



1-1-1992

# Mainstreaming Feminist Legal Theory

Carrie Menkel-Meadow

*University of the Pacific; McGeorge School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

## Recommended Citation

Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L. J. 1493 (1992).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol23/iss3/24>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Mainstreaming Feminist Legal Theory\*

Carrie Menkel-Meadow\*\*

*Does feminism have a theory? If so, what is it?*

*Does feminism have a method? If so, what is it?*

## I. INTRODUCTION: THE FEMINIST MOVES IN LAW

In the beginning, law was male.<sup>1</sup> Law was made by men,<sup>2</sup> though it was enforced against women as well as men and it was practiced only by men until relatively recently in human history.<sup>3</sup>

---

\* The *Pacific Law Journal* is published in conformity with a modified version of the HARVARD BLUE BOOK (14th ed. 1986). For ideological reasons, the author prefers not to comply with this form of citation of authority. The *Pacific Law Journal* respects the author's beliefs and feels that this article is worthy of publication in its present form, thus the normal rules governing citation format have been waived. — Board of Editors

\*\* Professor of Law, UCLA. A.B. Barnard College; J.D. University of Pennsylvania. This article is based on a lecture delivered at McGeorge Law School on April 9, 1992. Thanks to Carmel Sella for research assistance, good conversations and reminders to pay attention to what is real and what is important. Thanks also to three people I have never met who have put together one of the best bibliographies on feminist legal theory that currently exists. Though it is not totally up to date, and consigned to being outdated the minute it was published, given the vast outpouring of feminist scholarship, this volume will be of immense use to researchers and writers on feminist legal issues for many years. Thanks to F.C. DeCoste, K.M. Munro and Lillian MacPherson for FEMINIST LEGAL LITERATURE: A SELECTIVE ANNOTATED BIBLIOGRAPHY (Garland Publishing, 1991). Finally, thanks as always, to my most incisive, but supportive critic, Robert Meadow.

1. See generally Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARVARD WOMEN'S L.J. 83 (1980); TAUB & SCHNEIDER, WOMEN'S SUBORDINATION AND THE RULE OF LAW, THE POLITICS OF LAW D. Kairys, ed, 2nd ed. 1990; Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

2. See generally Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (arguing that law's language is male and therefore excludes women's experience).

3. MENKEL-MEADOW, THE FEMINIZATION OF THE LEGAL PROFESSION: THE COMPARATIVE SOCIOLOGY OF WOMEN IN THE LEGAL PROFESSION, LAWYERS AND SOCIETY, VOL. III COMPARATIVE THEORIES (Abel & Lewis eds., 1990).

In the late 1960s, what we now call "the second wave of feminism"<sup>4</sup> spirited an interest in how law could help achieve equality for women, through legal rights, as well as a less optimistic analysis that law was also responsible for, or at least played a role in, women's subordination. Women went to law school hoping to contribute legal activism to the larger political struggles for "women's rights" which grew out of the other social movements of the day, namely civil rights and anti-war activism.<sup>5</sup> In their efforts to study and use law to improve women's material, political and psychological conditions, feminist lawyers confronted male-made legal doctrine.

This Article reviews the history of feminist "confrontation" with law, from the earliest strategies of using and adapting preexisting legal categories to the more complex interrogations of law currently being made by feminists under the rubric of feminist jurisprudence or feminist legal theory.<sup>6</sup> Several themes will be developed in this Article, some of which may be controversial and may cause more trouble with my fellow feminists.<sup>7</sup>

First, this article will explore the relationship of real world conditions to the development of legal theory, a relationship that Elizabeth Schneider has described as "dialectical."<sup>8</sup> This section will review some of the current conundrums and impasses of

---

4. The "first wave of feminism" was the women's movement for equality and suffrage which began at Seneca Falls in 1848. See generally E. DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMAN'S MOVEMENT IN AMERICA 1848-1869* (1978).

5. See EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1980); Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. OF LEG. ED. 61, 62 (1988).

6. See generally Dunlap, *The "F" Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L. J. 251, 258 (1989-90) (discussing how the Supreme Court has recently been dealing with feminist legal issues). See also, Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); Whitman, *Review Essay, Feminist Jurisprudence*, 17 FEMINIST STUDIES 493 (1991).

7. I am somewhat used to this position as one of the "defenders" of Carol Gilligan's work, as applied to law. See GILLIGAN, *IN A DIFFERENT VOICE* (1982); Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 40 (1985) (hereinafter "Portia"); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 803-04, 810 (1989).

8. See generally Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986). See *infra* notes 20-57 and accompanying text.

feminist legal theory--the "sameness-difference" debate, the deconstruction of gender into the greater complexities of race, class and sexual orientation<sup>9</sup> and the "post-modernist turn" in feminist legal theory. Although this Article will refer to "stages" of feminist legal theory,<sup>10</sup> I do not intend to treat these developments hierarchically, even if they may appear so from a chronological telling. These different "turns" in feminist theory and feminist legal practice continue to exist and inform each other simultaneously, in lawsuits, law review pages and in conversations wherever feminist lawyers meet. However, it is important to keep theory grounded in real world conditions, just as real world legal struggles cause us to change or modify our theories. From this perspective, I will be making judgments, always a painful process for a feminist,<sup>11</sup> since feminist theory is supposed to help us with particular issues in enhancing women's material, political and social conditions and when it doesn't do that, the theory must be questioned.<sup>12</sup>

Second, the Article will explore how feminist legal theory has been affected by feminist inquiry in other disciplines.<sup>13</sup> Women's studies has proven to be one of the more successful efforts in "transdisciplinary" knowledge production in the academy<sup>14</sup> as well as having some effects in the real world.<sup>15</sup> In particular, this section focuses upon issues of feminist method and epistemology

---

9. See SPELMAN, *INESSENTIAL WOMAN* (1988) (discussing the varieties of women's experiences as filtered through different races, ethnicities, and classes).

10. Menkel-Meadow & Diamond, *The Content, Method and Epistemology of Gender in Sociolegal Studies*, 25 LAW & SOC'Y REV. 221, 225-27 (1991).

11. The first modern explosion on this topic was a negative review of Kate Millet's diary, *FLYING* (1974), in *Ms.* magazine, which resulted in an outpouring of criticism that it was "unfeminist" to criticize a fellow sister. See MINER & LONGINO, *COMPETITION: A FEMINIST TABOO* (1987); HIRSH & KELLER, *CONFLICTS IN FEMINISM* (1990).

12. See Williams, *supra* note 7, and Abrams, *Feminist Lawyering*, 15 LAW & SOC. INQUIRY 373, 375 n.5 (1991) (criticizing the author).

13. See *infra* notes 58-101 and accompanying text.

14. See Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. L. REV. 91, 108 (1990) (contrasting efforts at transdisciplinary work in law and social science with women's studies scholarship).

15. To wit, the development of battered women's shelters, see D. Martin, *BATTERED WIVES* 196-254 (1976); N. Matthews, *STOPPING RAPE OR MANAGING ITS CONSEQUENCES?* (1990) (rape crisis centers).

in the production and transmission of legal knowledge. Asking feminist questions and questions about women in law<sup>16</sup> has revealed not only substantive deficiencies in the law, but process deficiencies as well. At the same time, asking feminist or "the woman question" in law has begun to produce a particular morphology or structure of argument of its own which causes me to wonder whether we need some new ways (or old ways) to analyze on-going issues or to verify or falsify some of our assertions and debates.

Third, and most important, this Article will attempt to demonstrate how there has been a movement in the application of feminist theory, from the more obvious arenas of "women's issues" to the less obvious core and secondary fields of legal doctrine.<sup>17</sup> This section will explore if and how feminist theory is being "mainstreamed" into law so that new areas of legal doctrine are feeling the effects of the "feminist" pebble "skimmed" on the lake of masculinist or malestream law. To the extent it has, I will begin to explore the larger consequences of this movement for the development of legal doctrine, legal education and legal practice. Feminists, as well as other theorists, will differ about whether it is good for feminist theory to be "mainstreamed." There is the problem of co-optation, transmutation or what in another context I have called the "marble cake" problem (there is never enough chocolate in an "integrated" white cake).<sup>18</sup> Yet it seems that if the goals of feminist legal theory are to improve women's material, political and psychological well being, we must ultimately have feminist and women's concerns<sup>19</sup> expressed throughout the body of

---

16. See Wishik, *The Inquiries of Feminist Jurisprudence: To Question Everything*, 1 BERKELEY WOMEN'S L. J. 64, 65 (1985).

17. See *infra* notes 121-207 and accompanying text.

18. *Portia*, *supra* note 7, at 48 n.56.

19. I will deflect for the moment the complex issues of how we know when an issue or position is feminist or expresses "women's interests." See generally MACKINNON, *FEMINISM UNMODIFIED* (1987) and *TOWARD A FEMINIST THEORY OF THE STATE* (1990) (discussing the political debates about whether there are essentialist positions here or whether anyone can name them). See also Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988); Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217 (1988); Littleton, *The Difference that Method Makes*, 41 STAN. L. REV. 751 (1989); Bartlett, *MacKinnon's Feminism: Power on Whose*

laws that affect women and we must be heard by those who make, interpret and enforce the law in all of its forms. For me, the feminist project is ultimately a humanist project involving the pursuit of equality, justice, safety, respect, compassion and well being for all. Mainstreaming has its dangers, but it is also essential.

## II. FEMINIST LEGAL THOUGHT REVIEWED

### A. "Stages" of Feminism: The Genders of One, Two and Infinity

Legal feminism began with a simple principle which has been the cornerstone of many movements for civil and political rights--that all human beings should be treated with equality, respect and justice--principles that have been derived from Enlightenment political concepts embedded in our Constitution. So when women, like blacks, demanded admittance to both political and civil society they did so on the basis that they were humanly "the same" as the white men who originally "founded" the polity.<sup>20</sup> Thus, early feminist work, including both litigation<sup>21</sup> and the legal theories that supported it<sup>22</sup> were based on claiming equality through the

---

*Terms?*, 75 CAL. L. REV. 1559 (1987); Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147 (1989); Menkel-Meadow, *Review of MacKinnon, Toward A Feminist Theory of the State and Rhode, Justice and Gender*, 16 SIGNS 603 (1991) (reviews of these books by law professors contesting the possibility of speaking for all women); see also Littleton, *Does It Make Sense to Talk About Women?*, 1 UCLA WOMEN'S LJ. 15 (1991).

20. See PATEMAN, *THE SEXUAL CONTRACT* (1988); OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989) (discussing the feminist questioning of foundational political theory and the formation of the social contract).

21. See *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975), *vacated*, 429 U.S. 501 (holding some form of sex discrimination unlawful under constitutional equal protection). Cf. *Kahn v. Shevin*, 416 U.S. 351 (1974); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding gender discrimination with the appropriate level of governmental justification under the equal protection clause); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (bona fide occupational qualification exceptions under Title VII). One of the first legal arguments for "sameness" equality was made in women's efforts to become lawyers. See *Bradwell v. Illinois*, 83 U.S. 130 (1873). See also Ginsburg and Flagg, *Some Reflections of the Feminist Legal Thought on the 1970's*, 1989 U. CHI. L. REV. 9 (reflections of one of the major pioneers in feminist litigation).

22. See Brown, Emerson, Freedman & Falk, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE LJ. 871 (1971).

attributes of "sameness"--men and women are the same and should have equal rights. The goals of litigation included enforcing equal rights and converting laws into gender neutral propositions<sup>23</sup> that eliminated any preferences or biases in favor of one sex. This included laws or practices that seemed to "benefit" women such as the "tender years" doctrine in child custody,<sup>24</sup> as well as those that seemed to benefit men or to disadvantage women, such as those involving social security and other public benefits.<sup>25</sup>

From the beginning there were differences, or at least issues, with respect to which legal strategies to pursue in areas where assimilation to a "sameness" argument would not work. Such differences were specifically located in those "women's issues" which required legal redress but which were rooted (either because of their association with women's "different" bodies or because they were perceived to grant women benefits) in women's difference. The important reproductive rights cases which gave women some control over their bodies<sup>26</sup> were based in "sex neutral" privacy rights, a legal strategy that has met with much feminist criticism as of late.<sup>27</sup> In areas such as education, litigators had to argue that girls should be able to play with boys on teams, while school systems argued that "physical differences" hindered safety and other concerns that required separation for nonequal skills.<sup>28</sup> In other contexts, I have called this the claim for equality

---

23. See BROWN, FREEDMAN, KATZ & PRICE, *WOMEN'S RIGHTS AND THE LAW* (1977); K. PERATIS & E. CARY, *WOMEN AND THE LAW* (1977).

