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B. Women

(f) Feminist Legal Studies: A Primer

T. Brettel Dawson

INTRODUCTION

A headline in the New York Times on September 30, 1988 announced, "Feminist scholars spurring rethinking of law". In her article, Tamar Lewin commented

in a flood of recent articles in legal journals, feminist scholars are proposing a basic rethinking of everything from the doctrine of negligence to the criminal laws about rape.

She quoted Martha Minow, a professor at Harvard Law School as saying,

In many cases, the legal framework doesn't allow us to do justice. Where that's true, we have to change the framework. That's what good lawyering is, feminist or not.

In her book, *Feminism Unmodified*, published the year before, Catharine MacKinnon characterized the goal of critical, feminist engagement with law as being

to participate in defining the terms that create the standards, to be a voice in drawing the lines. This has been at the heart of every women's initiative for civil equality from suffrage to the equal rights amendment: the simple notion that law ... respond to women as well as to men (at 228).

Her words, in turn, echoed those of Canadian historians Ruth Roach Pierson and Alison Prentice who stated in 1982:

the critical task of feminism ... is to examine the structures of women's inequality. When and where has the systematic subordination of women existed? What have been the social, economic and political mechanisms of women's oppression? However, because an exclusive preoccupation with these mechanisms would lead to a distorting and purely negative picture of women as victims, it is equally the task of feminism to reclaim, elucidate and re-evaluate the positive aspects of women's experience in the present and the past. ("Feminism and the Writing and Teaching of History" (1982) 7 *Atlantis* 38).

FEMINIST SCHOLARSHIP

A succinct definition of women's studies is that it is an approach to research that investigates the world from women-centred perspectives which cross the boundaries of traditional academic disciplines. It also attempts to cross the boundaries of other identity markers: race, class, (dis)ability, sexual orientation to render a nuanced understanding of the contextualised, locally situated and complex experience of women in our society.

In the United States, the New Jersey Project, a curriculum transformation project funded by the New Jersey Department of Higher Education, has offered the following characteristics of feminist scholarship:

1. Feminist scholarship asserts the centrality of women's contribution to history, society and culture. Feminist scholars seek to recover the lost work and thought of women in all areas of human endeavour. They reveal women's contributions to the public as well as to the private sphere in every historical period and often show that, when women's contribution is taken into account, traditional thinking about a particular period must be revised.
2. Feminist scholarship begins with an awareness that much previous scholarship has offered a white, male, eurocentric, heterosexist, and elite view of 'reality'. Often feminist scholars seek to uncover and examine the way this bias has operated in their own discipline. These projects involve showing how certain groups, lifestyles, methodologies, categories, metaphors, symbols, or art forms were devalued or rendered invisible by the previous biases and distortions of the field.
3. Feminist scholarship is careful not to treat the experience or perspective of any one group as if it were universal. Feminist scholarship does not take the experience of white men or white women as the norm. It suggests that women may view and experience the world differently than men and women from different races and different classes may view and experience the world in different ways. Feminist scholarship is careful to reflect this recognition of difference in the way it structures topics and formulates questions and answers.
4. Feminist scholarship is defined as much by the kind of approaches it gives to the questions it asks as by the ways in which those questions are answered. Feminist scholarship seeks to

find new ways of thinking about people and the relations among them and new ways of thinking about nature and history by asking new and different questions—questions which reflect an awareness of the preceding three points.

5. Feminist scholarship tends to be interdisciplinary in its approach. This means that scholars do not allow traditional separations among the so-called 'academic disciplines' to get in the way of developing rich and comprehensive explorations of critical issues or questions.

(See generally, "Feminist Scholarship Guidelines", The New Jersey Project, White Hall, 315 William Paterson College, Wayne, New Jersey, 07470, U.S.A.)

Feminism

The term 'feminism' is itself in need of some definition. Of course, it is clear that there are many 'feminisms'. To capture some of the essences of what it means to teach and work from feminist perspectives, the following quotations have been gathered: They are offered without comment, and to stimulate thought and debate.

