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December 3, 2006
Law 437

Is Law Multicultural? Social Groups and Legal Reasoning

> Fundamentally, the law has often failed to call the problem of discrimination by a real name – say, white supremacy or male dominance. It has instead used more neutral terms like "racism" or "racial classifications" or "sexism" or "sex classifications" or "sex," terms that fail to specify who is doing what to whom. As a result, while many conditions of actual disadvantage are obscured, situations in which the affected and agent groups appear reversed can easily be made to look like discriminations. Abstractions (are you treated the same or differently?) may be inverted far more readily than substance (are you victimized by white supremacy or male dominance or both?) (MacKinnon 2001, 21)

Two people are on trial. Each stole one hundred dollars worth of merchandise from a convenience store. In our fictitious state, petty theft is a misdemeanor punishable by from no jail time to seven months for a first offense, which it is for each person. Person A, let's call him Andy, is a wealthy, Caucasian, twenty-five year old man who lives with his parents in the northside Suburbs of Chicago. He stole fireworks as a prank for a "scavenger hunt of theft" put together by his college fraternity brothers. The moment he was arrested, his father (a prominent Chicago attorney), paid his bond and hired another lawyer, who specialized in criminal process. Andy reminded the judge of his own son, a good kid with a little bit of mischief in him. Andy's attorney explained how Andy had definitely learned his lesson, did not need to steal, and would not steal again; if he had even stolen the first time. Andy knew the culture of the court and how to show respect for customs related to the law; it was in his upbringing.

Person B, let's call her Ann, is a poor, Hispanic-American single mother of a child born of rape. Ann tries to hold down a job, but most of the jobs she can get do not pay for the daycare she needs to be able to go, and she is alone in the world, so she does not have a free babysitter. Also, at work, it is hard for Ann to communicate with her

coworkers, because, no matter how hard she tries to learn English, her colleagues have trouble with her accent. Ann was laid off (again) last week, and her four-year-old daughter had a terrible cough. The free clinic was too busy to see her daughter, and the emergency room treated her, but gave her prescriptions rather than medicine. Ann stole a hundred dollars of cough and cold medicine for her sick daughter, because she could not find another way. Ann felt guilty immediately, and when arrested, admitted what she had done, in part because she did not understand her Miranda rights and in part because, in her culture, you admit your wrongs to be absolved of them. Ann did not ask for a lawyer, and did not understand the court process. She went to court in the only clothes she owned, jeans and a sweater. She often talked out of turn because she did not know the rules.

To the extent that Ann and Andy committed the "same crime", many forms of legal reasoning would advocate the "same punishment." In the United States' current legal system, it is likely that Ann will be punished more severely than Andy, because of Andy's superior knowledge of and access to a legal system steeped in tradition and formalism. Others would argue that Ann deserves the harsher punishment because she is more likely to steal again if she is not punished severely.

This paper argues that race, class, and gender should figure prominently in the legal reasoning that determines Ann and Andy's punishments, as well as other decisions of the courts of the United States. It begins by pointing out the absence of social group membership in current legal reasoning, arguing that this absence is systemic rather than incidental. Then, drawing on feminist critiques of science and the law, as well as critical race critiques of the law, the paper argues that the systemic absence of social group

reasoning from the law comes from the law's confidence in and reliance on concepts of equality and objectivity. From this observation, the paper goes on to point out two places where gendered, raced, and classed legal reasoning distorts the practice of the law: in process and in substantive product. It argues that these harms are material and meaningful. It proposes two alternatives to equality and objectivity as founding principles for jurisprudence: empathy and "strong objectivity." It concludes by demonstrating the procedural and substantive progress these concepts could make towards deconstructing the law as an oppressive framework and a subordinating process.

The Omission of "Groupthink" (the good kind) in Legal Process and Reasoning

American legal process and history has relied heavily on the concept of equality. In the *Declaration of Independence*, the "founding fathers" of the United States wrote: "we hold these truths to be self-evident. That all men are created equal and endowed by their creator with certain unalienable rights" (1776, Paragraph 1) The word equality *sounds* like a good idea: everyone is treated the "same." Then, we are reminded that a slavemaster, who actively engaged in the subjugation and oppression of black Americans, wrote those words, which were agreed to and ratified by other white slavemasters, who fought a war on those principles again without the consent of black Americans (Farley 2004). We are further reminded that it is men, not women, who are created equal in their minds and in their words (MacKinnon 2001). Fredrick Douglass drove home this point in a Fourth of July speech:

> What, to the American slave, is your Fourth of July? I answer: a day that reveals him, more than all other days in the year, the great injustice and cruelty to which he is the constant victim. To him your consideration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all of your religious parade and solemnity, are, to

> him, mere bombast, fraud, deception, impiety and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages (Douglass 1967).

Given the raced, classed, and gendered heritage of the principle of equality in United States Politics, Farley contends that "Equality of right, however, can pass to the slave only in the form of white-over-black. Equality of right and its denial *both* take the form of white-over-black. Equality of right is the foundation of the home built by the slave for the future good will of its master" (Farley 2004). In other words, the subordinating foundation of the principle of equality in United States laws explains the continued subordination of race, class, and gender "minorities" *even when* equality is a proclaimed principle. Farley contends that legal precedent and legal reasoning based on a system which, at its outset, defined the majority of Americans as *outside* of the realm of equality, is *necessarily* race subordinating and will continue that subordination. The *continued* omission of group membership, position, race, class, and gender from legal reasoning presents a systemic obstacle to the end of subordination in American society. Both precedent-based and case-by-case reasoning fall subject to this critique.

Precedent-based reasoning

Historical approaches to the law disagree on either the existence or the meaning of precedent, but all acknowledge that it exists. Scholars contend that precedent can serve a rule-making function, an example function, an analogical function, and/or the cause of uniformity (see, e.g., Moore, Alexander, Postema). Barbara Levenbook argues that precedent "should be viewed as setting an example" because "a precedent is a judicial decision that exemplifies something" (2000, 186). In other words, according to Levenbrook, precedent serves as a guiding light for other judicial decisions. Gerald

Postema takes this argument a logical step further, contending that "reasoning by example" can be understood as "the basic pattern of legal reasoning" where lawyers spend most of their effort making "arguments as to why the case at bar is more like one case than another based on inferred principles that appear to justify judgments in particular cases" ("*A Similibus* . . ." 2, citing Levi and the Sixth Circuit). Others, such as Grant Lamond, argue that precedent has a more mixed function, serving "to compensate for the erosion of consensus in the common law by simultaneously fixing starting points for decision-making while denying the judiciary law-making power" (2004, 1).

