging the white, middle class "woman." Nevertheless, Crenshaw does not specify how the intersectional analysis should be applied when there are multiple factors affecting the issue of gender. Thus, in a case of sexual discrimination, for instance, her analysis may not be able to avoid the privileging of a black woman over a black lesbian.

Noting that "the 'problem of difference' is really the problem of privilege," Elizabeth Spelman, another theorist, asserts that white, middle-class women should not let their fear, shame, and guilt keep them from learning about women who suffer from other forms of oppression in addition to sexism. Yet her argument does not end there—for focusing on the activity of white, middle-class women only reinforces their privilege and does nothing to change the definition of "woman." Spelman challenges the notion promoted by Simone de Beauvoir that studying the experiences of white, middle-class women will best reveal sexism. The very idea that one must remove all other forms of oppression in order to distill a more pure form of sexism shows that sexism does not

---

175. See Kimberlé Crenshaw, A Black Feminist Critique of Antidiscrimination Law and Politics, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356, 374 (David Kairys ed., 3d ed. 1998). In her critique of anti-discrimination law, Crenshaw argues that the norm for race discrimination is discrimination against black men, whereas an implicit norm for sexual discrimination is discrimination against white women, which leaves out the particular experience of black women, who suffer discrimination based on both sex and race. See id. at 358.

176. See id.

177. See id. at 374-75.


179. See id. at 161-62.

180. See id. at 162-64.

181. See id. at 166.
function in the same way against all women.182 Spelman argues that gender cannot be separated from other characteristics.183 Nevertheless, because thinking about or referring to women as "woman" is unavoidable, she reminds us that, in doing so, we must remember "which women . . . we are thinking about."184

Thus, Spelman suggests that people should re-conceptualize gender as a construct that incorporates all categories of description, resulting in the possibility of recognizing many genders rather than just two.185 To those who fear that acknowledging many genders might destroy any cohesion feminism has, Spelman responds that an agenda presented by a heterogeneous group of women will be stronger because it will reflect the desire of a larger number of women.186

Nevertheless, under the minimum criterion mentioned above, Spelman's theory may still privilege a specific group of "woman." In the process of re-conceptualizing gender, a theorist's own cultural, economic and racial experiences may influence her reconstruction.187 Thus, the theorist's re-conceptualized "woman" may share similar characteristics with herself, without addressing the oppression of those women who are not within her own conceptualization of "woman."

I do not attempt to propose that one of the above approaches is the best way to reform the law. I also do not claim that complete change may be effected by simply adopting the above approaches. Contingent factors such as the role of the judiciary as well as the political climate in the legislature must also be considered when devising law reform programs. Nonetheless, the study of the essentialism debate and the alternative approaches presented will provide useful guidelines for future research in the development of new feminist legal theories. Given the problems with the mainstream approaches to law reform and that essentialism in feminist legal theories is hard to avoid, it is necessary that a prevailing paradigm of feminist legal theory be aware of and address the problems that arise from trying to define the term "woman," which

182. See id.
183. See id. at 167.
184. Id. at 186.
185. See id. at 174-77. Spelman looks to Aristotle to elucidate her point. Aristotle distinguished power relationships between men and women from power relationships between men and slaves, both male and female. Thus, in his view, there were at least two female genders—the female citizen and the female slave. See id. at 172-73.
186. See id. at 176-77.
at the very least, includes privileging a particular type of "woman." Future research should examine the feasibility of existing alternative approaches that reach beyond the essentialism debate. Moreover, the identification of additional problems with essentialism and the exploration of alternative approaches which are capable of addressing such problems are compelling issues beyond the debate which the feminist legal theorists must confront. These are necessary hurdles that all feminist legal theorists must overcome if they seek to shape a body of law that accurately addresses the needs of all women.