1. "Feminism ... is necessarily a struggle to eradicate the ideology of domination that permeates Western culture on various levels as well as a commitment to reorganising society so that the self-development of people can take precedence over imperialism, economic expansion, and material desires ... Feminism is the struggle to end sexist oppression. Its aim is not to benefit solely any specific group of women, any particular race or class of women. It does not privilege women over men ... Most importantly, feminism is neither a lifestyle nor a ready-made theory or identity or role one can step into."
bell hooks, *Feminist Theory: From Margin to Centre* (Boston: South End Press, 1984), 24–26.
2. "I do not mean to confine 'feminism' to a way of thinking available only to persons born female. I refer to feminism as a method, as the critique of objectivity in epistemological, psychological, and social, as well as legal terms. Similarly, when I refer to 'femaleness' or 'maleness', or ascribe 'points of view', I am relying on the premise that gender identity is a complex, socially-determined phenomenon, a process (unavoidable to its subjects) of conscription into rigid sex roles."

- Ann Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373, n.2.
3. "Feminism does not begin with the premise that it is unpremiered. It does not aim to persuade an unpremiered audience because there is no such audience. Its project is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience."
Catharine MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635, 638.
 4. "At the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs will require a radical change ... in the social, economic and political order."
Rosalind Delmar, "What is Feminism" in *What is Feminism?* eds. Juliet Mitchell and Ann Oakley, (1986) 8, 8.
 5. "The three core assumptions of feminist critical theories are: that gender is a central category for analysis; that equality between women and men is a crucial social objective and that such equality for all women cannot be achieved without fundamental social transformation."
Deborah Rhode, "Feminist Critical Theories" (1990) 42 Stanford L. Rev. 617.
 6. "I refer to positions as feminist in a broad sense that encompasses a self-consciously critical stance toward the existing order with respect to the various ways it affects women 'as women'... Being feminist means owning up to the part one plays in a sexist society; it means taking responsibility for the transformation of 'our gendered identity, our politics, and our choices'."
Katharine Bartlett, "Feminist Legal Methods" (1990) 103 Harvard Law Review 829, at 833, including a citation of Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" (1988) 13 Signs 405, 432.
 7. "Feminism ... is not a 'natural' excretion of [woman's] experience but a controversial political interpretation and struggle, by no means universal to women."
Linda Gordon, "What's New in Women's History?" in ed. T. de Lauretis, *Feminist Studies/Critical Studies*, (1986), 20, 30.
 8. "Feminism is an awareness of the political and social implications of sex and sex discrimination within society. It is a recognition that the discrimination facing women is not just a concern of individuals, but is systematic. Feminism is a political commitment to challenge the systematic force and values inherent in patriarchy."
Susan Sherwin, Dalhousie University: cited in Christine Boyle, "Book Review" (1985) 63 Can. Bar Review 427, at n.4.
 9. "The current state of feminist legal theory makes me wonder if I am still a feminist. The feminism I see myself associated with has a capital F. That which aims at eradicating the various forms of oppression that affect all women, a project overlooked by 'small town' feminism. I am willing to risk being outside current postmodern trends by supporting capital letters. My capital letters connote expansion, breadth and inclusion. Far from claiming privileged access to truth with a capital T, feminism with a capital F thrives in a room with a great view of narratives about intersections ... Feminist legal theorist belong to a norm-forming group involved in what Robert Cover has described as the creation of new legal meanings."
Celina Romany, "Ain't I a Feminist?" (1991) 4:1 Yale Journal of Law and Feminism 23.
 10. "Feminism is (or at least aspires to be) a theory and practice forged directly from women's experiences as women. It thus directly implicates our biological status (as female) and our political status (as those who identify with women). As Catharine MacKinnon notes, the 'methodological secret' of feminism is that it is built on 'believing women's accounts', on recognizing women's experience as central."
Christine Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women" (1989) Univ. Chicago Legal Forum 23, at 24-25.
 11. "Black feminist thought consists of theories or specialized thought produced by African-American women intellectuals designed to

express a Black women's standpoint. The dimensions of this standpoint include the presence of characteristic core themes, the diversity of Black women's experiences in encountering these core themes, the varying expressions of Black women's Afrocentric feminist consciousness regarding the core themes and their experiences with them, and the interdependence of Black women's experiences, consciousness, and actions."