Though traditional legal theorists do not agree on the precise function of precedent, there is very little disagreement concerning the claim that precedent is important in legal reasoning.[1] This paper argues that there should be contention over that point, and that the very prominence of precedent in legal reasoning preserves and constitutes the subordinating power of legal discourse. Language, and the views that it expresses, is socially constructed by the speaker and socially constituting for the speaker's audience (Hintikka and Hintikka 1983; Lakoff and Johnson 1999).

The "speaker" of precedent in the United States legal system has been, largely, white men. The parochialism of these speakers' words is formally preserved in a legal system which prioritizes precedent. As Lucinda Finley explains, "Another significant feature of legal language is its conservatism. By always referring back to what has previously been defined, by building on precedent, legal language tends to stabilize and reflect the status quo, rather than to reach for radical understandings. Understandings that

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[1] This is not to trivialize the differences between legal theorists concerned with the precise meaning of precedent; these are important and meaningful debates. This analysis, however, means to get at a different question – the moral worth of the importance of precedent. Because that is the goal, and there is a length limit, I choose to conflate these arguments for efficieny's sake.

do not neatly match the existing definitions are suspect as radical, unthinkable, unexpressable, and unreachable by legal language" (Finley 1989). While the "founding fathers" were substantially narrower in their constructions of citizenship and rights than perhaps new "founding fathers" would be today, the function of a system which places value on precedent is to assign value to those narrow interpretations. This is because "men have defined the law in their own image, so it excludes the reasoning of the 'other'" (Finley 1989). As a result, the precedential reasoning entrenches race, gender, and class subordination.

Catherine MacKinnon discusses the impact that the gendering of precedent-based reasoning has on both individual and collective relationships with legal systems. She recognizes that "each woman who is discriminated against as a woman is personally harmed, but she is harmed in and because of her status as a member of the group of women. The injuries harm each woman but the basis on which the harm is done is group-based and collectively shared" (MacKinnon 2001, 22). The group-based and collectively shared portion of the harm cannot be captured either by a precedent-rule written by the oppressor and enforced on the oppressed, even if the individually-based portion of the harm could be. Further, precedent-based legal reasoning has trouble even covering the individually-based portion of the harm *because* it does not take into account the social, political, and economic dynamics of group membership which bring individuals to be situated where they are at the time of the individual harm. The 'precedent' (loosely understood, but still importantly) of the American legal system is in centuries of race, gender, and class subordination; respecting that precedent as an important tool of legal reasoning respects the subordination that it was bred of and continues to breed.

Case-by-Case Reasoning

This perspective is not the first to question either the ethical or practical value of precedent for legal reasoning. In fact, there are substantial debates about the ethical value of precedent. Ethical debates about the appropriateness of precedent's prominent role in legal reasoning are concerned with the times that precedent applies unfairly to individual cases. In other words, if precedent is a good general rule, there are still times that the general rule is the wrong outcome when applied in individual cases.

Ethical opponents to precedent-based decision-making point out these cases as justification to decide cases more individually. Like Bentham, they decry "the overwhelming technicality and impenetrability of actual common law doctrine" (Postema, "Bentham's Critique …", p.1). They point out the role of precedent-based common law in stifling judicial creativity (ibid, p.2). As Postema explains, Bentham critiques that "the inevitable consequence of such a regime of *stare decisis* is *rigidity* in the judicial decision making process. Still praising itself for its ability to respond flexibly and reasonably to changes in circumstances and community custom, courts bound by precedent become increasingly unable to perceive these changes" (ibid, p.4). Given that "almost surely, many of the legal materials in which the justifying legal principles are supposed to be imminent will turn out to be morally mistaken" (Alexander 1996, 57), they argue either that legal principles and moral principles will not match (Dworkin) or that both moral and legal principles are indiscernible. Sometimes, distinguishing the generalizable features of precedential cases is difficult (Moore 1987, 190).

Proponents of precedent rebut these arguments by demonstrating the high success rate of precedent. Many legal scholars, mindful of this critique, argue that, while precedent should still play some role, there is also a role for case-by-case analysis. This initially appears to be a "way forward" for a critique of the gender, race, and class bias of precedent-based law. A case-by-case analysis could take account of the oppression that Ann has experienced in her life, for example, in sentencing her for her crime. It could also take account of Andy's privilege in sentencing him. In this way, the incorporation of case-by-case analysis seems to solve the problem of the consideration of identity: on a case-by-case basis, race, class and gender can be considered in legal decision-making.

As much as the incorporation of case-by-case analysis and the move away from strict reliance on precedent *could* take account of individuals' circumstances and the oppression that they have experienced, it also could *not* take account of these things. I argue first that case-by-case analysis *does not* adequately account for concerns of race, gender, and class (collectively identified here as "group membership"); and second that it is systematically unable to do so.

In practice, case-by-case reasoning often does not account for circumstances of group membership. As MacKinnon recounts, "legal systems since the Enlightenment have recognized rights for individuals one at a time – either as a unique self or as an undifferentiated member of humanity – but rarely as members of social groups" because "social groups are seen to make persons 'different,' while their individuality and common humanity makes them 'the same'" and the legal system can only deal with sameness (MacKinnon 2001, 22). Still, group membership definitely shapes people's identities, their interactions with each other, their interactions with humanity as a whole, and their

positions within their respective societies, not to mention their plight in the legal process. Nonetheless, "people" in a reason-based legal system, with few exceptions, remain devoid of gender, race, ethnicity, religion, and a number of other relevant factors.

Further, case-by-case reasoning, like precedential reasoning, is fundamentally incapable of accounting for group membership and sociopolitical oppression adequately. Like precedent-based reasoning, case-by-case reasoning is "reasoned" by people who are largely members of the same race, gender, and class – by white men. Evelyn Fox Keller provides insight into this dilemma. After justifying gender as socially constructed, Keller deduces that "if women are made and not born, then surely the same is true of men. It is also true of science" (therefore, I deduce, true of law) (Keller 1985). What Keller means is that the social construction of gender roles affects individuals' social relations, social positions, and understandings of science and the law. According to Keller, men's lives and men's science can appear "apersonal *because* and to the extent that women's lives are personal" (Keller 1985, 5). The case-by-case application of the law appears unbiased and apersonal because and to the extent that it reflects race and gender dominance. Keller continues to explain that "modern science evolved in, and helped to shape, a particular social and political context" and "by the same token it evolved in conjunction with, and helped to shape a particular ideology of gender … in formation of a particular set of values, aims, and goals embodied in the scientific enterprise" (Keller 1985, 42). In other words, legal reasoning, whether precedent-based or case-by-case, is necessarily endowed with the history and voice of its creators and perpetuators, who act from positions of privilege and do not take account of either group membership or group-based subordination.