24. See J. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 536 (1978).

25. See, e.g., *Massachusetts v. Feeney*, 442 U.S. 256 (1979) (sustaining the unequal veteran's preference that disproportionately benefitted men in federal and state civil service jobs).

26. In my view, *Roe v. Wade* has always been a case protecting the medical profession (mostly male) as well as women's rights of reproduction. See WOODWARD, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979) (discussing Blackmun's important role, as seen through his involvement with the Mayo clinic).

27. See Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

28. See Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY W.L.J. 201, 205-06 (1985) (criticizing the maintenance of separate teams as enacting an inequality of experience that could only be justified by the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1886), now rejected for purposes of equality analysis under the equal protection clause). See also *Clark v. Arizona Interscholastic Assoc.*, 695 F.2d 1126 (9th cir. 1982), cert. denied, 464 U.S. 818 (1983); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

based on the sex of one; that is that women could be equal to men, with the male gender defining the norm.<sup>29</sup>

After the United States Supreme Court held that pregnancy discrimination was not gender discrimination because nonpregnant persons were both male and female,<sup>30</sup> it became clear that real differences between men and women could not be assimilated to equality claims based on sameness, and a first crisis in feminist legal theory developed. The "crisis" was temporarily averted when Wendy Williams and other legal activists successfully lobbied for the Pregnancy Discrimination Act which amended Title VII to treat pregnancy as sex discrimination if male "disabilities" were covered under employer health or benefits plans.<sup>31</sup> The crisis was averted only temporarily, however, when differential state treatment of pregnancy (state laws that gave women who were pregnant "more" benefits than general disability) caused feminists to disagree on the issue of whether pregnancy should be treated differently than other health conditions, based on women's different "needs."<sup>32</sup> While feminist litigators were grappling with statutes and constitutional theories which assumed equality required similarity, feminist theorists in other disciplines, including philosophy, literary criticism and the social sciences, were confronting the differences that gender presented in the form of the

---

29. The recognition that appeals to equality, based on equivalency or sameness, encoded the male as the norm came relatively soon after the first wave of constitutional, Title VII and Title IX litigation. See MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987). For an excellent application of this fallacy in reasoning about gender differences for the general public, see TAVRIS, *THE MISMEASURE OF WOMAN* (1992). See also Menkel-Meadow, *supra* note 10, at 225-26.

30. *General Electric v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

31. *Pregnancy Discrimination Act*, 42 U.S.C. § 2000e(A) (1978).

32. *Miller-Wohl Co. v. Montana*, 515 F. Supp. 1264 (D. Mont. 1981), *vacated*, 685 F.2d 1088 (9th Cir. 1982). See Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE L. REV. 513 (1983); Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. RFTR. 175 (1982). The case which finally reached the Supreme Court on this issue, after separate briefs were filed by a variety of feminist groups was *Cal. Fed. v. Guerra*, 479 U.S. 272 (1987). See also Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 10-20 (1985).



pregnant body,<sup>33</sup> socially constructed differences in moral reasoning,<sup>34</sup> differences in literary and artistic sensibilities<sup>35</sup> and new claims that women were different and in some ways superior to men.<sup>36</sup> Thus, a gender of one was replaced with a gender of two, in which gender differences could be acknowledged and indeed celebrated, or at least, as Chris Littleton has argued, "accommodated or rendered costless."<sup>37</sup>

Yet the danger of difference theory as explored by many of its critics<sup>38</sup> is that it necessarily sets up oppositional or binary systems, with a hierarchy of value usually placed on one set of the oppositions.<sup>39</sup> As Carol Tavris has recently recognized, when parents of two children are asked to talk about their children, they define one in relation to the other--one is a leader, the other a follower, one is sociable, the other is not. When parents of more than two children speak of them, they talk in individual, not comparative terms, one is an athlete, one is an intellectual, one is sociable.<sup>40</sup> Binary polarities are reductionist and men and women are seen only in the ways in which they can be compared to each other, on both individual and group levels.

At about the same time that difference reared its complexifying head, other women lawyers who were less sanguine about the ability of conventional legal categories to accommodate to women's needs developed a more systemic critique of the legal system as creating, constituting and then reinforcing patriarchy.<sup>41</sup> Perhaps the most influential feminist legal theorist, Catherine

---

33. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980); EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988).

34. See Gilligan, *supra* note 7.

35. Oates, *Is There A Female Voice?*, in *FEMINIST LITERARY THEORY* (M. Eagleton, Editor) (1986).

36. This reaction to sameness-equality theory is alternatively known as difference theory or cultural feminism.

37. Littleton, *supra* note 29, at 1337.

38. See, e.g., Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-22 (1989) (discussing difference theory).

39. See Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* (D.Kairys ed., 2d ed. 1990).

40. TAVRIS, *THE MISMEASURE OF WOMEN* 90 (1992).

41. See Rifkin, *supra* note 1; Polan, *Toward a Theory of Law and Patriarchy*; *THE POLITICS OF LAW* (Kairys ed., 1982).

MacKinnon, began to write about how legal categories created by men defined rules that in turn constructed women and their rights and limits in the legal system. Probably the first to use the more high falutin term of "feminist jurisprudence," MacKinnon urged feminists to rethink the entire legal system in which they were operating to claim equality for women.<sup>42</sup> MacKinnon saw dominance and power relations where others saw either "innate" essentialist differences or socially constructed ones, but in her ground-breaking work in analyzing sexual harassment as workplace discrimination<sup>43</sup> and rape as male defined unacceptably violent sex,<sup>44</sup> MacKinnon caused a whole generation of feminist lawyers, students and now finally, scholars, to step back and look at the whole legal system through feminist eyes.

While this Article does not suggest that difference theory and the notion of a feminist jurisprudential sensibility developed at exactly the same time, the contiguity of these intellectual moments is significant because of the various theoretical and political ruptures that resulted from these developments in feminist legal work. While the feminist legal community was never totally uniform or without disagreement, early constitutional cases had been won with near unanimity of legal strategies. Now there were cleavages in the feminist legal community<sup>45</sup> between "equality" feminists and "difference" feminists, between "cultural" feminists and "radical" feminists,<sup>46</sup> between practical litigators and academic theorists.

Yet, even here there are overlapping categories. MacKinnon's theories, as radical as they seem to some, are always related to the specific legal issues and reforms, such as rape, sexual harassment

---

42. MacKinnon, *supra* note 29. See also West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60-61 (1988).

43. See MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1978).

44. MacKinnon, *supra* note 29; MacKinnon, *Feminism, Marxism and the State: An Agenda for Theory*, 7 SIGNS 515-44 (1982).

45. Many of these cleavages had their counterparts in feminist splits in other fields as well, such as literary criticism. See *Feminist v. Feminist*, LA Times, Apr. 29, 1992, D-1. See also HIRSH & KELLER, *supra* note 11.

46. See Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in HIRSH & KELLER, *supra* note 11, at 149; West, *supra* note 42, at 3.

and pornography, on which she has worked.<sup>47</sup> Her theories then, have been in service to her legal reform and transformative agendas.<sup>48</sup> Others have preferred the "battleground"<sup>49</sup> of legal theory and jurisprudence for reconstructing gender relations.<sup>50</sup>

Two other "ruptures" have produced yet a third stage of feminist theory, what I have referred to as an "infinity" of genders. First, women of color and lesbian legal feminists criticized the white, middle class assumptions of "essentialist" feminism<sup>51</sup> and suggested many ways in which gender experience and legal treatment is filtered, as through the glass of a prism, through race, class and other social characteristics that create a more varied expression of gendered experience.<sup>52</sup> Second, legal feminist theorists, influenced by continental philosophy and French feminism<sup>53</sup> began to focus on poststructuralist, post-modernist critiques of modernist conceptions of knowledge and the integrity of the self.<sup>54</sup> If to use Gertrude Stein's famous words, "there is

---

47. On the feminist debates on pornography see Hunter & Law, Brief Amicus Curiae of Feminist Anti-Censorship Taskforce *et al.*, in *American Booksellers Assoc. v. Hudnut*, 21 U. MICH. J.L. REF. 69 (1987-88); MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 195-214 (1985).

48. MacKinnon is not alone in her combined feminist theorizing and lawyering. Other noted authors and litigators are Nadine Taub, Wendy Williams, Chris Littleton, Sally Burns, Susan Ross, and Sylvia Law.

49. In light of what I have previously written about the sexism of legal metaphors, I hesitate to use war metaphors, but they are powerful when discussing law. See Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEG. ED. 3, 8 (1991).

50. West, *supra* note 42; Olsen, *supra* note 39; Frug, *Re-reading contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Colker, *supra* note 19.

51. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and AntiRacist Politics*, 1989 U. CHI. LEGAL F. 139; Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L. J. 191 (1989-90).

52. See Bobo, *Black Women in Fiction and Non-Fiction: Images of Power and Powerlessness*, 13 WIDE ANGLE 72 (1991); COLLINS, *BLACK FEMINIST THOUGHT* (1990) (discussing the claims that women of color may have particular experiences with rape, motherhood, family, abortion, community, public/private splits that differ from white feminism). See also J. BUTLER, *GENDER TROUBLE* (1991) (arguing that gender as a cultural construct can be manipulated by "play").

53. DE RIGUEUR CITES ARE MARKS & DICOURTIVRON, *NEW FRENCH FEMINISMS* (1980); TORIL MOI, *SEXUAL/TEXTUAL POLITICS: FEMINIST LEGAL THEORY* (1985); FRENCH CONNECTIONS: VOICES FROM THE WOMEN'S MOVEMENT IN FRANCE, (C. Duchon ed., 1987).

54. See Frug, *A PostModern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992); CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW* (1992); Patterson, *PostModernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992). For an excellent review of how post-modernist philosophy has influenced the social sciences, see generally PAULINE

no there, there'' because gender identity is fractured by the multiple levels and socially constructed bases on which it exists, theorists have begun to ask whether there is any core to feminism if ''woman'' is totally socially constructed and fractured by multiple and different experiences.<sup>55</sup>

Feminist lawyers continue to struggle with the myriad ways in which women continue to be disenfranchised or discriminated against both in the legal system and in the larger world, such as in poverty, in families, in abusive or violent encounters with men, and in glass ceiling limits to workplace achievement. The challenge of this ''third'' stage of feminist theory is to see whether the encounter of post-modernist ''big theory''<sup>56</sup> with real world conditions will help us to transcend the divisions and splits among feminists on practical legal issues or whether such intense theoretical inquiries will implode upon themselves.

For those attempting a reconciliation of post-modernist theory and politics,<sup>57</sup> the key is the focus on local ''micro-narratives'' and the contexts in which women's legal problems are experienced. In a sense, then, this third stage returns us to where we began--with the particularities of the ways in which law helps or hinders women's social and political conditions. Thus, the three stages of feminist theory identified above are responsive to the different needs and audiences of women grappling with different issues in different places. Feminist legal scholars who see their principal audience as other legal scholars respond differently to issues than those who are doing legal work in the streets or in the courts.

---

ROSENAU, POST-MODERNISM AND THE SOCIAL SCIENCES (1992).

55. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 SIGNS 533 (1989); FLAX, *THINKING FRAGMENTS, PSYCHOANALYSIS, FEMINISM AND POSTMODERNISM IN THE AMERICAN WEST* (1989); Gagnier, *Feminist Post-Modernism: The End of Feminism or the Ends of Theory*, in RHODE, ed., *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (1990); YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

56. In a sense the phrase in the text is an oxymoron. Postmodernism decries ''big theory'' or metanarratives or globalized statements and prefers local or micronarratives- ''smaller'' truth claims based on rooted experience. See ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES* xii-xiii (1992).

57. See HANDLER, *POST-MODERNISM, PROTESTS AND THE NEW SOCIAL MOVEMENTS* (1992) (manuscript on file with the author) (presidential address, Law and Society Association, May 1992).

