## Spaces and Challenges: Feminism in Legal Academia

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*Notes renumbered from original.*

[...] The "core" curriculum remains a powerful presence in Canadian law faculties, despite the addition of "law in context" courses on its periphery.[1] What this means is that most law school administrations take the position that courses that are "core" -- not necessarily mandatory, but viewed as essential to a student's legal education -- must be offered and staffed as a priority. "Law and" courses, such as Feminism and Law or Social Justice and Law courses, are a lesser priority, and are not necessarily offered every year. As a result, students can easily design their upper year program to be virtually devoid of critical approaches to law.

Law students are easily seduced by the core curriculum, for various reasons. We live in an era during which law school tuition fees have risen exponentially (to over $10 thousand per year in most provinces), as government funding drops and law schools are encouraged to move towards operating on a cost recovery basis. Students who do not have access to wealth incur significant debt to complete the three years of law school, which typically follow an undergraduate degree such as a BA where many students accumulate a debt load.[2] The incentive for students to obtain articling positions and junior lawyer positions in large law firms is significant. The larger firms not only pay higher salaries, but once they hire a student, they are more likely to cover the student's expenses during bar admission courses and even pay a portion of their third year university fees. In addition, opportunities for articling are more limited, and less well paid, for students who want to practice public interest or social justice law. All of this corrals students into the larger firms where a corporate ethos often dominates, which may mean that courses such as Feminist Legal Studies on student transcripts are not valued or viewed as suspicious. Such suspicion may be informed by a general "backlash" against feminism and a sense that we live in a post-feminist era.[3] Students themselves may be far more comfortable expressing an interest in environmentalism or anti-racist or anti-poverty work than they are with identifying with feminism. Feminist students have in the past expressed concern to me about the implications of having feminist courses or feminist volunteer work on their résumés, although UBC Law's Career Services personnel indicate that this concern has waned.[4] As a result of these pressures, business law tends to dominate law schools even if many diverse course offerings exist, as they do at my school. Students are advised to be sure to take Corporations and Tax, even if they have no interest in practicing in these fields, because they are more practical and are on the bar admission exams. While I endorse the value of a generalist law degree, my point is that students are rarely advised to be sure to take a critical thinking course such as Feminist Legal Theory. The new minimum requirements for an accredited Canadian common law degree proposed by the Federation of Law Societies in October 2009 are not likely to foster enthusiasm for "outsider" courses, but rather to dampen it.[5] Student enrolment in feminist law courses has diminished in the 21st century, at least at some law schools, and it has never been high.

Approximately seven to eight per cent of law students take a feminist law course.[6] These low numbers may reflect wariness on the part of some anti-sexist students to engage with what they see as mainstream feminism produced by academic feminists who are often privileged along lines such as race, class, and disability status. Having said this, other reasons why students do not

take these classes include market pressures, not wanting their beliefs to be challenged, stereotyped perceptions of such courses, fear about extra workload, and lack of clarity about their importance.[7] Diminished student enrolment in feminist law courses may also in part be due to a proliferation of other "outsider" courses, which in itself, is not a bad thing.[8]
[...]
When hiring of faculty members takes place, finding candidates who can teach in core areas -- especially the first year "core" courses such as Property, Contracts, Criminal Law, and Torts -- often takes priority, even in law schools with feminists in the dean's office. As well, law schools often snap up, as rare commodities, candidates in fields where it is difficult to lure lawyers away from lucrative private practices, such as business and tax law. Graduate students who have focused their research on "core" fields are more likely to be offered interviews than those who have worked more squarely within fields such as feminist legal theory, lesbian legal studies, critical race theory and law, and so on. At our faculty, we have been fortunate to recruit several professors who contribute to the "core" fields and who also identify as feminist. However, few of these professors teach in the feminist curriculum, and their energies are often taken up by activities related to the "core." Feminists may well be hired, but the rationale for their recruitment is rarely first and foremost for their expertise in feminist theory.

One might argue that it is sufficient to have feminist legal scholars teaching in the core areas, because they will infuse these courses with feminist insight. Specialized feminist law courses might not, then, be necessary. While this development would be welcome, debates continue about whether "mainstreaming" entirely resolves the question of incorporating outsider perspectives into legal education.[9] Moreover, feminism has not yet been mainstreamed across the law curriculum in the way that mandates elimination of specialized courses, although the situation is much improved from the 1970s. One problem is that not all professors are motivated to include feminist analysis and some are wary of doing so or even hostile. Another is that in most "core" courses, there is so much content to cover that the time spent on feminist perspectives is likely to be minimal, even if the course is taught by a feminist. Finally, if only some sections of a core course feature feminist content, students tend to worry -- and complain -- that they are not being taught the "real" law and that the approach being taken is "biased" or "subjective."

Why is it important to feature feminist analysis of law? Many law students arrive at law school with an often unconscious allegiance to liberalism, the dominant (and therefore often unarticulated) political philosophy in North America, which assumes that everyone is more or less on a level playing field and, if given the opportunity to compete under "objective" legal norms, will be able to succeed. Given the extent to which law is embedded in liberalism, it takes time and a conscious effort to educate those studying law in the ways that the liberal values underlying most legal norms may marginalize those for whom the level playing field does not work well, such as poor women and indigenous peoples. Even a course in feminist legal theory barely scrapes the surface of this sort of critical analysis. Expecting that complex feminist analysis that develops a nuanced mode of critique will be taught in courses such as Taxation, Evidence, or even Family Law (which involves many issues involving gender, race, and sexual orientation) is unrealistic. As well, those professors who explicitly introduce feminist perspectives into their core courses almost inevitably encounter resistance or even hostility from some law students – even sometimes students who are sympathetic to feminism.