Groups and Reasoning

The next question is an obvious one – why is it important to take account of group membership or group-based subordination when making legal decisions? Accuracy is one reason, Keller argues:

> My argument is not simply that the dream of a completely objective science is in principle unrealizable, but that it contains precisely what it rejects: vivid traces of reflected self image. The objectivist illusion reflects back an image of self as autonomous and objectified: an image of individuals unto themselves, severed from the outside world of other objects (animate as well as inanimate) and simultaneously from their own subjectivity. It is the investment in impersonality, the claim to have escaped the influence of desires, wishes, and beliefs – perhaps even more than the sense of actual accomplishment – that constitutes the special arrogance, even bravura, of modern man, and at the same time reveals his peculiar subjectivity. (Keller 1985, 70).

Keller describes her mission as "to understand the culturally pervasive association between objectivity and masculinity" (1985, 71). She explains that purported objectivity is "colored by the biases of patriarchy and sexism" within "a circular process of mutual reinforcement" between sexism and objective reasoning where the feminine is excluded from "the special social and intellectual value" placed on purported objectivity (1985, 92). As a result, though "the concept of law is subject to expansion and revision, the very world, and hence the concept also, remains tainted by its political and theological origins" (Keller 1985, 134). As Keller concludes, "to know the history of science is to recognize the mortality of any claim to universal truth … the survival or productive difference in science requires that we put all clams for intellectual hegemony in their proper place – that we understand that all such claims are, by their very nature, political rather than scientific" (1985, 178-79).

This critique of gendered objective reasoning can be expanded to reach other group memberships and standpoints. Indeed, a number of scholars have related the

method of reasoning that an individual engages in to culture, race, and gender (Harding 1998; 1987; Hall 1999). Ideological bias based on culture can be "intentionally enacted by individuals" or institutional, societal, or philosophic (Harding 1998, 13). A number of critical scholars question the idea that objective knowledge is either possible or desirable, a critique which questions the validity of the application of a single form of legal reasoning to all people.[2] Knowledge which is purported to be objective is often the subjective knowledge of privileged voices (Harding 1998; Keller 1985; Goetz 1991).

As Harding explains, "we can identify several distinctive kinds of cultural elements that come to constitute the cognitive cores of any systematic knowledge about the natural world under any social and political conditions" (1998, 61). Even in "the same" environment, "different cultures have different interests and desires. This leads cultures to pose distinctive questions about 'the same' part of the world" (1998, 64). These differential knowledges of the world would be less problematic if power differentials did not give some voices more influence than others.

A feminist understanding of power makes the point that the problem is not just *interpretive difference* between different social groups, but power-based ranking of the influences of groups' interpretations. Gendered power is the victory of certain ideas over

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[2] Feminisms have a unique critique of the possibility of objective knowledge, but are by no means the first to deny the possibility of objective science. The feminist critique is unique because of its grounding in women's subordinations. Sarah Brown notes that, "in social science generally, the move towards science has excluded women as subjects, silenced women as theorists, and naturalized the world as a world of gender inequality" Brown, S. (1988). "Feminism, International Theory, and the International Relations of Gender Inequality." Millenium: Journal of International Studies **17**(3): 461-75.

In this understanding, claimed objectivity encapsulates gender subordination. "The discovery of pervasive androcentrism in the definition of intellectual problems as well as in specific theories, concepts, methods, and interpretations of research fuels efforts to distinguish between knowledge and prejudice" (Hawkesworth 1989, 534). It is Habermas' contention that knowledge is necessarily interested, as "the ontological illusion of pure theory behind-which knowledge-constitutive interests become invisible promotes the fiction that Socratic dialogue is possible everywhere and at any time" (1968, 314). Habermas sets up three typologies of knowledge-interest: *technical*, coming from the empirical-analytic sciences; *practical*, coming from the historical hermeneutic sciences; and *emancipatory*, coming from the critically oriented sciences and from the root of traditional theory more generally (1968, 308). Habermas, J. (1968). Knowledge and Human Interests. Boston, Beacon Press.

Each knowledge interest is what we would traditionally call a "bias" in reasoning.

others in social interaction because they are associated with valorized gender. Charlotte Hooper explains gendered power in terms of masculinism, commenting that "masculinism is the ideology that justified and naturalizes gender hierarchy by not questioning the elevation of ways of being and knowing associated with men and masculinity over those associated with women and feminism" (Hooper 1998, 31).[3] Note, here, that we are talking about the *values socially associated with* femininity and masculinity, rather than about the values of specific men and women or of men and women as groups. The importance of this observation is that 'femininity' and 'masculinity' are not terms that stereotype *men* and *women* but terms which address social values in *perceived* gender difference. Not only are gendered characteristics perceived to be different, those characteristics assumed to be masculine are valued over those assumed to be feminine even outside of direct gender relations. Social processes, then, "select" for values and behaviors that can be associated with masculinity. Hooper explains that this is an idealized, or hegemonic, masculinity in social construction of gender that governs social discourse (Connell 1995; Hooper 1998; Hooper 2001).

Applying this critique more generally to encompass race and class differences, Scheman explains that knowledge ought to "always be seen as especially problematical when it was constructed only be those in positions of privilege that afforded them only

[3] Hooper is influenced substantially by R. W. Connell, who explains a number of different hegemonic and subordinated masculinities in relation to each other (1995). A hegemonic masculinity, then, is not stable – instead, different hegemonic masculinities are articulated in different ways in different times, but are always concerned with the subordination of other masculinities and femininities (which will be addressed later). Differences between hegemonic masculinities and subordinated masculinities play a role in the ordering of the social process of gendered power (Hooper 2000, 70). For example, heterosexual (hegemonic) masculinities must subordinate homosexual masculinity to maintain identity for the masculine ideal (Hooper 2001, 55; Connell 1995, 99). This is self-sustaining - Hooper explains that "as long as masculinity is perceived as a relatively unitary, stable, and coherent phenomenon that corresponds to the experiences of all men, dichotomous thinking remains either obviously or secretly at the core of these solutions, compromising their radical potential" (Hooper 2001, 48) – in other words, failure to see gender as a multiple, constitutive social power process would be damning to the feminist project of emancipation. Using the word 'emancipation' here might be misread as a product of Enlightenment thought – but it should be read as a quest for contingent betterment – not absolute, but directed.

distorted views about the world" (1993, 211-2; Garry and Pearsall 1996; Harding 1998). In other words, members of privileged and underprivileged social groups *live* the world differently, so they see the word differently. Therefore, knowledge claimed to be objective is often unrepresentative and biased towards political, social, and material privilege, yet hides that bias through claimed objectivity. Therefore, "whatever knowledge may ostensibly be about, it is always in part about the relationships between the knower and the known" (Scheman 1993, 214). Different social groups have different relationships with knowledge, and therefore with reasoning. Knowledge is necessarily both contingent and interested; the influence of various contingent knowledges depends on the social and political positions of their holders (Acker, Barry, and Esseveld 1991).