B. *The Contexts of Feminist Legal Theory I: "Women's Issues"*

As reviewed above, earliest feminist theory responded to women's needs in a number of different ways. Like the black civil rights movement before it,<sup>58</sup> feminist activist lawyers used test case strategies to ask the Supreme Court to recognize formal equality as a matter of constitutional law.<sup>59</sup> Feminist activists working on particular issues effecting woman's lives "attacked" doctrines in areas close to women's interests--family law reform, criminal law, rape, abortion, employment, education and domestic violence.<sup>60</sup>

Feminists organized (with medical activists) on the issues of reproductive rights and developed lawsuits as a concerted effort to mobilize both social action groups and legal reform at the same time.<sup>61</sup> Yet the legal strategy that culminated in *Roe v. Wade*<sup>62</sup> employed old legal categories to construct a genderless "right to

---

58. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICAN'S STRUGGLE FOR EQUALITY* (1976).

59. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (holding that gender is an impermissible classification for preferring probate administrator); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that general stereotypes in statutory entitlement programs can be constitutionally impermissible).

60. In another important moment in feminist legal theory development, several law students organized the first Women in the Law conference in 1969 at NYU to address issues affecting women in the law. The conference has since met every year and one way of measuring the growth and expansion of "women's issues" is to compare the numbers and types of sessions that have increased from year to year. As the audience of feminist legal theory began to include an increasing number of women and male feminist students, pressures to first offer and then increase the numbers of courses on Women and Law, helped develop the first generation of legal theory. The movement to Feminist Jurisprudence recounted in the text has had its analog in legal education as courses moved from a survey in women and the law to seminars on feminist jurisprudence and legal theory and particular legal issues like rape, domestic violence, reproduction, etc. See Kay & Littleton, *Feminist Jurisprudence Text Notes*, in KAY, *SEX-BASED DISCRIMINATION* 884 (3rd ed. 1988). See also *From the Editors*, 38 J. LEGAL ED. (1988) (special issue on women in legal education).

61. For an in depth discussion of the legal reproductive rights movements, see Schneider, *supra* note 8; GORDON, *WOMAN'S BODY, WOMAN'S RIGHT* (1977); LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984). As I write this and the ruling of *Roe v. Wade* hangs in jeopardy, hundreds of thousands of women are marching today in Washington in a social protest movement for choice and abortion that continues to mobilize the female and male feminist populace.

62. 410 U.S. 113 (1973).

privacy'' which protects both female bodies and male medical establishments.<sup>63</sup>

In a variety of areas, feminist lawyers sought to remove gender bias from laws which made assumptions about men's or women's roles based on stereotypes of gender appropriate roles, in ways that restricted women's choices or actions.<sup>64</sup> As any review of the first editions of sex discrimination texts will reveal,<sup>65</sup> early legal cases had to do with women's right to bear their own names, establish their own legal domicile, acknowledge their own criminal responsibility, earn their own separate legal identities for the purpose of contracting and engaging in other legal and commercial activities, own their own property, control their own children, end their own marriages and earn access to employment, support and public benefits that could assist, if not guarantee, some modicum of financial equality or self-determination.<sup>66</sup>

Even within the agreement to seek "equality" within the obvious spheres of women's experiences, early differences of theory emerged. In the family law area, Martha Fineman argued that efforts to neutralize legal conceptions of parenthood led to "losses" of custody for women in ways which ignored the actual parenting experiences of women.<sup>67</sup> Kate Bartlett, on the other hand, argued that without using the law to enforce "neutral" gender equalizing concepts such as "joint custody," women would forever be trapped in conventional sex-stereotyped roles.<sup>68</sup> And

---

63. Of course, for the many critics of abortion and constitutional law, the legal cloth from which the right to privacy has been woven is considered the creation of new categories. Privacy, derived from the "penumbras and emanations" of the fourth, fifth, and ninth amendments of the Constitution, *Griswold v. Connecticut*, 381 U.S. 479 (1965), is not found in the text of the constitution. *TRIBE, ABORTION: THE CLASH OF ABSOLUTES* 82-83 (1990).

64. See Taub, *Keeping Women in Their Place: Stereotyping Per Se As Form of Employment Discrimination*, 21 B.C. L. REV. 345, 345-418 (1980).

65. See KANOWITZ, *SEX ROLES IN LAW AND SOCIETY* (1973); GINSBURG & KAY, *SEX-BASED DISCRIMINATION* (1974); BABCOCK, FREEDMAN, NORTON & ROSS, *SEX DISCRIMINATION* (1975).

66. See, e.g., *People ex rel Rago v. Lipsky*, 327 Ill. App. 63 (1945); *Carlson v. Carlson*, 75 Ariz. 308 (1953); *United States v. Lazell*, 382 U.S. 341 (1966); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); See *supra* note 22 (listing cases analyzing this proposition).

67. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

68. See Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986).

after long efforts to reform divorce law to permit women to exit more easily oppressive marriages,<sup>69</sup> empirical studies now show that more "equalized" no-fault regimes actually create enormous inequalities of economic situations for women and men and their children, following divorce.<sup>70</sup> Thus, eliminating "gender bias" by neutralizing husbands and wives and mothers and fathers into more equal spouses and parents (that ignored the situated differences of these roles)<sup>71</sup> helped expose how formal and rhetorical equality was not entirely responsive to women's needs for substantive, actual or outcome equality.

Efforts to either equalize or make various forms of legal regulation gender neutral did not really deal with the real social "causes" of gender inequality, or more accurately "oppression."<sup>72</sup> The domination or oppression of women was effected in the physical fear or economic limits and reluctance that women were subjected to as a result of male "sexual terrorization"<sup>73</sup> of women through rape, domestic violence and sexual harassment.

In attempting to deal with these larger social problems, feminist legal activists and theorists found the old legal categories would

---

69. Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375 (1988-89); Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); Kay, *Equality and Difference: A Perspective on No-fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1 (1987); JACOBS, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); Blumberg, *Reworking the Past, Imagining the Future On Jacob's Silent Revolution*, 16 LAW & SOC. INQ. 115 (1991).

70. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985).

71. See Blumberg, *Review Essay of Fineman's Illusion of Equality*, 2 U.C.L.A. WOMEN'S L.J. (1992) (discussing economic disadvantages to women after divorce in both community property and equitable distribution regimes).

72. Oppression is a strong word and many are reluctant to use it in the context of gender, as compared to race or class subordination. But women's oppression or domination as a class is real enough in the physical oppression and violence that women experience, across all class, race and ethnic divides.

73. The term sexual terrorization has long been used in women's studies scholarship to describe the emotional and subjective fear that women have, given their physical vulnerability to men, through rape and other forms of physical domination. Recently Mary Joe Frug eloquently applied these notions to how law's failure to adequately control male physical force serves to "terrorize" women through their experience of bodily vulnerability. Frug, *A Feminist PostModern Legal Manifesto*, 105 HARV. L. REV. 1045 (1992). The tragic irony of this writing is that Mary Joe herself was murdered by such anonymous male violence.

not work.<sup>74</sup> New theories or causes of action were created and legal definitions were radically altered by putting women's experience at the center of the law-making function. For example, Catherine MacKinnon crafted new claims by demonstrating that sexual harassment was sex discrimination at work because women, seen as stereotypic sex objects, were asked to give sexual favors for work benefits in ways that men were not.<sup>75</sup> Susan Estrich and others demonstrated that rape laws were constructed with a male concept of sex,<sup>76</sup> both in terms of legal definitions of rape itself and the gendered expectations of consent and other defenses,<sup>77</sup> resulting in massive state law reform changing definitions of rape or by common law or statute eliminating or curtailing certain defenses.<sup>78</sup>

As women sought to defend themselves from habitual beatings in domestic situations by murdering sleeping husbands, feminist lawyers crafted new defenses, such as the controversial "Battered Woman Syndrome,"<sup>79</sup> which attempted to account for women's different "non-masculine" forms of self-help. This defense of "learned helplessness," developed from a structural argument of "difference" in response to violence, is now in as much theoretical, as well as practical trouble, as difference theories are in general.<sup>80</sup> Feminist theorists and lawyers argue about whether the learned helplessness defense, which relies upon expert witnesses, continues to paint a picture of women based on passivity

---

74. For example, marital rape was not a crime.

75. MacKinnon, *supra* note 43.

76. ESTRICH, *REAL RAPE* (1987); Goldberg-Ambrose, *Theory, Practice and Perception in Rape Law Reform*, 23 *LAW & SOC. REV.* 949 (1989) (reviewing ESTRICH, *REAL RAPE*); MacKinnon, *SIGNS*, *supra* note 44.

77. The gendered understanding of such issues as "consent" remain unresolved as recent occurrences of individual and group gang rapes become subjected to more public treatment and scrutiny. See SANDAY, *FRATERNITY GANG RAPE* (1990). We see how differently men and women respond to the circumstances, see William Kennedy Smith rape trial, Florida rape trial, etc.

78. For a discussion of laws concerning a woman's prior sexual history, see Letwin, *Unchaste Character: Ideology and California Rape Evidence Laws*, 54 *S. CAL. L. REV.* 35 (1980); Berger, *Man's Trial, Woman's Tribulations: Rape Cases in the Courtroom*, 77 *COLUM. L. REV.* 1 (1977).

79. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self Defense*, 15 *HARV. C.R.-C.L. REV.* 623 (1980); Schneider, *Describing and Changing Women's Self Defense Work and the Problem of Expert Testimony on Battering*, 9 *WOMEN'S RTS L. REP.* 195 (1986).

80. See *supra* note 38 (discussing TAN 39-4).



and dependence, that while successfully acquitting women who murder their husbands, also confirms stereotypic images of woman as passive victims in their subordinated conditions. Other feminist theorists and activists prefer to see women as agents of their own release from violence, but this may inherently compromise the self-defense theory.<sup>81</sup>

The most dramatic and controversial of the "new legal theories" to confront women's subordination was the MacKinnon-Dworkin campaign to create a civil rights action based on the harms of pornography to women.<sup>82</sup> Rather than focusing upon a criminalization strategy that would more clearly implicate first amendment defenses and would also leave women dependent on the vagaries of state power for enforcement,<sup>83</sup> the pornography civil rights ordinance sought to put women in control, by granting them the right to sue over what they felt caused them harm. The significance of the effort to legislate in this area, while developing a theory of feminist legal action, is an exemplar of how theory and action work together. By attempting to define pornography from the perspective of what is considered harmful, hurtful or offensive to women, MacKinnon and Dworkin decentered the subject of law, to use the phrases of post-modernism. Pornography was defined from the perspective of women, not men, though whether the definitions satisfied all women became part of the controversy.<sup>84</sup>

The pornography campaign and the legal debate which followed, both in the courts<sup>85</sup> and in the academic and activist

---

81. See Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHILO. & POL. 59 (1990); Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHILO. & POL. 105, 116-30 (1990).

82. MacKinnon, *supra* note 19, at 195. Brest & Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

83. The issue of women's reliance on the state for equality is enormous and is beyond the scope of this paper. See Menkel-Meadow, Comments in Dubois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values and the Law--A Conversation*, 34 BUFF. L. REV. 11, 86 (1985); MacKinnon, *supra* note 19, at 157. In short, feminists' and women's relationship to the state, as to the law, has to be one of ambivalence. The state offers up some protection, but at the same time it is the source or enforcer of oppressive regimes as well.

84. *FACT Brief*, *supra* note 47.

85. *Hudnut v. American Booksellers Asso.*, 475 U.S. 1001 (1986).

discourse<sup>86</sup> demonstrates at least three important aspects of the feminist legal theory project. First, the reactions of the "liberal" "progressive" or "ACLU feminists" and a lot of lesbian feminists to the pornography campaign demonstrated the difficulties of asserting an "essentialist" woman's position. These women claimed that any regulation of pornography would limit their consumption of texts, including the health manual "Our Bodies Ourselves," as well as feminist and lesbian erotic literature.<sup>87</sup> Women could no more "know it when they saw it" then could justices on the Supreme Court, so any claim that "women" as a category could define pornography was doomed to fail and left open the usual debates of who would make the important ultimate determinations.