Patricia Hill Collins, *Black Feminist Thought* (Boston: Unwin Hyman, 1990), at 32.

12. "Womanist is to feminism as purple is to lavender. [One is a womanist] when one is committed to the survival and wholeness of entire people, male and female. [A womanist] is not a separatist, except periodically for health [and is] traditionally universalist as is 'Mama, why are we brown, pink and yellow and our cousins are white, beige and black?' Ans.: 'Well, you know the coloured race is just like a flower garden, with every color represented'."

Alice Walker, *In Search of Our Mothers Gardens* (New York: Harcourt Brace Javanovich, 1983), xi.

13. "Not to be able to come to one's own truth or not to use it in one's own writing, even when telling the truth, having to 'tell it slant', robs one of drive, of conviction. ... Everywhere, women working in the common field of men are denied that integrity of work and life which can only be found in an emotional and intellectual connectedness with ourselves and other women."

Tillie Olsen, *Silences* (New York: Delacourt Press, 1978).

14. "If we conceive of feminism as more than a frivolous label, if we conceive of it as an ethics, a methodology, a more complex way of thinking about, and thus more responsibly acting upon, the conditions of human life, we need a self-knowledge which can only develop through a steady, passionate attention to all female experience. I cannot imagine a feminist evolution leading to radical change in the public/private realm of gender that is not rooted in the conviction that all women's lives are important; that the lives of men cannot be understood by burying the lives of women; and that to make visible the full meaning of women's experience, to reinterpret knowledge in terms

of that experience, is now the most important task of thinking."

Adrienne Rich, "Towards a Women Centred University" in *On Lies, Secrets and Silences* (New York: MacMillan, 1980).

A recurring theme in these quotations is the term 'woman'. In our postmodern world, of course, the term 'woman' has been subjected to critique: does it describe a coherent experience or has it little meaning beyond being a biological marker (itself subject to change.) There are vigorous debates about the term or category of 'woman' in women's studies. These correlate with concerns to avoid essentialism. The central preoccupations are with questions such as: Who do we mean (or include) when we talk about "women"? Given the diversity of women, is it even meaningful to talk about "women" as a group? Does talking about "women" obscure important differences between us and perpetuate the visibility of only certain women and women's issues? Does moving away from the category "woman", undermine the potential for social transformation and leave women divided, living (at least heterosexual women) "dispersed among the males, attached through residence, housework, economic condition, and social standing to certain men ... more firmly than they are to other woman" as noted by deBeavouir in *The Second Sex* (at 19).

Logically, the analytical category of male is just as profoundly fragmented in these theoretical accounts of identity, and we are at the very least called away from essentialism to understanding the significance and distribution of social power and social construction. These debates have profound significance for thinking about law and its impacts on "women" and formulating strategies for change.

FEMINIST LEGAL STUDIES

Feminist critique of law is broad-based, often concerned with the underlying structures of legality and power relations—the systems of legal ordering—and with refashioning them in ways that take women into account on their own terms.

The complexities and ranges of the projects of legal feminisms are the focus of much of this book. However, one now classic example of feminism's uncovering project was the controversial and important book review undertaken in the same period by Professor Christine Boyle of two leading books law of injunctions and damages ("Book Review" (1985) 63 Canadian Bar Review 427). Professor Boyle

began by noting that the law of remedies would seem to be ideally suited for the apolitical exposition of legal doctrine. Nevertheless, she argued, even here, "the law is deeply imbued with the result of many value choices." She noted that the authors could in, 1985, be assumed to be "aware of the political implications of the choice of language, methodology and subject matter and methodology", and it was on this level that Boyle engaged with the texts.