As a result, "all systems of knowledge depend on deeming certain issues irrelevant, therefore silences are as important as positive rules" and the silences of public systems of knowledge usually involve the knowledges of marginalized social groups (Charlesworth 1999). Charlesworth sees that the absence of gender in the law is cannot be simply read as blind omission, but as (either intentional or unintentional; implicit or explicit) bias.

Given the contingency of knowledge, it follows that different social groups would *know* certain empirical phenomena differently. Here, I mean "know" in several distinct ways. The first meaning of "know" that I mean to imply concerns experience. As Sandra Harding and Merrill Hintikka explain:

> What counts as knowledge must be grounded on experience. Human experience differs according to the kinds of activities and social relations in which humans engage. Women's experience systematically differs from the male experience upon which knowledge claims have been grounded. Thus the experience upon which the prevailing claims to social and natural knowledge are founded is, first of all only partial human experience only partially understood: namely masculine experience understood by men. However, when this knowledge is presumed to be gender-free – when the male

> experience is taken to be the human experience – the resulting theories, concepts, methodologies, and knowledge claims distort human social life and thought" (Harding and Hintikka 1983).

The second meaning of knowledge that I mean to imply is an epistemological framework. Taken from the work of Liz Stanley and Sue Wise, I see:

> An 'epistemology' is a framework or theory for specifying the constitution and generation of knowledge about the world; that is, it concerns how to understand the nature of 'reality.' A given epistemological framework specifies not only what 'knowledge' is and how to recognize it, but who are the 'knowers' and by what means someone becomes one, and also the means by what competing knowledge-claims are adjudicated and some rejected in favor of another/others (Stanley and Wise 1993).

Epistemological frameworks, or ways of defining what it is to know, are differentiated both by experience and by the lenses through which we see that experience. Susan Heckman explains that "activity is epistemology: women and men create their own realities through their different activities and experiences" (Heckman 1997). Epistemology has a second contingent factor, however, in *context* – activities and experiences sometimes differ because the simply *do* differ, and sometimes because the context in which they occur gives them different content and meaning (for example, the differential meaning of a cross burning in a yard, depending on the racial background of the owner of the home).

The third meaning of knowledge that I wish to imply is knowledge as ontology. An ontology is a theory of reality or being. Most purportedly objective understandings of ontology are based in Cartesian systems of thought, where "being is seen to encompass the boy and the mind, with body associated with women and mind with men" (Stanley and Wise 1993, 194). It follows from the above two meanings of knowledge that different people and groups with different experiences and different epistemologies will hold different ontologies. For example, in 1776, most black Americans had a different

experience with inequality than did most white colonists. Black Americans experienced inequality as slavery, while white colonists experienced inequality within the British Empire. It would not be a wild assumption that black Americans also had a different understanding of what counted as knowledge of inequality, and a different understanding of what it would mean both to be unequal and to redress that inequality. Yet their experiences, epistemologies, and ontologies were not the ones which wrote "the law" as embodied in the *Declaration of Independence* and the Constitution of the United States. Instead, these counter-hegemonic understandings of beings were not included in the purportedly objective establishment of the United States.

In these three senses, I argue that different groups, especially those whose voices are marginalized in the production and enforcement of legal reasoning and the law, *know* differently than those groups which produce purportedly objective but in reality biased knowledge which becomes legal precedent, legal principle, or the rule of law. I contend that it is not that objectivity as we know it needs to be watched more closely for omissions and biases, but that the idea that there is one universally valid experience, epistemology, or ontology needs to be discarded in favor of a more pluralistic and inclusive system. Otherwise, hegemonic knowledges will continue to manifest themselves in political practice (the knowledge of the powerful is powerful) and be instrumentalized by the powerful to maintain their power.

The aspect of fortuity can be understood by looking at (apparently) race-emancipatory policies in United States domestic politics and law. School integration is an example of the role of the differential knowledges manifested in politics by power. Derrick Bell argues that Blacks knew school integration as a path to emancipation, while

whites in power who were instrumental in making the policy and ensuring its enforcement saw it as appeasement and as essential for competition in the Cold War. Bell explains that dominant knowledges will co-opt subordinate knowledges for their purposes. He characterizes apparently "neutral" or even "emancipatory" policies made for blacks by whites as a case of fortuity:

> Rule 1. The interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief that the degree of harm suffered by blacks or the character of proof offered to prove that harm.
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> Rule 2. Even when interest-convergence results in an effective racial remedy, the remedy will be abrogated at the point that policy-makers fear the remedial policy is threatening the superior societal status of whites, particularly those of the middle or upper classes. (Bell 2004, 69)

MacKinnon makes a similar argument concerning gender, arguing that "in received traditions, equality is sameness and gender is difference. To define equality in terms of sameness and women as 'not the same' raises the question of whether women will be equal under the law only when they are no longer women" (2001, 20). Both authors suggest that the reasoning used in legal decision-making is reliant on the race, class, and gender of the majority of decision-makers, who are wealthy, white, and male, often explicitly and always. If this is true, the *process* and the *result* of legal reasoning is dependent on social group membership.

Groups and the Process of the Law

If people's experiences, epistemologies, and ontologies differ as a result of their membership in social groups, then *who* practices the law will affect the process of its practice. Alternate knowledges produce alternate understandings of the rules of legal process and the standards by which decisions are made.

For example, we can look at the debate about the "reasonable man" standard. Leslie Bender identified the "reasonable man" standard in tort law as "male-naming, male norm-stetting, and an overt sexism at the heart of traditional law of torts" (Bender 1988). In what he characterizes as the "new wisdom," Gary Schwartz describes the "reasonable man" standard as one which has "effectively served to exclude or erase women" even though "there have been cases which did impressively emphasize the relevance of gender" (Schwartz 2001). Assaf Jacob goes further, to explain that:

> Feminists further assert that the legal characteristics of the reasonable person – particularly the ability to detach oneself from the specific circumstances of a situation and weigh the costs and benefits of an action without recourse to "emotional" or "sentimental" considerations – are male in the sense that they rely on characteristics conventionally attributed to and applauded in men and are in contrast to the features typically associated with women, such as passionate or emotional nature. That is to say, at least some feminist legal scholars doubt the validity of economic analysis and economic principles as the (primary) guiding rules in tort. In this context, Professor Bender asks in one of her articles, "Have we gained anything from legally condoning behavior that causes enormous physical and mental distress and yet is economically efficient? (Jacob 2001).