Second, the crafting of the statutes incorporated (and we can now say "foreshadowed") a new perspective on legal decision-making--the substitution of the presumed neutral "reasonable man" standard, which in fact enacts a gendered understanding of reality through a neutral facade, with the now recognized, at least, in some contexts "reasonable woman"<sup>88</sup> standard, recognizing that perspective matters greatly in legal decision-making.<sup>89</sup>

Third, the controversy over the pornography legislation, with claims of first amendment violations, has caused a reconsideration of first amendment jurisprudence and has convinced a host of constitutional scholars, including some men, that our readings of "neutral" constitutional principles are in fact gendered, or that at least particular readings may privilege particular interests over

---

86. Minow, *supra* note 46.

87. See FACT Brief, *supra* note 48, at 109, 120-22. See also VANCE, PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 5 (C. Vance ed., 1984).

88. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); Chamallas, *Feminist Constructions of Objectivity, Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. OF WOMEN AND LAW 95 (1992).

89. Minow, *The Supreme Court 1986 Term-Justice Engendered*, 101 HARV. L. REV. 10 (1987); Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L. J. 413. See Menkel-Meadow, *supra* note 7, at 59 (suggesting that all legal decision-making and fact-finding would be benefitted by having both male and female judges). See also Resnik, *On the Bias, Feminist Reconsiderations of the Aspirations of Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

others.<sup>90</sup> This new reading of the exceptions to first amendment absolutism has already had important jurisprudential and practical effects on regulation in other areas, most notably, the regulation of racist hate speech.<sup>91</sup>

Feminist legal work on what began as "women's issues" has led to several important developments in feminist legal theory and jurisprudence. First, attempts to use conventional legal categories did not always work and the legal categories had to be reconstructed or redefined (such as the self-defense argument for battered women). Second, new categories of legal analysis (new definitions of rape) or new causes of action had to be created to deal with women's legal regulatory and social experiences.

Feminist legal theorists also demonstrated a third insight about the structure of legal reasoning in that the categories themselves could not be maintained separately. There was, using the word in a feminist sense, a "bleeding" of categories that was required to redress women's concerns and needs.<sup>92</sup> One of the best examples of this is the work done by Chris Littleton on the pregnancy leave cases referred to above. Conventional legal analysis pointed to equality of treatment in the workplace by arguing that pregnancies should not be treated more favorably than other conditions with temporary disability. However, if pregnancy was not treated differently then there would be inequality of parenthood, as men could have children with no adverse effects on their employment. Littleton artfully demonstrated how true equality would require a regime in which neither employment nor parenthood would be burdened on the basis of gender. In order for people to experience

---

90. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988); Michelman, The Supreme Court, 1985 Term, Forward: Traces of Self-Government, 100 HARV. L. REV. 4, 17 (1986); Brest, *supra* note 82; Karst, *Woman's Constitution*, 1984 DUKE L. J. 447, 480-508 (1984).

91. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431 (1990).

92. This notion of "bleeding" or transdisciplinary categories is also reflected in the categories of knowledge produced by feminist work. Bibliographers and librarians must develop categories for classifying work that defies conventional categories, like the new feminist interdisciplinary field of "body-ology." See Shelton, *Wrestling with Women's Studies: Endeavors in Cross-Disciplinary Collection Building*, U.C.L.A. LIBRARIAN (March, 1992) at 5.

equality of working parenthood, pregnancy leaves had to be sustained.<sup>93</sup> Similarly, at the jurisprudential level, Fran Olsen, employing analysis derived from womens' studies scholarship outside of law, argued that legal regimes sustained separation of the market or public sphere from that of the private or family sphere and the symbiotic relationship of the one on the other served to oppress women.<sup>94</sup>

Echoing developments in general feminist theory that writers assumed a white middle class woman in their theorizing about women's conditions,<sup>95</sup> women of color and lesbians demonstrated that feminist legal theory seemed to be assuming a feminist essentialism. For example, Kim Crenshaw argued that antidiscrimination law permitted successful challenges to antidiscrimination only if "victims" claimed either race discrimination as blacks or sex discrimination as women, but were unsuccessful if they had been discriminated on the double axis of being a black female.<sup>96</sup> Angela Harris exposed the essentialist assumptions of the feminist jurisprudence written by Catherine

---

93. Littleton, Brief Amici Curia of Coalition for Reproductive Equality in the Workplace, *California Federal Savings & Loan v. Guerra*, No. 85-494 (1985). See Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 *FORDHAM L. REV.* 699 (1986); Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 *HARV. C.R.-C.L. L. REV.* 79 (1989); Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 *COL. L. REV.* 1118 (1986).

94. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

95. As political scientist Carole Patemen recently pointed out in conversation with me, however, the earliest feminist anthologies of theory, taken from the more "grassroots" days of the feminist movement, in fact contained much writing by women of color and lesbians. See, e.g., MORGAN, *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* (1970). One of the most outspoken early leaders of the feminist movement was the black civil rights lawyer, Florynce Kennedy. In my view, feminist theory became more white and middle class as its theorizing moved from the living rooms to the academy, where white middle class women had greater relative success in entering the inner sanctum of power than did women of color. See Barbara Reskin, *Reskin Study (Ohio State) of Women of Color in Law Teaching*, *Daily Bruin*, April 3, 1992.

96. Crenshaw, *supra* note 51. Judy Scales-Trent made a similar argument with respect to how constitutional treatment under the equal protection clause failed to remedy the particular kinds of mistreatment that black women suffered, as black women. Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 *HARV. C.R.-C.L. REV.* 9 (1989). See also Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L. J.* 365 (1991) (discussing how the dilemmas of black women's hairstyles reflect their issues of identity).

MacKinnon and Robin West, criticizing in particular their assumptions that women are always dominated by men in the same way<sup>97</sup> or that femaleness is always characterized by valuation of connectedness over autonomy.<sup>98</sup> Harris argues that black women necessarily must experience themselves through more multiple identities because of the various roles they have played historically in our society.<sup>99</sup> Pat Cain, Ruth Colker and Janet Halley have similarly deconstructed the heterosexist assumptions of much feminist legal scholarship that assumes connections to men as an essential determinant of woman's condition in the world.<sup>100</sup>

Even focusing on "women's issues" in the law, namely those substantive areas and their jurisprudential underpinnings that most directly affect women, feminist lawyers have come to recognize that multiple theories and multiple legal categories will have to be employed. "Women's Law" as it is called in some other countries<sup>101</sup> must necessarily involve other areas of law, as it must deal with all of the variations of women's experience.

---

97. Harris demonstrates how MacKinnon's account of rape is an account of white, rather than black, women's experience of rape. Harris, *supra* note 51, at 594.

98. See West, *supra* note 42; Harris, *supra* note 51 (discussing West's treatment of motherhood, intercourse, and pregnancy as a different "self" conception than that of males, particularly those writing about human nature).

99. Patricia Williams eloquently and poetically makes similar claims, by exploring her own "oxymoronic" position as a black female commercial law professor, as the great granddaughter of a slave, raped by a white lawyer master. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1990). See also Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA Women's L. J. (1992).

100. This connection can either be of the subordinating dominance decried by MacKinnon or the more positive cast of the "affiliational" feminists, see West *supra* note 42; Gilligan *supra* note 7; Menkel-Meadow, *supra* note 7.

101. See Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. SOC. LAW 239 (1986) (discussing "Women's" Law as a function of what women need from law in Norway).

C. *The Context of Feminist Legal Theory II: The "Core" Doctrinal Areas*

As feminist legal theorists began to explore the limitations of law in ameliorating women's disadvantages in society<sup>102</sup> several new turns were taken in feminist theorizing regarding the role of law in the feminist project to improve the conditions of women. First, building on MacKinnon's legal theories, some legal scholars such as Deborah Rhode and Martha Minow called for more nuanced, contextually based legal standards, rather than the more protean, neutral-sounding constitutional and statutory standards that were now decried as "masculinist" by masking, with their neutral objectivity, their actual disempowering, unequalizing effect. Rhode argued for a standard that would ask whether women were to be actually disadvantaged by particular legal rules or practices,<sup>103</sup> requiring both lawyers and judges to examine particular laws and actions within the context in which they are situated.<sup>104</sup> This of course leaves legal decision-makers with a great deal of discretion, in areas which abound with political and cultural differences to determine whether particular activities hurt or hinder women.<sup>105</sup>

A second effort sought to look behind the given fields in which legal doctrine was developed to analyze the basic underlying concepts, principles and assumptions that informed conventional legal doctrine. Like efforts to scrutinize the canon in literature, periodization in history, standards of aesthetics in art and epistemology in philosophy, this bold new feminist project sought

---

102. One feminist critic has pessimistically called law as "juridogenic" to women; that law causes harm as it is used to correct women's inequalities. SMART, FEMINISM AND THE POWER OF LAW 12 (1989).

103. RHODE, JUSTICE AND GENDER 5 (1989).

104. This is responsive, for example, to a concern that legislation which may seem to benefit women, such as pregnancy leaves, may in fact burden women by making them more expensive to employ as reflected in the concerns about protective labor legislation in the early decades of this century. See Williams, *supra* note 32.

105. See Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913 (1983); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984).

to deconstruct the absences, silences and ellipses of treatment of issues of interest to women in the "core" subjects of law.<sup>106</sup>

The following discussion of feminist critiques of legal doctrine is divided into two categories: First, the "core" subjects of any first year legal curriculum, recognized as the foundational building blocks of law; and the more specialized subject area bodies of law that commonly comprise what we think of as the "upperlevel" curriculum.<sup>107</sup> Second, the analysis attempts to identify the patterns, structure, or morphology of the feminist arguments about law and doctrine. Following on the first wave of feminist theorizing informed by real world problems, a second wave of scrutiny of man-made laws has produced some commonalities of feminist reasoning or argumentation that should themselves be subjected to analysis, debate and scrutiny. If feminist theories about law, doctrine and jurisprudence are to be used to change women's actual conditions, the arguments must be "mainstreamed," that is, debated within the larger conversations of doctrinal development and the meaning of law from both a jurisprudential and a sociological perspective. Some of this conversation<sup>108</sup> is already occurring in particular areas such as constitutional and family law where women's issues cannot be ignored, but in other areas great resistances are still in evidence. Indeed, as Mary Joe Frug recounts in her recent analysis of contract law, the AALS Section on

---

106. Elsewhere I have argued that this development occurred not only because feminist lawyers needed to examine the underlying principles of laws that were affecting decisions relating to women, but also because as more women entered the legal academy, their writing and teaching as feminists caused them to examine the implications of what they were teaching for women. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or the "Fem-Crits" Go to Law School*, 38 J. LEGAL ED. 61 (1988); Menkel-Meadow, *Excluded Voices in the Legal Profession Making New Voices in the Law*, 42 MIAMI L. REV. 29 (1982). If I argued in *Portia In a Different Voice*, that women lawyers would change the practice of law, I argue here that more women legal scholars and teachers will transform the concepts, as well as the teaching of law. See Menkel-Meadow, *supra* note 7, at 55-63.

107. One could, of course, analyze these divisions within the curriculum from a feminist perspective by asking what principles inform the assigning of categories. See generally G. LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987) (discussing how categorization structures our thinking).

108. See Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 138 (1989) (anticipating some of the debates and conversations among feminists and anti-feminists in law).

Contracts, through Professor David Slawson, could not see how contract law “could possibly be affected by feminist analysis.”<sup>109</sup>

### 1. *The Patterns of Feminist Argument*

The basic structures of argument identified in this Article are as follows: First, as explored above, is the use of conventional legal categories applied to women, such as including “equality” from the Constitution, in employment, and family law, and “privacy” for reproductive rights. Second, is the recrafting of old legal categories to meet the specific needs or experiential conditions of women. The examples here include new readings of “consent” in rape and expanded readings of exceptions to first amendment jurisprudence.

Third, is the exposure of gender bias in “malestream” law in a number of ways. The law may assume male experience as the norm, just as medicine has recently been exposed for basing its propositions and predictions about health on male only subject studies.<sup>110</sup> The law may not recognize women’s interests in its articulation and enforcement. Feminists have argued that the failure to enforce domestic relations contracts with the same vigor as commercial contracts is one such example.<sup>111</sup> Law, in assuming its neutrality and objectivity (which is in fact constructed on an “objectivity” of male experience in law making and interpretation)

---

109. Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1030 (1992).

110. See More, *The Cholesterol Myth*, ATLANTIC MONTHLY, Sept. 1989, at 37 (discussing the famous male only Framingham studies on the effects of cholesterol in heart disease); Dresser, *Wanted: Single, White Male for Medical Research*, 22(1) HASTINGS CENTER REPORT 24 (Jan.-Feb. 1992); TAVRIS, *THE MISMEASURE OF WOMAN* (1992), Ch. 3 (reviewing a variety of medical conclusions reached by employing males only for study).