Feminist and other critical perspectives such as critical race theory are too often viewed as additional and peripheral to what is viewed as the central purpose of the course – learning a "neutral" set of legal norms and procedures --especially if other professors are not introducing them in their core courses. A feminist professor who tries to thoroughly infuse a "core" course with critical analysis of existing norms is almost certain to be penalized by students on her teaching evaluations. My relatively non-ambitious efforts to raise questions about gendered inequalities and sexual orientation in some parts of my Family Law course are typically criticized by several students on their course evaluations, and they often inflate the extent to which these questions permeate the course. I also receive applause from students but, ironically, strongly feminist students often find my course rather too liberal and pluralist! All of these problems point towards the need for specialized courses in feminism and law, as well as mainstreaming, at least for the time being until the law school curriculum is thoroughly infused with critical perspectives.

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## Ken Cooper-Stephenson & Elaine Gibson, eds. (1993) Tort Theory, chapter 4: Feminist Analysis of Tort, p. 183 and 184.*

*See attached Article below (pg. 183&184)

# INTRODUCTION

Feminist legal theory can be described as a critical examination from the perspectives of women of the relationship between law and society, and of the ideological premises underpinning law and society. Its orientation is multi-faceted and wide-ranging, and it cannot be pinned down to any single definition or interpretation. Nevertheless, a fundamental premise of feminist legal theory is the need for the elimination within legal structures of women's oppression, exploitation and disenfranchisement. Feminists search for ways in which law can actively promote the advancement of women, with the aim of achieving substantive equality for all women in our society.

The beginning point for much of feminist scholarship is an examination of male patriarchy, as embedded, manifested, and maintained in the dual institutions of male domination and the hierarchy of power. The midpoint usually involves an assertion of the right to substantive equality for women and women's perspective, and an analysis of the processes whereby these might be attained. Such theorizing also pays particular attention to other oppressed groups, of whom women often constitute a disproportionate number, and to personal and societal concerns of particular importance to women. Its theoretical endpoint appears clearly to advocate a legal system in one way or another wholly different from any yet experienced. Postmodernist feminist theory rightly makes the point that feminist theory itself is necessarily dependent on time and context, and is inherently indeterminate. Feminist theory thus has a range in its focus which reflects differing philosophical and political viewpoints.

It can be suggested that much of feminist legal scholarship exemplifies some combination of the following themes: caring and concern; equality and difference; power and subordination; subjectivism and particularization; and empiricism and pragmatism. In the field of tort law and compensation, the theme of care and concern manifests itself in social and communitarian considerations; holism and interconnectedness; compromise; and an interest in safety and health over wrongfulness and blame. The theme of equality and difference pays attention to, on the one hand, the real and practical unfairness suffered by women within the tort system as well as systemic discrimination; and, on the other, the accommodation of diversity and a respect for gender difference. The theme of power and subordination confronts male patriarchy, emphasizing the oppressive dominance of the male viewpoint; the politics of law, institutions and legal reform; systemic change and the role of the state in maintaining male-dominated and male-model institutions; and the functioning

of sexual exploitation in male patriarchy. The theme of subjectivism and particularization commences with the experiential basis of women's perspectives; emphasizes personal and emotional interests, including mental distress and dignitary interests; encourages the personalized and individualized treatment of the sick and disabled; and promotes increased subjectivity in the analysis of defendant behaviour. The theme of empiricism and pragmatism encourages sociological and scientific study of the oppressed position of women in society; the blending of the "real" with the "ideal"; and the development of theory that responds not to cloistered academia but to the genuine disadvantage that women experience in today's society. These themes are interconnected and interactive; not classifications or categories, they simply represent aspects of feminist scholarship.

The two papers in this chapter bring a feminist perspective to the assessment of damages. The papers locate themselves within the wider theoretical context of feminist analysis of law. They are not primarily ***about*** feminist analysis of tort law, but ***exemplify the practice of feminist scholarship***. They reveal some of the range and diversity of feminist enquiry.

In her paper, Elaine Gibson shows how empirical investigation and sociological insight can respond to the call of feminist methodology, and can cause us to question even the most fundamental principles of tort law. She addresses the practical, evidential and conceptual gender biases in the assessment of damages for loss of earnings in personal injury cases. Professor Gibson challenges the historical and theoretical roots of the compensatory principle and its incompatibility with the notion of substantive equality implemented in the Canadian *Human Rights Codes* and the *Charter of Rights and Freedoms*. After exploring some of the causes of gendered wage discrimination, and examining the evidential biases in assessment practices, she outlines tentative proposals for reform. She suggests that tort law's treatment of injury is far from the optimal response to disability, and that it contributes to the impoverishment of disabled women in today's society. Her claim is that we as a society can no longer advocate the simple and logical application of an earnings-replacement principle for damages assessment in tort law.

The paper by Kate Sutherland focuses on the assessment of damages in cases of sexual abuse. She suggests that an increased emphasis on subjective analysis and personal storytelling will help break down barriers to judicial understanding of the effects of sexual abuse of women and children. Her approach links feminist theory to the realm of law and literature. After reviewing and critiquing damages assessments in recent Canadian cases, Ms. Sutherland goes on to advocate the combined use of personal testimony by plaintiffs, appropriate expert evidence on the effects of sexual abuse, and an experiential account of the stories of others who have suffered similarly — to bring home to judges and juries the extent and character of the harms caused by sexual abuse. The paper exemplifies its own thesis by including literary accounts of personal trauma from sexual abuse, which helps bring home the message to the reader.