Some feminists argue that the application of a gender-neutral standard of personhood (or even victimhood) in the law neglects women's knowledges. In the area of sexual harassment, Leslie Kerns argues that "sexual harassment is not a gender-neutral problem. In ninety percent of sexual harassment cases, women are the victims and men are the aggressors" (2001, 195). Taking account of group membership, then, "sexual harassment is uniquely devastating for women" (Kerns 2001). While "women are not all alike, and thus, one woman's experiences, both personal and professional, are not identical to another woman's experiences," "women do have much in common" (Kerns 2001, 197). One of the things that women have in common is their membership in a group of people *disproportionately affected* by certain offenses, such as sexual harassment, domestic violence, and rape. As such, these *gendered* offenses require the tools of gendered

knowledges to create a [substantive and procedural] standard for the evaluation of claims related to them. Kerns and others argue the reasonable man standard encapsulates a definition of reason which has long maintained a masculine identity, and, therefore, is inappropriate for areas of the law which are gendered (2001, 210). According to Kerns,

> Because the reasonable man standard was developed from the male point of view and was explicated by men sitting on the bench, feminists soon came to the conclusion that the reasonable man did not live up to the fair … expectations of the American legal system. The reasonable man standard underwent heavy criticism from feminists, and lawyers and judges responded by changing the name of this generic figure to the reasonable person. But changing the name does not change the viewpoint. Although the reasonable person standard seemed to better personify the objective and fair goals f the American legal system, the standard maintained a male bias. (Kerns 2001, 210-11).

Another example of the influence of differential knowledges on legal process is in the study of the selection of juries. In *Batson v. Kentucky*, 476 US 79 (1986), the Supreme Court held that "although a defendant has no right to a petit jury composed in whole or in part of his own race," the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." The issue in *Batson* was the use of preemptory challenges to exclude people from juries on the basis of their race. In *J.E.B. v. Alabama*, 521 US 127 (1994), the Supreme Court ruled that gender could not be used to select potential jurors for preemptory challenges. The Supreme Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality" (MacKinnon 2001, 237).

The attorneys who excluded people from juries on the basis of race and gender acknowledged the differential knowledges and experiences that people have as members of certain social groups and deemed the inclusion of those experiences undesirable. The Supreme Court's response, however, denied that people may hold different knowledges at all, in holding:

> Today, we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. 511 US at 129.

This is not to say that many of the stereotypes about the relative abilities of men and women are not "invidious, archaic, and overbroad" but only to point out that the Court's rebuff of using gender for preemptory challenges in substance denies any knowledge differences between men and women. In fact, in the opinion in *JEB v. Alabama*, the court worries about reifying perceptions of differences between women and men six times.

In Justice O'Connor's concurrence with the judgment, she discusses the potential for different, group based knowledges to matter in legal reasoning. She explains that "we know that, like race, gender matters" 511 US at 133. For example, she cites women's greater likeliness to convict in rape cases, and argues that "one need not be a sexist to share the intuition that in certain cases, a person's gender and resulting life experience will be relevant to his or her view of the case" 511 US at 135. Indeed, in the dissent, Justice Scalia points out that "if male and female jurors are (as the Court thinks) fungible, then the only arguable harm from the prosecutor's 'impermissible' use of the male sex as the basis for his peremptories is injury to the stricken juror" and argues that the postion that jurors' knowledge is gender-neutral is in direct opposition to the "fair cross-section" cases which struck down laws excluding women from jury service. 511 US at 137.

The question of who can be struck from a jury and why has at its heart the existence and value of differential knowledges based on social group membership. Who decides how to (make and apply) precedent is a contentious issue because *who decides* overlaps with *what is decided*; identity, knowledge, and the substance of the law are not inseparable. What process a litigant is entitled to, especially in the area of jury selection,

depends on the meaning assigned to that process (the perception of who knows what and how) and the value assigned to that meaning (what knowledge is crucial and/or important to include in the litigation process to make it fair.

Through these two examples, I have argued that group-based knowledges *do* inform understandings of legal processes and legal standards, and that seeing those decisions through a lens concerned with group knowledge and group membership has substantive value for understanding those choices, for their substance, and for their implementation. In the example of jury selection, a belief in the objectivity of privileged knowledges would lead decision-makers to hold that the composition of juries does not matter to the result of the proceeding; the only impact of discriminatory juror selection is discrimination. On the other hand, a belief that those subordinated in social and political life *know* differently than the authors of purportedly objective knowledge could lead a decision-maker in one of two directions. First, the decision-maker could understand those different knowledges as wrong and/or substandard, and try to exclude them from the dialogue (for example, using peremptory challenges on the basis of race or gender). Second, the decision-maker could see those knowledges as valuable, like the strong objectivity standard discussed below does, and encourage or require their participation with the goal of obtaining a more meaningful and representative result.

Groups and the Substance of the Law

The inclusion or exclusion of different individuals' knowledges as a result of their group membership is only one facet of the role that "groupthink" should play in legal reasoning. While these knowledges are a major way that group membership matters to legal analysis, the group impact of the issues that the law deals with is another question.

It is not only the *process* and *result* of legal reasoning that depend on social group membership, but the very definition of the *subject* of legal reasoning. If African-Americans *know* slavery differently than whites, it is in part because they experience it differently: slavery was an *experience* common to and reserved for African-Americans.[4] Likewise, daily concern with rape (either actual or feared) is an experience common to and reserved for women. An individual rape, then, as mentioned above by MacKinnon, is both a harm to the individual and an act of gender subordination. Legal reasoning which relies on apparently gender-neutral rules misses both of those problems; legal reasoning which individualizes cases misses the second. As MacKinnon explains, women are "given sex equality where law counts but gender-specific violations of it are ignored," resulting in a situation where "through a seamless web of society and law, women as women – understood as members of a social group defined as gender female – are deprived of avenues for independence and self-development, degraded for profit and entertainment and pleasure, violated with impunity, and exploited without limit" (2001, 23).

An *act of* gender or race subordination, then, has a different meaning than an act either counter to or (if such a thing were possible) outside of the system of oppression of subordinated social groups. Evaluating the rape of a black woman by a white man, then, has different implications than the *same 'facts'* concerning a rape of a white woman by a white man. While courts have recognized combined, or intersectional, discrimination where race and gender subordination meet (see *Jeffries v. Harris County Community*

[4] By this I do not mean and would not contend that *only* African-Americans were slaves in US history; just like in the next example I do not mean and would not claim that *only* women experience rape. What I do contend is that the infrequency of and special attention to those experiences which occur outside of the expected group classification prove the rule of the association: slavery was a *phenomenon* of white supremacy, and rape is a *phenomenon* of male dominance.