111. See Dalton, *An Essay in the Destruction of Contract Doctrine*, 94 YALE L.J. 997 (1984); Frug, *Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook*, 34 AM. U.L. REV. 1065, 1078 (1985) (discussing the female role in contracts cases as part of a domestic arrangement). See also *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981) (holding that unmarried cohabitants may recover some property following separation); Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. AND FEMINISM 1 (1989) (discussing the importance of relational feminism in contract law).



may not consider its differential impact upon women. Thus, only a masculinist view of pregnancy could see nonpregnant classifications as not gendered, or breadwinner assumptions in Social Security could assume men only in such roles. Most interestingly, recent work has begun to explore the historical circumstances under which particular rules were established at common law or by legislatures with sexist assumptions or gendered interpretations of earlier eras, exposing the lack of "neutrality" in the most innocuous of rules.<sup>112</sup>

Fourth, and perhaps most evocative, provocative and controversial, are claims from a wide variety of legal scholars analogizing (as lawyers have been taught to do) from Carol Gilligan's work that gender difference (whether based on social construction or more essentialist views of gender) will produce different laws, legal practices and legal methods when women's values are recognized and acknowledged in the legal system.<sup>113</sup> Across a broad spectrum of legal doctrines, methods and practices, feminists (both male and female) have argued that the articulation of "women's values" of care, connection, nurturance, sensitivity to others, experienced-based reasoning will transform many aspects of legal doctrine, as well as practice.<sup>114</sup>

Fifth, what some view as a subset of the "difference" school is an analysis of how male dominance operates to hold women in their legal, as well as social places, asserting that laws must be analyzed and debated with a specific, particularized view of how they disempower, or disadvantage women. This view explains the emphasis on areas of law where women are physically,

---

112. See Vandervelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992) (discussing deconstruction of the specific performance rules as developed through the consideration of contract and labor principles applied to female entertainers).

113. See, e.g., Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990).

114. It is somewhat interesting to note that with all of the criticisms of Gilligan's gender difference theory, the difference arguments for proposed changes in the conceptualization of law far outnumber the other structures of arguments from a feminist perspective. See Williams, *supra* note 7, at 802-821. For criticisms of Gilligan's work see, e.g., *Symposium*, 50 SOC. RESEARCH 576 (1983) and Kerber, *Some Cautionary Words for Historians*, 11 SIGNS 304, 309 (1986).

economically and emotionally hurt by the operation of law, particularly violence against women (rape and domestic abuse), pornography, health law (RU486 regulation),<sup>115</sup> family law<sup>116</sup> and welfare law.<sup>117</sup>

Sixth, and also related to difference arguments, are claims that laws must be made responsive to the specificity of women's particular needs, which is in turn an effort to transform legal discourse on constitutional and statutory entitlements to a more humane emphasis on needs particularized to the groups of individuals who articulate a need to be recognized by law and the state. One part of this argument is the feminist-critical legal studies critique of rights as an empowering device for women when legal rights operate most successfully on a rhetorical level and less so on a material level.<sup>118</sup>

Finally, most recently, some feminists in law, like feminists in other disciplines,<sup>119</sup> have made claims for feminist methods,

---

115. See, e.g., Ricks, *The New French Abortion Pill: The Moral Property of Women*, 1 YALE J.L. & FEMINISM 75 (1989).

116. In this context, family law specifically deals with the work on government benefit entitlements and other economic issues. See, e.g., Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, (1980); Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981).

117. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169; Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PENN. L. REV. 1249 (1983); White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

118. See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Minow, *Feminist Reason: Getting It Losing It*, 38 J. LEG. ED. 47 (1988); Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (discussing rights as both an empowering device for women and a rhetorically empty device for women). See also West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1985); FRASER, UNRULY PRACTICES (1989); Fineman, *supra* note 68; Littleton, *supra* note 30 (discussing the appeal to women's needs); Becker, *supra* note 117; Law, *supra* note 117. The "needs" feminists are also implicated in the larger jurisprudential discussion of group versus individual rights.

119. Looking at how feminists in other disciplines have characterized their contributions indicates other ways of categorizing the "data" of women's contributions. Feminist scholarship is "corrective" when it points out absences of women, "celebratory" when it adds the achievements of women to the canon of men, otherwise known as cultural feminism, transformative when it adds new categories of analysis in a wide variety of fields, such as public-private, *écriture féminine*, and standpoint epistemology. DUBOIS ET AL, FEMINIST SCHOLARSHIP: KINDLING IN THE GROVES OF ACADEME (1985); LANGLAND & GOVE, FEMINIST PERSPECTIVE IN THE ACADEMY (1981). Skeptics still ask: "Does feminism have a theory?" If so, what is it? Most feminists would refuse the notion

methodologies and epistemologies<sup>120</sup> that they argue will transform the way we produce legal knowledge, legal doctrines and practice, as well as the way we think about law, based on the situated, positioned and contextualized experiences that women have with the law.<sup>121</sup> By examining the concrete applications of feminist analysis to conventional doctrines of law we can see how varied and successful these intellectual strategies are and begin to assess how they will be “mainstreamed” in legal theory and doctrine. Will they be assimilated, deformed, transformed, and ignored or instead serve to transform the law itself?

## *2. The Arguments Applied to Core Doctrine*

Starting with the core law subjects of criminal law, torts, property and contracts, we can see how feminist lawyers and legal scholars have demonstrated ways in which legal doctrine ignores women’s experiences and must begin to be inclusive of women’s interests. This may appropriately be labeled as “the corrective” strategy.

Feminist lawyers focused upon situations where crimes against women did not take account of women’s experience. In the rape area, rape was defined in terms of penetration and required resistance, and consent was interpreted to include such activities as the victim’s past sexual history and her conduct and dress at the time of the rape. As both MacKinnon and Estrich have demonstrated, rape was defined in male terms and with requirements and defenses that at least have the effect of minimizing the behavior that is actually punished in our system. Similarly, feminist lawyers and activists demonstrated that women suffering from abusive behavior in their homes were unable to have

---

of “a” or “the” theory. We are committed to multiple understandings of reality and regard efforts at global statements as reductionist. See J. DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* (1985).

120. See HARDING, *FEMINISM AND METHODOLOGY* (1987); HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) (discussing the distinctions between feminist methods, methodologies and epistemologies).

121. See Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (discussing feminist transdisciplinary knowledge).

the criminal justice system treat their victimization as serious.<sup>122</sup> Efforts on the part of both lawyers and academics called attention to this disparate enforcement of the criminal laws of assault and battery as new causes of action for spouse abuse were created at the same time that conventional criminal prosecution was applied to domestic abuse. As outlined above, the theoretical response to women as criminal defendants has been more controversial in the competing perspectives on when women should be excused from killing their abusers.<sup>123</sup>

Illustrating another strategy of legal analysis, Mary Coombs has supplied a feminist analysis of justifications and rationales for Fourth Amendment search and seizure law. This theory employs feminist concepts of relationships and privacy to analyze traditional doctrinal questions of who may consent to searches.<sup>124</sup>

In the torts area several scholars have pointed to devaluation of women's experiences in the recognized categories of tort liability, the failure to recognize women's injuries and the application of presumed "neutral" but in fact sexist standards for judging behavior and imposing liability.<sup>125</sup> Such scholars have pointed to the gendered assumptions of the "reasonable man" standard and asked to what extent is a man actually intended in the objective standards of care required? This standard may now be subject to rethinking as at least some courts have adopted a "reasonable woman" standard in the area of sexual harassment<sup>126</sup> while others urge us to consider rape liability from the reasonable

---

122. MARTIN, *BATTERED WIVES* (1976); Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U.CHI. L. FORUM. 23 (1989).

123. Schneider, *supra* note 79.

124. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987).

125. See, e.g., Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL ED. 3 (1988); Bender, *Changing the Values in Tort Law*, 25 TULSA L. REV. 759 (1990); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989). See also Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981); Tobias, *Gender Issues and the Prosser, Wade & Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988); Love, *Tortious Interference With the Parent Child Relationship: Loss of An Injured Person's Society and Companionship*, 51 IND. L. J. 591 (1976).

126. See *supra* note 88 and accompanying text (discussing cases addressing the "reasonable woman" standard).

woman's perspective.<sup>127</sup> Women's rights to be compensated for loss of consortium of husband and children have now been recognized, as well as, in limited circumstances, compensation for emotional distress for the loss of a loved one.<sup>128</sup>

Lucinda Finley argues for the application of conventional tort doctrine to injuries suffered by women in such notorious mass tort cases as DES, Dalkon Shield and now breast implants, raising important issues about whether the legal system is able to account for the particular injuries and harms that women feel when their reproductive capacities are lost or other "gendered" injuries are suffered.<sup>129</sup> Leslie Bender goes further and, utilizing the difference strategy of argument, suggests that women's values of care and connection might reconstruct negligence standards to account for a higher level of caution and care and liability for one's actions because of women's greater likelihood to care for others.<sup>130</sup>

In property, scholars like Peggy Radin and Carol Rose have explored the limits of what may properly be the subject of ownership, including property rights in the integrity of one's body, a woman's concern when linked to reproductive and sexual capacities and the justifications for ownership in our society.<sup>131</sup> That women have been property, both under Blackstone's regime of coverture and under slavery, may, as Patricia Williams has

---

127. This of course raises issues of false consciousness among women as we listen to some of the reactions to notorious rape trials like those of William Kennedy Smith (what was she doing at the Kennedy estate after midnight?) and fraternity rapes like Laurel's in Sanday's book. *See supra* note 77 (expressing the view that if she was drunk and on drugs she asked for it, rather than the drugs and alcohol precluded her ability to consent).

128. *See generally*, cases collected in Bender, *supra* note 126 and Finley, *supra* note 126.

129. Finley, *supra* note 126.

130. *See supra* note 126 (discussing Bender's utilization of the difference theory). Bender extends this analysis to the important area of tort liability for a duty to rescue. Bender is, in effect, utilizing the strategy of seeing women's qualities as superior to, and substituting for, men's (more "detached" negligence) in the formal legal standards.

131. *See* Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982); Radin, *Market-(In)Alienability*, 100 *HARV. L. REV.* 1849 (1987); Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory and Feminist Theory*, 2 *YALE J.L. & FEMINISM* 37 (1990). *See also* Rose, *Women and Property: Gaining and Losing Ground*, 78 *VA. L. REV.* 421 (1992) (using game theory to explore assumptions that women's "taste for cooperation" results in their owning less property).

poignantly described in recounting the sale of her great-grandmother into slavery, give women a "different perspective" on what it means to own and be owned.<sup>132</sup> Feminists in family law have contributed to expanded concepts of property in reconceptualizing what must be divided at divorce including the contributions and investments of wives in the "property" of their husband's professional degrees and goodwill.<sup>133</sup>

In contracts, Professors Dalton and Frug have deconstructed the familiar doctrines of contract and their teaching to demonstrate that presumed "neutrality" of rules in fact divides the world into gendered categories of what may be enforced (commercial promises) and what may not (domestic promises).<sup>134</sup> More recently Mary Joe Frug has demonstrated that any contract (or any legal) doctrine can be subjected to a feminist analysis by demonstrating the relationship of the interpreter to the text.<sup>135</sup> She argues that even a doctrine as "neutral" as the impossibility doctrine permits ambiguous or dualistic readings that can be used to cut off excuses in masculinist line drawing Draconian ways or instead, can be used to permit flexible appeals to discretion and mercy and forgiveness.<sup>136</sup>

Most recently, several scholars have argued that feminist sensibilities might affect the processes we bring to bear on solving legal problems, again signaling the controversies and differences among feminists.<sup>137</sup> Are clear rules male and discretionarily flexible rules female? Is law male and equity female? Is

---

132. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988). Here again we confront differences among feminists who debate whether women ought to be allowed free trade in their bodies as in prostitution. See, e.g., Frug, *supra* note 54, at 1052-59; PATEMAN, *THE SEXUAL CONTRACT* (1988).

133. Blumberg, *Intangible Marital Property*, VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (Matthew Bender 1984). See Blumberg, *Identifying and Valuing Goodwill at Divorce*, in LAW AND CONTEMPORARY PROBLEMS (1992). See, e.g., Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978); O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

134. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). See also Tidwell & Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791 (1991).