In relation to their choice of language, Boyle pointed out that both authors used male pronouns almost exclusively and without explanation. She observed that many writers now "make an effort to avoid writing about the world as if it were exclusively male." This is not trivial: "to do otherwise is to provide evidence of a phallogocentric world view, that is, one that equates the 'human' with the 'male' ... this would be a mere irritating if it were not for the real danger that use of male language has a limiting and perverting effect on intellectual inquiry." Thus, Boyle identified as a matter of concern, the contingency or ambiguity of women's inclusion in texts about law.

In relation to methodology, Boyle focused on whether the methods of reasoning employed by the authors were limited by any masculinist bias. She noted the strong preference for the concept of rationality, and pointed out that "the concept is a specially sensitive one to feminists because of its treatment as epistemologically superior to sentiment and intuition" and emotion. These kind of embedded assumptions have an influence on how issues and problems are conceptualized and resolved.

Boyle also examined whether women and their legal problems appeared in the books or was whether the "coverage [was] as male as the pronouns." She noted that one book in particular covered family law injunctions in one paragraph while devoting 68 paragraphs to injunctions protecting property and entirely omitted injunctions to protect physical safety. While she was careful to avoid suggesting that "family law is a 'woman's' subject," she argued that "people who are concerned about the position of women in our society would, on this issues-oriented level, look for material on injunctions for the protection of abused wives." As Boyle made clear, coverage matters—"Practitioners whatever their feelings about feminism, have female clients who seek remedies too. It is time for male academics, who after all are paid to think, to reflect on whether they are specializing in 'Men and the Law'."

Boyle's review addressed a number of issues: the question of who is addressed by the terms of legal

debate or thought to be included in it and the ways in which legal inquiry is constituted and conducted. By focusing on books concerned with "black letter law"—traditional, doctrinal areas of law, Boyle declared the "radical and subversive" reach of legal feminisms to go to the core of the legal world. As Stephen Gillers a professor at New York University School of Law told Tamar Lewin in her New York Times article, "it's not one doctrine that feminists are proposing, its a reconstruction of legal theory. Ultimately we are going to feel it through an avalanche of a thousand little decisions."

In the past 20 years, the project of 'women and law' has shifted from the crucial threshold struggles which were concerned with identifying "women's issues" in law and "adding women into" law. It has been observed that the problem is not so much that irrelevant, capricious, or irrational distinctions are made between women and men for the purposes of designing law and laws but that Euro-Canadian society/law is structured in such a way and with such roles and starting positions (relationally, sexually, reproductively and economically) that sex is a relevant ground of distinction and of different and less beneficial treatment.

In the words of Professor Margaret Thornton, an eminent Australian academic,

So successful has been the prevailing ideology of law as a neutral arbiter of disputes and as a positive instrument of social change, rather than as a primary determinant of social relations, that little attention has been directed to the possibility that the form of law itself might be flawed." ("Feminist Jurisprudence: Illusion or Reality ((1986) 3 Australian Journal of Law and Society 5, at 8.)

Law reproduces underlying contradictions/complexities in the (social) situation of women (and men) as mediated by the intersectionality of gender, class, race/ethnicity, sexual orientation, and (dis)ability. Feminist legal theorists, then, work with ideas that law is laced with contradictions and inconsistencies in the interests facilitated within or by it, and in the ordering it achieves.

The centrality or importance of law in struggles for women's liberation from oppressive social relations, violence and inequality cannot be assumed. The use of law and legal forums, to the extent that they are premised upon the very structures being challenged, can in fact further entrench oppression. Instead, refocusing on integrated political, economic and social action, of which legal engagement is but one part, has been urged. Certainly, law changes

(g) It's Time for Change. Demands to the Federal Government to End Poverty and Violence Against Women

slowly and in complex ways; it does not by itself cause nor cure social inequalities. In the end, law becomes a "terrain or arena of struggle" in which

meanings and visions are contested, which can be strategically engaged with or resisted, and which can be seen as an integral part of social organization.