Action Association), the American system of laws and legal reasoning has yet to accommodate a comprehensive set of standards for evaluating the role and meaning of group membership in the commission of offenses and the litigation of their resolution. Yet, it is here where social group membership matters not only to the perception of the meaning of the problem but fundamentally to the meaning of the legal problem.

According to MacKinnon, "unable to grasp discrimination that does not come in one of two boxes, the *Jeffries* court created a third box" (2001, 451). Kimberle Crenshaw laments "the failure to embrace the complexities of compoundedness is not simply a matter of political will, but is also due to the influence of a way of thinking about discrimination which structures politics so that struggles are categorized as singular issues" (Crenshaw 1989). In the example that opened this paper, Ann was not only a victim of sex discrimination, but a victim of sex discrimination, race discrimination, and national origin discrimination. She also suffered disproportionately because of her marital status. The man that raped Ann committed an offense against her, but also committed an offense against *women as a group*. Bosses who fired Ann for her racial background or national origin did not only commit an offense against her, but also committed an offense against *immigrants as a group*. Further, the discriminatory things which happened to Ann can be said to have had a disproportionate impact on *immigrant single women with children*. All of these group memberships are meaningful, because each provides both a *causal explanation* of the things that happened to Ann and a part of the explanation of why they will happen again, to Ann or someone else.

Legal precedent has very few methods for dealing with the group-based impacts of an offense. While the designation "hate crime" does exist in most states, that

designation is often meant to cover the added harm to the individual because the crime was based on the individual's membership or perceived membership in a given group. There is no provision for the harm *to the group* of any given offense, or the harm to each individual member of the group as a result of the harm to, oppression of, or subjugation of the group. Likewise, case-by-case decision-making does not have the tools to see offenses as non-individual. Such reasoning could count a single case as particularly severe, much like the hate crimes precedent can, but it has no provision for the understanding of a group of cases as oppression or subordination.

Those legal rules and standards which do take account of group membership, such a sex and race discrimination laws, base their logic on the potential for "equality" of those groups and their members. The idea of equality is that "under law, anyone is entitled to the same consideration as anyone else, to be treated without personal favor or prejudice" (MacKinnon 2001, 3). Additionally, "on another level, reasoning though analogy and distinction makes the notion of equality methodological in the law" (MacKinnon 2001, 3). This notion of equality, however, relies on sameness as a foundational principle. Equality law does not ask "why one must *be* the same as someone else before one *ought* receive equal consideration or benefit" (MacKinnon 2001, 6).

Equality discourse is also somewhat confusing for a number of reasons. First, it leaves somewhat unclear whether that inferior situation is a result of some factors which justify differential treatment (for example, gender traits which are a result of biological difference). Second, it assumes liberal analyses of rights and duties in political organization – that equality is the framework in which politics ought to work, instead of

some framework like needs or care. Third, interpretations of equality are divided into equal *opportunity* and equal *situation*, with the former usually both winning the interpretive war and masking oppression which creates difference in situation (MacKinnon 2001). Looming in the equality debate are questions of which men women want to be equal to (Phillips 1987). These problems with equality rhetoric and practice often turn critical scholars and legal theorists from questions of equality to questions of oppression (Phillips 1987, 10).

Equality encourages subordinated groups to try to be seen as like dominate groups, even though "society has organized its inequalities along lines of socially perceived 'unalikeness'" (MacKinnon 2001, 7). This is ironic, because, as MacKinnon points out:

> The worst conditions of subordination, such as racially segregated schools or sexually segregated workplaces, place those disadvantaged by them in situations that are most circumstantially "unlike" the situation of those advantaged by them. These conditions can make their occupants look "different" from those free from such conditions, institutionalizing inequality while breeding as well as demarcating differences between groups. If these situations are seen as people being "different" from one another rather than as conditions being unequal, treating some less favorably than others merely looks like treating unalikes unalike. (MacKinnon 2001, 7).

This analysis does not even account for the times when groups actually *are* unalike: for example, as respect to pregnancy – treating men and women "the same" as concerns pregnancy would be ridiculous. Less extreme examples confirm the point. Treating a first-generation American who has little instrumental knowledge of English "the same" as a fluent speaker for purposes of college admissions test, or treating a rape victim "the same" as a football player or expert marksman when they injure an intruder, or treating a quadriplegic "the same" as a marathon runner in expecting them to get places quickly would be silly – in these examples, the people *are not* "the same" – equality, or same

treatment, would not work for them. There are times when men and women, blacks and whites, handicapped and non-handicapped persons, are not similarly situated, but still merit treatment without subordination or oppression.

"Strong objectivity" and "Empathy": Two Possible Pathways Forward

From a feminist perspective, I argue that it is essential to take account of group membership in order to understand legal knowledge, make effective legal rules, and combat the oppression and subordination of a legal system dominated by privileged knowledges which claim neutrality and objectivity and argue for the elusive equality. This conclusion section means to briefly explore two logical ways to integrate social groups into legal reasoning, strong objectivity and empathy.

Strong objectivity

One of the options is to make apparent and claimed "objectivity" and "neutrality" more pluralistic and a closer approximation of objectivity's goal of representativeness. Sandra Harding's understanding of "strong objectivity" attempts to operationalize such an effort (1998). Harding's concept of "strong objectivity" draws on "standpoint epistemologies to provide a kind of method for maximizing our ability to block 'might makes right' in the sciences" and in the law (1998, 129). Strong objectivity moves neutrality from the solution to the problem (Harding 1998, 132). Since apparently "neutral" knowledge is actually defined by the social groups in power in a given political atmosphere and the claim of "neutrality" is a tool to silence other voices, "strong objectivity" tries to include more voices.

Harding sees the exclusion of pluralistic knowledges as the most silencing impact of the utilization of purportedly objective legal standards. As Harding explains, "we

could say that holding truth as an ideal for scientific claims as well as truth-maximizing procedures are not just unachievable but incoherent. . . . . truth claims are a way of closing down discussion, of ending critical dialogue, of invoking authoritarian standards" (Harding 1998, 145). Harding suggests, in the realm of science, to include not only the voices which are traditionally understood as "good science" (standards defined by white, western men) but also other "scientific" voices of the post-colonial, the post-modern, and the marginalized in global politics. Cross-applying this logic to legal reasoning, both rule-making and rule-enforcement should intentionally include diverse voices from different social groups *as a measure of the validity of the reasoning* and *replacing* such standards as the "reasonable man" standard and other purportedly neutral analyses. Evelyn Fox Keller explains some of the benefits of this approach:

> Dynamic objectivity aims at a form of knowledge that grants to the world around us its independent integrity but does so in a way that remains cognizant of, indeed, relies on, our connectivity with that world. In this, dynamic objectivity is not unlike empathy, a form of knowledge of other people that draws explicity on the commonality of feelings and experience in order to enrich one's understanding of another in his or her own right. (Keller 1985, 117).