135. Frug, *supra* note 109; Frug, *supra* note 111.

136. Frug, *supra* note 109.

137. Bartlett, *supra* note 121.

adjudication male and alternative dispute resolution female? Is reluctance to cut off relevancy or issue preclusion female? These were procedural questions recently debated at the annual meeting of law professors as feminist proceduralists explored the contributions of feminism to legal process.<sup>138</sup>

Related to the issues of feminist process in the legal system and more fully explored below are such controversial issues as whether women lawyers will practice law differently from men,<sup>139</sup> now complemented by the question of whether judges will make different legal decision-makers based upon their gendered experiences?<sup>140</sup> If feminists engage the legal process in a gender differentiated way, will they create particular forms of knowledge, argumentation or legal method?<sup>141</sup>

This cursory review of the first round of feminist contributions to legal theory on issues directly pertaining to women and the basic core of legal thought is only partially suggestive of what feminist theory can do. More recent work has begun to push the feminist analysis into corners and cracks of the law that at first glance do not appear to have direct applicability to women's issues. It is here that feminist theory will be mainstreamed into all forms of legal analysis.

---

138. See AALS Joint Session of Civil Procedure and Women In Legal Education, Judith Resnik, Elizabeth Schneider, Barbara Babcock, Harold Koh, & Judge Shirley Abrahamson, San Antonio Texas, Jan. 1992. See generally Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEG. ED. 243 (1988) (other efforts to include feminist thinking in civil procedure).

139. Menkel-Meadow, *supra* note 7, at 55-58.

140. Resnik, *supra* note 90; Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL L. REV. 1945 (1988).

141. Bartlett, *supra* note 121; Colker, *Feminist Litigation: An Oxymoron--A Study of the Briefs Filed in Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1991); Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1992).

### III. MAINSTREAMING FEMINIST LEGAL THEORY

#### A. Constitutional Law

It seems fitting that one of the first attempts to mainstream feminist theory came from one of my male colleagues, a distinguished constitutional law scholar. In 1984, Ken Karst associated himself with the "difference school" of female values explored by Carol Gilligan to suggest that the Constitution and our precious civil rights and liberties might be conceived of in dichotomous values that echoed the gendered "ladder" (of hierarchical thinking of Gilligan's Jake) or "web" (of Amy's connected and relational thinking).<sup>142</sup> This author and others have suggested that classic constitutional concepts like liberty and autonomy might be defined differently from a woman's perspective.<sup>143</sup> For instance, Suzanna Sherry has controversially suggested that Justice O'Connor has demonstrated a "feminine" sensibility in constitutional decision-making.<sup>144</sup>

Utilizing yet another of the feminist theoretical strategies, Janet Halley has demonstrated that the rubric of "immutable characteristics" as a foundational claim for heightened scrutiny in conventional equal protection analysis will not work with a socially, as well as sexually, constructed concept of homosexuality,<sup>145</sup> brilliantly elaborating the problems of binary categories in legal thinking.<sup>146</sup>

---

142. Karst, *Woman's Constitution*, 1984 DUKE L. J. 447, 480-508 (1984).

143. Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989). See Menkel-Meadow, *supra* note 7, at 62 (discussing *Lassiter v. Dept. of Soc. Services*, 452 U.S. 18 (1981), as not fully recognizing the right "not to be cut off from one's children" as a liberty right).

144. Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

145. Halley, *The Politics of the Closet: Towards Equal Protection For Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

146. Elsewhere I have written of the law's seeming need to dichotomize and think in binary categories, unlike other disciplines, because of the basic structures of the adversary system. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789 (1984). See also HINTIKKA AND HARDING, *Adversary Thinking in Philosophy*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* (1983). The complex arguments of causation in sex



*B. Doctrine Beyond the Core*

More recent work by another generation of feminists has expanded into new areas of inquiry. This work seeks not only to refine and reframe feminist issues for and among feminists, but it addresses areas of law, not obviously related to feminist or women's concerns. Thus, it is an effort to mainstream feminist legal theory, to show how women's experiences, conditions or concerns can inform all aspects of law. Just as the "feminist" takes on women's issues and core areas of law explored above, these scholars demonstrate the same structural arguments about feminist or women's inputs into law.

Building on her work in procedure and process, Cynthia Farina has argued for a feminist approach to public administration and the administrative state by suggesting, as have feminist political theorists before her,<sup>147</sup> that masculinist conceptions of the state and its regulatory schemes assume a rationalist, individualist, autonomous set of actors (an argument similar to Robin West's characterization of male jurisprudence),<sup>148</sup> especially among those regulatory theorists who pattern their work on economic analyses of "rational or economic man."<sup>149</sup> Farina is interested in exploring the relationship of the regulated to the state in reviewing recent male attempts to grapple with the complexities of the modern state.<sup>150</sup> Farina suggests that theorists, like MacKinnon who have begun to explore a theory of the state and feminist proceduralists focused on court processes, have begun to examine

---

discrimination in high commission jobs was dichotomized in the expert theories of "discrimination" vs. "women's choice." See Menkel-Meadow, *supra* note 10 at n.9. See also, Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990); Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUDIES 375 (1986); Scott, *Deconstructing Equality-Versus-Difference or the Uses of Post-Structuralist Theory for Feminism*, 14 FEMINIST STUDIES 33 (1988).

147. Pateman, *supra* note 20; Okin, *supra* note 20.

148. WEST, *supra* note 54.

149. Farina, *Getting From Here to There*, 1991 DUKE L.J. 689 (1991).

150. Farina is reviewing Cass Sunstein's AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990) and Chris Edley's ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990), in Farina *supra* note 149.

the nature of public law from a feminist perspective.<sup>151</sup> Feminists have deconstructed the public/private distinction and shown the symbiotic relations of differential regulations in these spheres.<sup>152</sup> Indeed, Judith Resnik has attempted to show how public law bounds itself by separating from the "housekeeping" functions it regards as less important.<sup>153</sup> Several feminist scholars have taken on explicitly the functions of the modern administrative state to explore the responsibility of the government for individual welfare, focusing upon the kind of "interdependence theory"<sup>154</sup> of state responsibility for individuals that builds on earlier work by political scientist Kathy Ferguson.<sup>155</sup> Whether in the process concerns of Lucie White, who chronicles how individuals and oppressed groups are left out of the administrative and public law discourse,<sup>156</sup> or the substantive welfare policy concerns of such writers as Sylvia Law,<sup>157</sup> Mary Becker<sup>158</sup> or Johanna Brenner,<sup>159</sup> such feminist theorists explore some version of the connection thesis to argue that feminist lawmakers would reconceptualize rules, institutions and the relationship of these to people in a different way than the traditional liberal social contractarians or even the civic republican revivalists.<sup>160</sup> Such theorists posit an "interactive, collaborative decisional" structure for our institutions that in some sense reflects old debates about discretion and rules, but recasts the dialogue in

---

151. Farina, *supra* note 149.

152. Olsen, *supra* note 94.

153. Resnik, *Housekeeping: The Nature and Allocation of Work in the Federal Trial Court*, 24 GEORGIA L. REV. 909 (1990).

154. Farina, *supra* note 149, at 707.

155. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984).

156. White, *supra* note 117.

157. Law, *supra* note 117.

158. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169 (1989).

159. Brenner, *Towards A Feminist Perspective on Welfare Reform*, 2 YALE J. OF L. & FEM. 99 (1989). Brenner argues that a feminist welfare policy has to focus on the welfare mother's job and employment possibilities, not on a romantic defense of the family (as urged by some feminists) in order to prevent dependency. *Id.* Brenner thus takes on some of the complex equality-difference issues in the particular context of welfare policy. In welfare policy this is a particularly tricky endeavor, because not only does it reveal the cleavages of feminist theorists in several disciplines, but it also aligns some feminists on the side of what appear to be conservative political policies requiring some forms of workfare.

160. See Michelman, *supra* note 90.

a more open-ended fashion by linking it to particular contexts, rather than trying to justify a global or meta-theoretical defense for discretion on a systemic level.<sup>161</sup> As Farina points out, feminists have been concerned with the uses of power from having experienced, at first hand, the often arbitrary use of state power.<sup>162</sup> Feminists, in Farina's work, have looked at power "from both sides now--from win and lose,"<sup>163</sup> where women have been the object or victim of both male and statist power, but have also exercised a different form of power, that of the caretaker, nurturer, and empowerer.<sup>164</sup> Thus, women may reconstruct our conceptions of power and governmental authority, as feminists have now tried to reconstruct other core concepts in our jurisprudence.<sup>165</sup>

In a somewhat related manner, some feminist theorists have begun to explore the exercise of private power in the corporate setting in similar ways. For instance, arguing that women might organize the workplace differently, it has been suggested that different forms of ownership and control might obtain with a feminist corporatism.<sup>166</sup> Building on the work of sociologist Rosabeth Kanter,<sup>167</sup> Lahey and Salter recognize that organizational structures are necessary sites of social change and

---

161. See Edley, *supra* note 150.

162. Farina, *supra* note 149.

163. Apologies to Judy Collins, "Both Sides Now," *Colors of the Sky* (1966).

164. Farina, *supra* note 149, at 709.

165. The best example I can think of here is Jennifer Nedelsky's work on autonomy. See Nedelsky, *supra* note 143. I have urged feminist reconstructions of other key legal concepts like "liberty." See Menkel-Meadow, *supra* note 7, at 62. See also Karst, *supra* note 142 (urging feminist reconstructions of several constitutional principles). There is virtually no limit to the key legal concepts feminist legal theorists could choose to explore in the reconstruction and reconceptualization project.

166. See Lahey & Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOOD HALL L.J. 543 (1985). Lahey and Salter look briefly at the alternative feminist organizations that were created during the heyday of the second wave of the women's movement involving modes of participation, democratic governance, nonelitism and antihierarchy. *Id.* Many of these institutions have failed or gone on to more conventional forms (worker cooperatives and employee ownership are some non-feminist examples), but they still serve as evocative countermodels. See also A. PHILLIPS, *ENGENDERING DEMOCRACY* (1991) (describing feminist democratic organizations).

167. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

are greatly responsible for molding individual behavior and choices.<sup>168</sup> Like others who explore decision-making in the private and public sphere, Lahey and Salter implicitly identify themselves with a woman's "difference" model by suggesting that women will be more concerned with self-governance and the effects of corporate decisions on others, beyond the mere monetary concerns of the "bottom line."<sup>169</sup> In a different but related context, Regina Austin has explored how oppressed workers, both women and racial minorities have exercised some control over their work by resisting managerial policies that attempt to control workers by subordinating them,<sup>170</sup> and by creating alternative work cultures and internal rules of self-management.<sup>171</sup> In Austin's analysis, women (and people of color) develop alternative cultural constructions of work, not necessarily from the "Gilliganesque care" perspectives, but from resistance to oppressive conditions. Thus, difference can be expressed in the Janus-face of care, and anger as resistance. As MacKinnon points out, structurally these may produce the same result since both care for and resistance to the oppressor lead to reactions to the oppressor, rather than the creation of something totally new.<sup>172</sup> Thus, feminists who really seek to explore other forms of ownership and control must begin to examine what alternative models exist that are not built totally from reactions to masculinist structures and conceptions.

Addressing this challenge in a related area, Marion Crain has recently argued that feminizing unions is one way to meet head-on

---

168. Lahey & Salter, *supra* note 166.

169. *Id.* at 569.

170. Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

171. Austin's work relies heavily upon the empirical work of feminist anthropologists and sociologists who have studied feminist workplace behavior. *See, e.g.*, SACKS, *CARING BY THE HOUR: WOMEN, WORK AND ORGANIZING AT DUKE MEDICAL CENTER* (1988); SACKS & REMY, *MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME* (1984); WESTWOOD, *ALL DAY, EVERY DAY* (1984); ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* (1985).