A strong or dynamic objectivity approach takes three assumptions as basic: human relational autonomy, group-based and constructed knowledge, and the value of dialogical approach to knowledge synthesis. I will briefly explain these assumptions to give substance to the concept.

First, dynamic objectivity takes the assumption of relational autonomy as basic. Scheman argues that understanding integral human interconnectedness influences the ways that we think about knowledge. She explains that "attention to interconnectedness can also make possible an epistemology that doesn't start by positing a separation

between the knower and known, and then enforcing that separation in the name of maintaining objectivity" (Scheman 1993, 211).

Instead, Nancy Hirschmann's understandings of political and moral obligation are a useful starting point understanding human relational autonomy. She explains that obligation, in the liberal sense, is generally discussed as a limit on behavior, a requirement of non-action (Hirschmann 1989, 1227). Most theories of obligation are, then, based in the idea of having consented to those behavioral limitations in some (implicit but) voluntaristic way, like, for example, a social contract (Hirschmann 1989). Voluntary consent doesn't work practically – it has never happened. Feminisms help reach this insight because they see the gender bias in this understanding of how obligation works (Hirschmann 1989, 1228-9).[5] In other words, the nature of the epistemology of political obligation is such that it is gender biased.

In discussing gender bias in obligation, Hirschmann asserts the "claim that freedom is central" to traditional understandings (1989, 1233). She loosely explains the purposes of civil society as the protection of natural freedom and ensuring that the individual can act rationally (Hirschmann 1989, 1234). But freedoms perceived to be natural are not always gender-neutral. Psychoanalytically, the girl is more likely to learn sameness from mothers and the boy is more likely to learn difference, so the boy develops conflictual tendencies and the girl peaceful ones (Hirschmann 1989, 1235). Boys' freedom is reactive autonomy; girls' is relational autonomy (Hirschmann 1989, 1235). This has a twofold effect, according to Hirschmann – both in the ways that

[5] Hirschmann is not talking about a gender bias in the application of obligation, like disparate impact. Instead, she is talking about a structural gender bias in how societies understand and treat obligation. She defines structural gender bias as "the bias of the very structure of obligation (its being defined solely in voluntarist terms, and the fact that *nonvoluntary obligation* is an oxymoron) toward a masculinist perspective which automatically excludes women from obligation on an epistemological level" (Hirschmann 1989, 1229).

gendered lives play out and in the struggle for discursive recognition. Hirschmann explains the latter, as she talks about the relationship between freedom, recognition, and violence:

> If the conception of freedom as negative is premised on the struggle for recognition, particularly on the ability to be recognized without reciprocation – if non-recognition is (as it is for the Oedipal boy and Hegel's master) a form of power and violence – freedom, too, must be at least in part an expression of that same power and violence. (Hirschmann 1989, 1238).

She explains that, in an obligatory relationship, the obligated must recognize the obligor but not vice versa (Hirschmann 1989, 1239). Often, women are the obligated and men the obligor, in a cycle which has self-perpetuated for much of history. Hirschmann understands that the feminine is obligated to recognize the masculine and the masculine is not obligated to recognize the feminine. Assumed consent to obligation thus becomes insidious and counterproductive, as Hirschmann explains that "consent thus seems to save us from authoritarian coercion. But in reality it merely masks it" (Hirschmann 1989, 1239).[6] Femininities come to an unfair bargaining table with an unfair bargaining position. Hirschmann explains it as a trap where "even acts of dissent are interpreted as acts of consent, and unfair bargaining positions belie the freedom implicit in free choice" (Hirschmann 1989, 1239). In this way, voluntarist theories of obligation lead to gender subordination and totalitarianism, and have similar affects across subordinated groups (Hirschmann 1989, 1240).

Hirschmann explains that feminisms can help sort out the conceptual mess of political obligation. She explains that a feminist understanding of the function of consent would not be based in the assumption that all choices made are made from a perspective

[6] Instead of a general social norm, we assume that consent exists despite "that such consent is non-existent for all but a select few" (Hirschmann 1989, 1239). The struggle for discursive recognition here interacts with the gendering of social norms.

of freedom (Hirschmann 1989, 1241). Instead, feminisms see and understand (mostly because they have experienced) "responsibility in the sense of response, or even obligation itself; that is, from a 'feminist standpoint,' perhaps obligation needs to be taken as given" (Hirschmann 1989, 1241).[7] She explains that "one cannot merely add women's experience to the dominant discourse because the two utilize different ontological and epistemological frameworks" (Hirschmann 1989, 1242). Instead, "a fully consistent consent theory would have to include (perhaps paradoxically) the recognition that not all obligations are self-assumed" (Hirschmann 1989, 1229). Feminist understandings of obligation see obligation as sometimes forced, and always relational.

The assumption of relational autonomy is accompanied by the assumption of the existence and value of knowledges and experiences differentiated on the basis of group membership. The assumption of the existence of these knowledges was detailed above; their value will be discussed briefly here. Harding advocates "starting thought from marginalized lives" as standpoint epistemologies recommend, for "more rigorous, more competent standards for maximizing objectivity" (Harding 1998, 18). bell hooks explains that politicized knowledge of and from marginality uniquely strengthens analysis. She contends that "these statements identify marginality as much more than a site of deprivation; in fact I was saying just the opposite, that it is also the site of radical possibility, a space of resistance" (hooks 1990). The contribution of these knowledges is multifaceted as, "the critical counterdiscourse by the colonized can appear either as an oppositional discourse, by those who, say, actively work to overthrow the rule of the

[7] In other words, it is not an issue of making women 'free' in order to accept obligation; women's experience proves that freedom to choose and obligation are both not necessarily related and not a one-to-one map even if they are related.

colonized, or as a more ambivalent, complicitous discourse by those of criticize the evils of colonialism even as they also extol its virtues and its necessity" (Harding 1998, 15).

Finally, given interdependence of human knowledges and choices *and* the value of those diverse knowledges, dynamic objectivity assumes that a dialogical knowledge production process (and thus dialogical production of the law) is a viable and valuable option. Jill Steans describes the process of dialectical knowledge creation as she explains that "conceptualization and conceptual frameworks are produced by concrete understanding of the significance of social facts generated by the process of reflection and thought [a dialectic between subjective and objective]" (Steans 1998).