172. MacKinnon, *Feminism Unmodified*, in *DIFFERENCE AND DOMINANCE* (1984). *See* MacKinnon, *Comments*, in DUBOIS, *supra* note 83.

the gendered system of wage labor.<sup>173</sup> Adopting yet another version of the "difference" theory, Crain suggests that the growing numeric strength of women in the workforce could be tapped to have women begin to exercise control in labor unions by demonstrating "new ideas about how unions should be structured," to exert economic power and democratic decision-making. Women collectively organized, for example, might make child care, parental leave, medical insurance and other "social" and affilial benefits more significant than they are now.<sup>174</sup> (Might women value some of these things more than pure economic wages, such as having child care close to work?)<sup>175</sup> If women are notable for their "care" for others, why isn't that expressed as care for others in the workplace, just like care at home?<sup>176</sup> If women are more likely to be self-sacrificing<sup>177</sup> then they should be naturals for the collective action of unions in which all work is for the greatest good for the greatest number.<sup>178</sup> Crain goes even further to suggest a "deconstruction" of labor law, as Frug has deconstructed contract law and others are deconstructing other areas.<sup>179</sup> She demonstrates the strategy of masculinist assumptions in the law, including definitions of "worker" as male, breadwinner with need for a family wage, the exclusion of confidential workers and

---

173. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991). See Conaghan, *The Invisibility of Women in Labor Law: Gender Neutrality in Model-Building*, 14 INT'L. J. SOC. L. 377 (1986) (discussing how basic labor concepts are developed from male, and not female, labor experiences).

174. Crain, *supra* note 173, at 1156.

175. Crain notes for example that where women have been in leadership positions in unions these issues moved to the fore of the organized activity. See Crain, *supra* note 173, at 1180-81 (discussing the Harvard and Yale labor strikes).

176. Crain attributes this classic misinterpretation of women's care at the workplace to the strength of the public/private split which sees women as caring only at home, while feminist scholars of women in the workplace have demonstrated that care does not stop at home. See, e.g., Sacks, *supra* note 171; Milkman, *supra* note 146.

177. This is one of the most controversial aspects of Gilligan's ethic of care. See ALLEN, *UNEASY ACCESS; WOMEN'S PRIVACY* (1988).

178. Both Crain and Vicki Schultz do an outstanding job of deconstructing the lay and scholarly myths about women's inability to organize or choose particular types of jobs. See Crain *supra* note 174; Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

179. See, e.g., Frug, *supra* notes 109, 111; Dalton, *supra* note 134.

independent contractors from labor laws that just coincidentally happen to be jobs principally held by women; no-solicitation rules that limit where workers, who are busy mothers, may learn about unionization, work actions prohibited that may be more likely to be engaged in by women (like slow-downs) and arbitrary divisions of mandatory and permissive bargaining subjects that just happen to divide traditional wage and hour issues from more women's interest work benefits.<sup>180</sup> Crain urges that feminist scholars deconstruct labor law to unmask the masculinist assumptions which have informed the legal categories that comprise American labor law.<sup>181</sup>

Almost as if she heard Crain's clarion call, Lea Vandervelde has recently deconstructed one rule of contract and labor law--the *Lumley* rule, limiting specific performance, but enjoining certain employees from plying their trade elsewhere.<sup>182</sup> Vandervelde engages us in a historical *tour de force* by demonstrating the gendered origins of a seemingly neutral rule. Given that the rule was developed and elaborated upon in late nineteenth and early twentieth century cases dealing with female entertainers, Vandervelde demonstrates that the particular gendered context in which these cases were litigated enacted a gendered conception of female subordination to male managers, thus creating legal principles that were later applied in a more neutral, but still oppressive fashion, to men.<sup>183</sup> By uncovering the historical circumstances of how our neutral rules came to be, Vandervelde explores another dimension of feminist scholarship that could easily inform all areas of law.<sup>184</sup> We must ask how often are the neutral

---

180. Crain, *supra* note 173, at 1214-19.

181. *Id.* at 1214.

182. Vandervelde, *supra* note 112, at 775.

183. *Id.* at 834.

184. Many other social historians have begun to engage in this kind of historical deconstructive work to demonstrate that our "neutral" rules seldom have neutral contexts as they are developed. See, e.g., Minow, *Forming Underneath Everything that Grows: Toward A History of Family Law*, 1985 WIS. L. REV. 819 (1985); FINEMAN, *ILLUSIONS OF EQUALITY* (1990); HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITIES OF NEW YORK IN AMERICAN LAW* (1983); FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

rules we are in thrall to the product of gendered parties and sexist assumptions of social and legal relations.<sup>185</sup>

Even in areas as seemingly remote as commercial and tax law, feminist scholars have recently explored how feminist perspectives might inform new readings of laws or affect policy justifications. In reviewing the empirical bankruptcy work of Teresa Sullivan, Elizabeth Warren and Jay Westbrook,<sup>186</sup> Karen Gross has recently argued that attention to who comprises individual bankrupt debtors in our society, informed by "women's different values," might recast some of our priorities in bankruptcy.<sup>187</sup> If women are a large percentage of the debtors and the poor in America, alternatively formulated as "the povertization of women" or the "feminization of poverty,"<sup>188</sup> we may need to uncover the different routes by which women become debtors, either as single women or as the "passive" bystander of spousal consumption patterns, and the different attitudes that women may have about invoking particular aspects of the bankruptcy law.<sup>189</sup> Gross explicitly employs the Gilligan-difference approach to suggest that some women may adopt a different moral stance with respect to past debts.<sup>190</sup> Bankruptcy law, she suggests, is "phallocentric."<sup>191</sup> Gross suggests that a different, more mediational approach might occur in bankruptcy court, if not only women as debtors, but women as bankruptcy judges, were taken more seriously.<sup>192</sup> Like Crain, Gross engages in gendered deconstructive readings of particular provisions of the bankruptcy

---

185. Frug, *supra* notes 110, 112; Finley, *supra* note 125.

186. SULLIVAN, WARREN, & WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989).

187. Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990).

188. *Id.* Pearce, *The Feminization of Poverty: Women, Work and Welfare*, URB. & SOC. CHANGE REV. 28-36 (Winter-Spring 1978).

189. Gross suggests, for example, that women may be less likely to want a clean break under Chapter 7 of the Bankruptcy Code (the "screw you approach"), but might prefer the reorganization plan, under Chapter 13, that allows them to reaffirm and take responsibility for their debts, especially if they are trying to reestablish their own credit after an unsuccessful relationship with a man. Gross, *supra* note 187, at 1538.

190. *Id.* at 1541.

191. *Id.* at 1533.

192. *Id.* at 1544.

code to elaborate how a feminist sensibility or at least attention to the empirical differences of female debtors might inform the drafting and "re-visioning" of particular bankruptcy provisions.<sup>193</sup>

Operating on a more global policy level, Marjorie Kornhauser suggests that feminism may offer a justification for progressivity in our tax system.<sup>194</sup> After canvassing the more classic defenses of and justifications for progressivity in our tax system, based upon law and economics analysis, Kornhauser suggests that a feminine - "Gilliganesque" difference model of care and connection can be used to provide an "alternative" philosophic vision of our tax system, based on our interdependence and sense of responsibility for each other.<sup>195</sup> She argues that people with enough money to live on can "care for others" by providing a share of their own income to provide an equitable redistribution of wealth.<sup>196</sup> Kornhauser further applies her feminist analysis within the suggestions of recent efforts to look more closely at self-interest and altruism as motives within our public actions.<sup>197</sup> Other feminists have explored various strategies of analysis to demonstrate that the effects of "neutral" tax laws operate to penalize women, based upon the particularities of their working and family patterns, which do not necessarily conform to traditional male patterns of earnings and family life.<sup>198</sup>

---

193. *Id.* at 1542-53.

194. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987). See Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317 (1990) (applying more traditional feminist analysis to the tax area). In more traditional analysis, marital statutes and the use of the family as the taxable unit have long been part of the conventional tax policy analysis. Similarly, the gendered aspects of other government programs like Social Security and welfare have recently been subjected to feminist analysis. See Blumberg, *supra* note 116 (Social Security); Law, *supra* note 117 (welfare).

195. Kornhauser, *supra* note 194, at 507-08.

196. *Id.* at 511.

197. See *id.* at 505, 513. See also J. MANSBRIDGE, *BEYOND SELF-INTEREST* (1990); Henderson, *Empathy and Legality*, 85 MICH. L. REV. 1574 (1987); Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GEO. ST. L. REV. 385 (1992) (explaining some of the author's thoughts on this subject); Rose, *supra* note 131.

198. See, e.g., Maloney, *Women and the Income Tax Act: Marriage Motherhood and Divorce*, 3 CANADIAN J. OF WOMEN'S & L. 182 (1989).



Extending the analysis of our responsibility for others still further, a variety of feminist theorists in international law have applied feminist analyses to the international law arena. Again, focusing upon a structural argument that claims difference on behalf of women, some analysts decry the absence of women from international law positions that minimize their impact on international law, resulting in the kinds of silences and absences about women's issues that characterize our study of domestic law as well.<sup>199</sup> For example, international human rights treaties and laws typically fail to mention or fail to enforce a myriad of provisions that inhibit women from taking part in the political life of our global world, replicating the public/private distinctions which seem to inhere in all legal systems. This is evidenced by the treatment of such issues as genital mutilation,<sup>200</sup> domestic physical abuse not recognized as torture,<sup>201</sup> coercive contraception or population control practices, regulation or treatment of international or diplomatic prostitution, mail order bride practices and international rings of pornography and other sexual abuse.<sup>202</sup> While disputes in the international arena about how to evaluate sexist and gendered conduct implicates cultural practices<sup>203</sup> that may vary and be subject to even more dissensus than domestic feminism, feminist international law scholars inform us that we can examine these important issues through a deconstruction of the individual rights schemes that inform much of international law.<sup>204</sup> Like other feminists, international law scholars also suggest that women in the international arena may be more likely

---

199. Charlesworth, Chinkin & Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L. LAW 615 (1991); Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, NEW. ENG. L. REV. (forthcoming edition).

200. Gunning, *Arrogant Perceptions, World-Traveling and Multicultural Feminism: The Care of Female Genital Surgeries* (manuscript on file with author); Bouleware-Miller, *Female, Circumcision: Challenges to the Practice as A Human Rights Violation*, 8 HARV. WOMEN'S L. J. 155 (1985); Cranfield and Cranfield, *Female Circumcision: An Assault*, 227 PRACTITIONER 816 (1983); Engle, *supra* note 199.

201. Charlesworth, *supra* note 199, at 627.

202. *Id.* at 630.

203. See Gunning, *supra* note 200; Engle, *supra* note 199 (discussing the tensions between feminism and cultural relativism or its new formulation, multiculturalism).

204. Gunning, *supra* note 200; Engle, *supra* note 199.

to employ consensual, conciliatory processes than the adversarial processes that characterize much international law-making and practice.<sup>205</sup> These scholars point out that a body of law which takes “self-determination” as its primary ideological justification has largely excluded more than one-half of the world’s population.<sup>206</sup> Feminists working in international law and human rights also critique the “Eurocentrism” of western feminism as applied to third world women.

These illustrations of feminist theory applied to particular areas of law are partial and incomplete. They are intended to illustrate and evoke the kinds of arguments that feminist theorists are making about law and lawmakers. Implicitly, they argue that if more women were admitted to the process of making, interpreting and enforcing law, perhaps interacting with and translating with male colleagues, a greater variety of values would be expressed in the law and whole bodies of law might change or have their underpinnings questioned. Since I have been among those arguing that more women in the legal profession will change the way law is made and practiced,<sup>207</sup> we can see the work of the feminist academics discussed above have already affected the ways in which we think about law and legal phenomena. Women have moved from being “victims” of, or the “acted upon” in law, to begin to assert their own understandings and reconceptualizations of law.