Anthias explains that the process of constructing such a dialogue is difficult and fragile, fraught with substantial contingency (Anthias 2002). She describes the dialectic of ethical discussion:

> One of the most pressing theoretical and political issues of the present moment is to consider the potential found in the dialogical moment that moves beyond collective imaginings. This involves thinking about ways that on the one hand validate and respect differences of location and positionality (as well as the validity of the collective imaginings that inform peoples valued and cherished beliefs, cultural practices, and self-identities), without neglecting the important issue of equality for individuals and groups. (Anthias 2002, 281)

Nira Yuval-Davis calls such a dialogue 'transversal.' She claims that transversal politics aims "to be an alternative to the universalism/relativism dichotomy" (Yuval-Davis 1997). Yuval-Davis describes not only a dialogue, but a structured one which attempts to understand the ways in which ideas relate, both conceptually and in power terms. She explains that transversal politics "aims at providing answers to the crucial theoretical/political questions of how and with whom we should work if/when we accept that we are all different as deconstructionist theories argue" (Yuval-Davis 1997, 135).

Anthias contends that "effective dialogue requires an already formulated mutual respect, a common communication language, and a common starting point in terms of power. It also assumes good will of partners in dialogue" (2002, 282; (Misra 1999). Hajer discusses the dialogue as a discussion, or way of communicating, much like any interpersonal conversation. He argues "discourse is seen as synonymous with discussion, or is at best understood as a 'mode of talking.'" (Hajer 1995). Conversations can produce alternative discourses that entail new subject positions (Gibson-Graham 1994). These new subject positions, the result of dynamic objectivity, can be used to inform law-making and the formation of legal process.

Empathy

The plurality of reasoning, however, only solves half of the problem. While different social groups reason differently, this reasoning is not *guaranteed* to take account of the social-group based impacts of events which may make it into the legal system. In order to take account of differential impacts, legal reason-ers (juries, judges, and even lawyers) who are not in the situation that the litigants are (ie, are members of different social groups), need to find some way to identify and try to understand the ways that the litigants *experience* and *know* both the world and the facts of the case at bar. For this task, I propose a feminist ethic of empathetic cooperation.

Vivian Jabri sees the task of identification within reasoning as impossible impossible, because it must simultaneously rest in "a dualism between what Gilligan refers to as an 'ethic of justice' identified with a Kantian ontological project of autonomous personhood" and a contradictory "'ethic of care,' the ontological project of which is centered on the relational self" (1999, 41). I argue that an 'ethic of justice' can

be formed from, and not in opposition to, feminist understandings of relationality and care.

It does not benefit subordinated social groups to continue complying with legal reasoning which marginalizes them and considers individuals unequally situated as "the same" when the odds are stacked against them by parochial ideas and impacts. Instead, Christine Sylvester argues that empathetic cooperation is a way of dealing with interaction and obligation. She explains that "empathy rests on the ability and willingness to enter into the feeling or spirit of something and appreciate it fully. It is to hear what the nativized say and be transformed in part by our appreciation of their stories" (Sylvester 1994, 96; Bystudzienski 1992).

In other words, empathy can be, at least in part, understood as solidarity inspired by feminist consciousness (Ruddick 1989, 239; Arendt 1970).Sylvester provides a definition of empathetic cooperation and expands on the political implications of this understanding:

> To be empathetically cooperative is to become relationally rather than reactively autonomous with those we have defined as unmistakably other, with those who are not inside 'our' community, our value system . . . . One does not take up permanent domicile in the other when one has empathy; one does not universalize her experience as something 'I' can know absolutely, thus cannibalizing her. Rather, one appreciates the similarities that are echoes of one's independent experience . . . . Empathy enables respectful negotiations with contentious others because we can recognize involuntary similarities across difference as well as differences that mark independent identity. There is no arrogance of uniqueness. Precious little committed defensiveness. (Sylvester 2002, 119-20).

Empathetic cooperation, then, is based on an intentional feeling of connectedness focused on subordination. Fiona Robinson explains that "*It is crucial to examine how structural features of institutionalized relations combine with typical situations to enable or deform the abilities of all concerned to hear and be heard*" (Robinson 1999, 49). Jan Jindy

Pettman envisions such a political understanding as an alternative strategy of collaborative empowerment (Pettman 1996, 179). June Lennie contends that feminist empowerment discourse combined with empathy leads feminisms to political and security ethics of care without neglecting justice (1999, 107). An ethics of care, according to Lennie, is inclusive of diversity, emphasizes ethics, considers equity in participation and empowerment, acknowledges and accommodates subjectivity and value differences, focuses on balance, values local knowledges, and encourages the involvement of women (1999, 107).[8]

Empathy does not take the form of "the wealthy and powerful caring about the weak and impoverished in a manner which is dangerously close to robbing those moral subjects of their own agency and self-esteem" (Robinson 1998, 153). Instead, "what is required is a restructuring of political action in such a way that enduring relationships can flourish and agents can focus their moral attention and, ultimately act with the virtues of care – attentiveness, responsiveness, and responsibility" (Robinson 1998, 154). Empathy is a value that those currently "in power" can transform their rules to accommodate the knowledges and needs of other groups, particularly those who are at the political, social, and legal margins.

Gender and Reasoning, a look forward

This paper argued the group membership should figure prominently in legal reasoning. It showed the absence of social group membership in current legal reasoning, both precedent- and case-based. It presented evidence that the neglect of group

[8] Feminisms see relational interdependence among humyn beings, and care deals with that interdependence. As Dahl documents, "care in my view is an activity that presupposes needs that a person cannot meet by him- or herself where needs are conventionally defined" (Dahl 2000, 477). Fiona Robinson sees this operative interpretation of care, but also understands it as a behavioral and epistemological framework for policies made outside of the realm of direct caring. She explains that "care can be both moral principle and practice in global politics" (Robinson 1999, 31). Robinson argues that such a worldview is important, and holds transformative potential (1999, 23).

membership in legal reasoning is systemic rather than incidental, coming from the law's reliance on concepts of objectivity, neutrality, and equality. It contended that the failure to consider social groups impacts both the process and substance of the law, affecting oppressed and subordinated groups disproportionately. It proposed two alternatives to equality and objectivity as founding principles for jurisprudence: "strong objectivity" and empathy.

This paper lays the groundwork for the argument that strong objectivity and empathy could, independently or together, make legal reasoning more accommodating of the knowledges of subjugated groups, and thus make legal decision-making more likely to reverse subordination and oppression. If empathy were guiding legal decision-making, a judge or jury would listen to Ann's story in order to *feel* what she felt when she made the choice to steal cough medicine to save her little girl. A decision-maker would identify with the gender, race, class, and national origin-based subordination that she experienced. He or she would then make a decision in accord with an ethic of care. Likewise, the jury in Andy's case would be necessarily composed of diverse voices cognizant of white male privilege and Andy's exercise thereof in making a decision about how to deal with his offense. Strong objectivity combats privilege by *including* multiple voices in the process; empathy listens to the voices which are neglected. Together, they can begin the process of integrating the diverse knowledges and experiences of social groups into the making and enforcement of laws.

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