#### IV. FEMINIST THEORY INTO DOCTRINE AND PRACTICE

Some of these feminist analyses of law have already made their mark on doctrine as illustrated by the few examples already referred to above. Catherine MacKinnon has forged her theoretical approaches to women’s inequality in law through efforts in specific legal reforms including sexual harassment conceived as gender

---

205. Charlesworth, *supra* note 199, at 616.

206. *Id.*

207. Menkel-Meadow, *supra* note 8, at 55 and note 107.

discrimination<sup>208</sup> and pornography as an actionable civil rights violation,<sup>209</sup> utilizing both statutory and common law strategies. MacKinnon's efforts have created new laws where once there were none.<sup>210</sup>

Other feminists have won traditional equality rights for women based upon new or reconstructed arguments. Chris Littleton's successful argument about the relationship of work to procreational equality is one example of this progress.<sup>211</sup>

Other feminist strategists have redefined legal standards to expand women's needs, interests and rights within the legal system, as in the development of rape shield laws, reconceptualizations of consent in rape defense<sup>212</sup> and the adoption of a "reasonable woman" standard in sexual harassment cases.<sup>213</sup>

Further, both black feminist and lesbian feminists have pointed out that generic categorizations of "woman" fail to account for their particular needs and interests from the legal system.<sup>214</sup> Thus, the constitution and statutes that attempt to remedy discrimination require more specific formulations to deal with the particulars of black women's experience<sup>215</sup> and the particularities of the ways in which gays and lesbians are oppressed, subordinated and discriminated against in our society.<sup>216</sup>

---

208. MacKinnon, *supra* note 43; *Meritor Savings Bank v. Vinson*, 447 U.S. 57 (1986). Several feminist scholars have now also tried to reclaim sexual harassment as a tort. See Chamallas, *supra* note 88.

209. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV.C.R.-C.L. L. REV. 1 (1985); MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

210. Even though these laws haven't always been sustained legally; they have provided organizing devices for women. See *Hudnut v. American Booksellers*, 475 U.S. 1001 (1986). See also *supra* notes 84-91 and accompanying text.

211. See *supra* text accompanying notes 92-94.

212. See *supra* text accompanying notes 74-78.

213. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Rabidue v. Osceola Ref. Co.*, 805 F.2d. 611 (6th Cir. 1986) (applying a "reasonable woman" standard).

214. See *supra* text accompanying notes 51-55.

215. See Crenshaw, *supra* note 51; Harris, *supra* note 51; Scales-Trent, *supra* note 96 (discussing the black woman's experience in this context).

216. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding sodomy law constitutional); Halley, *supra* note 146; Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA. L. REV. 499 (1991); Karst, *The Freedom of Intimate Associations*, 89 YALE L. J. 624 (1980) (discussing constitutional bases for non-intervention in personal and intimate relations). See also Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

Other feminists have focused upon the process or practice of law to accomplish feminist ends, either by using law and legal battles such as reproductive rights<sup>217</sup> and pornography<sup>218</sup> to organize women politically for substantive legal battles or to attempt to transform legal process itself through feminist practices.<sup>219</sup>

I have argued that some of the concerns associated with women's socially constructed interdependence on and for others may facilitate a concern for the other that might both transform the ways in which women practice law<sup>220</sup> and more broadly cause us to deconstruct and reconstruct the binary oppositions of our adversary system that cause us to see the other as someone to be defeated, rather than helped.<sup>221</sup> Although there has been some empirical support for these claims,<sup>222</sup> there has been vigorous objection to the notion that women have distinctive styles of lawyering<sup>223</sup> or that particular processes such as mediation, conciliation or ADR generally are particularly feminist.<sup>224</sup> Rigorous analysis has shown, and will continue to show, that women operate within social structures that may inhibit whatever differences they may bring to the world: the economics of big and

---

217. See, e.g., Taub, *Reproductive Rights*, in WOMEN AND THE LAW (2nd ed. 1987); Schneider, *supra* note 8.

218. With Catherine MacKinnon and Andrea Dworkin on one side, see *supra* note 82, and Sylvia Law and the FACT brief on other, see *supra* notes 47 and 85.

219. See Menkel-Meadow, *supra* note 7, at 55; Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991).

220. Menkel-Meadow, *supra* note 8, at 55; Menkel-Meadow, *Comparative Sociology of Women Lawyers: The Feminization of the Legal Profession*, in LAWYERS AND SOCIETY, vol. 3 (1990).

221. Menkel-Meadow, *Toward Another View of Legal Negotiation*, 31 UCLA L. REV. 54 (1984); Menkel-Meadow, *supra* note 197.

222. JACK AND JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989); *Symposium on Women in the Lawyering Workplace: Feminist Considerations and Practical Solutions*, 35 N.Y.L. SCH. L. REV. 293 (1990). See *Symposium on Gender and Legal Ethics*, 4 GEO. J. LEGAL ETHICS 1-208 (1990).

223. Cahn, *Male and Female Styles of Lawyering* (forthcoming publication in HASTINGS L. R.); Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. REV. 309 (1990).

224. See, e.g., Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); AALS SESSION ON WOMEN AND CIVIL PROCEDURE (1992).

small practice;<sup>225</sup> the pressures to conform to the usual way in which business is transacted;<sup>226</sup> and the never ending conflicts between professional work and family life.<sup>227</sup>

The women lawyers who are working on transforming law include the academic women lawyers who have written the articles and books and worked on the lawsuits described herein. Transformation has been and will probably continue to be slow, but feminist theorists are making some mark on how we understand law, legal knowledge and legal doctrine.

## V. FEMINIST LEGAL THEORY AND THE PRODUCTION AND TRANSMISSION OF LEGAL KNOWLEDGE

The final pages of this Article will focus upon some of the ways legal education and legal knowledge are being transformed by feminist theory and feminist work, and suggest some of my hopes and fears about this project.

### A. Legal Education

Tracking some of the structured arguments discussed above, a variety of feminist scholars and teachers have analyzed the process of legal education itself as male<sup>228</sup> in its modeling of competitiveness, individualism, adversariness in opposition to shared learning, nurturance, or as I have previously described it,

---

225. Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989); SERON, *MIDDLE CLASS LAWYERS* (forthcoming).

226. Maiman, Mather & McEwen, *Gender and Specialization: Differences Among Lawyers* (paper presented to 1991 American Political Science Association, Washington D.C. 1991).

227. See Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979); Dowd, *supra* note 93. In recent years I have tempered my own claims about how women will transform the legal profession by realizing that women who still devote more time to both spheres may simply be too tired to work on transformative efforts in the workplace, thereby relinquishing the power to the traditionally work-committed males (those who are most likely to preserve the status quo of work). See Menkel-Meadow, *supra* note 225; A. HOCHSCHILD, *THE SECOND SHIFT* (1991).

228. I like to think of myself as one of the pioneers in this area. See Menkel-Meadow, *Women as Law Teachers: Toward The Feminization of Legal Education*, in HUMANISTIC EDUCATION IN LAW 31 (1981).

“rigor” with “warmth.” In a special issue of the *Journal of Legal Education*, both the failings of traditional legal education and the possibilities for change were explored by feminists who explored how less hierarchical classrooms with more shared learning might transform the process as well as the content of learning.<sup>229</sup> Feminist teachers have explored the relation of the personal to the legal,<sup>230</sup> the social context of cases and legal principles,<sup>231</sup> uses of more participatory teaching methods, like consciousness raising and the use of real cases to teach about real people’s legal problems.<sup>232</sup> Feminist students have explored the broader context of first year legal education, amassing their own texts to study from<sup>233</sup> and their own stories for telling.<sup>234</sup> These approaches, aimed at opening up legal education, are not without their difficulties. In yet another recent memoir about legal education at Harvard Law School, Richard Kahlenberg misogynistically criticizes a “more humane, contextualized” class taught by Martha Minow because, as he argues, to be gotten the better of by a woman and compassionate teacher is so much more humiliating than a classic Socratic put-down by a traditional hard male teacher like Arthur Miller.<sup>235</sup> The openness of the feminist classroom has led other groups to demand their place in the experience of legal education, particularly ethnic minorities, gays and lesbians, yet all

---

229. *Women in Legal Education—Pedagogy, Law, Theory & Practice*, 38 J. LEGAL ED. 1, 1-270 (Menkel-Meadows, Minow, Vernon eds.) (1988).

230. See, e.g., Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990); Torrey, Casey & Olson, *Teaching Law in a Feminist Manner: A Commentary from Experience*, 13 HARV. WOMEN’S L. J. 87 (1990).

231. Minow, *Beyond Universality*, 1989 U. CHI. LEG. FORUM 115 (1989); Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287 (1986); Cain, *Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL ED 165 (1988).

232. Goldfarb, *A Theory-Practice Spiral: The Ethics of Clinical Teaching*, 75 MINN. L. REV. 1599 (1991); Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. LEGAL ED. 183 (1988).

233. Stanford Law Students, *Beyond the Casebook: A Supplementary Reader for First Semester Stanford Law Students* (1990); *Part One: Civil Procedure, Contracts & Cross Cutting Issues* (1990) (copy on file with author).

234. Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (discussing the experiences of female Yale law students).

235. KAHLENBERG, *BROKEN CONTRACT* 3 (1991).

of this has occurred as others attack the "political correctness"<sup>236</sup> they claim is required in law school classes where some try to give voice to the previously silenced.<sup>237</sup> In their attempts to reconstruct the law school classroom and legal education, feminist legal educators and scholars have attempted to specify how their method and theories of knowledge have broadened the ambit of traditional legal education.

### *B. Legal Knowledge*

Moving from claims of differences in learning styles, such as contextualized connected learning<sup>238</sup> based on experience, feminist legal scholars exploring the question of whether there is anything distinctive about a feminist method have concluded that like other twentieth century antipositivist movements,<sup>239</sup> feminists recognize the partiality and positionality of all knowledge.<sup>240</sup> Law is no longer only man-made, and it is certainly no longer interpreted only by men. But at the same time, feminist theorists have moved away from essentialist oppositionalism to recognize the multiplicities of perspectives from which law must be understood. For example, Patricia Williams, the great-granddaughter of a slave raped by a white male lawyer master, explored how the law looks from the perspective of the hunted fox in *Pierson v. Post*<sup>241</sup> and several polar bears in a zoo.<sup>242</sup> In her words, "subject position is everything in . . . law."<sup>243</sup> Though I remain partial to the view that the oppressed and suppressed have the ability to see more because of their need to master the language

---

236. *Federalist Society Symposia*, THE DOCKET (UCLA Student Newspaper Debating P.C.) (P. Berman ed., 1992) (debating political correctness).

237. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEG. ED. 147 (1988); Banks, *Gender Bias in the Classroom*, 38 J. LEG. ED. 137 (1988).

238. See BELENKY ET. AL., *WOMEN'S WAYS OF KNOWING* (1986).

239. BERGER & LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

240. Bartlett, *Feminist Legal Method*, 103 HARV. L. REV. 829, 880 (1990); Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

241. 3 Cai. R 175 (N.Y. Sup. Ct. 1805).

242. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 202 (1990).

243. *Id.* at 3.

of the oppressor as well as their own, such "standpoint" epistemologies<sup>244</sup> are no longer in such favor as we realize that power relations structure all of our ways of knowing and seeing, from both sides of any particular power divide.<sup>245</sup> Yet in its legal form, feminist and critical race scholars point us to ways in which "outsider jurisprudence"<sup>246</sup> informs us about law by telling us what it is like to be acted upon by law, rather than by being the makers and enforcers. This claim has met its opposition in the vigorous debate about racial and gender essentialist epistemology begun by Randall Kennedy, Steve Carter and others (why are there only males on that side of the argument?).<sup>247</sup>

There are particular contributions to legal knowledge that are derived from feminist concerns ranging from the use of narrative, storytelling and interpretation,<sup>248</sup> to increasing analysis of the empathetic, caring, helping side of law.<sup>249</sup> Also included are the deconstruction of binary oppositions and critiques of the adversary system and the harshness of law,<sup>250</sup> as well as post-modernist skepticism about global truths or metanarratives<sup>251</sup> that can be told about law. All of these insights, though shared with other twentieth century assaults on the rationalist Enlightenment project,

---

244. HARDING, WHOSE KNOWLEDGE, WHOSE SCIENCE? 119 (1991).

245. ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); JOHN BERGER, WAYS OF SEEING (1972).

246. The phrase is Mari Matsuda's. See Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. RPTR. 7 (1989).

247. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Johnson, *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Johnson, 24 *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 137 (1990).

248. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); *Interpretation Symposium*, 58 S. CAL. L. REV. (1985); Radin, *The Feminist and the Pragmatist*, 63 S. CAL. L. REV. 1699 (1990); Cohen, *Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction*, 25 TULSA L. REV. 657 (1990). There is some danger that with the narrative turn, the articulate will be privileged. See White, *supra* note 156.

249. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Menkel-Meadow, *supra* note 197 (altruism).

250. My new favorite example of this is the feminist reconsideration of finality rules in civil procedure. AALS SESSION PANEL ON WOMEN IN LEGAL EDUCATION AND CIVIL PROCEDURE (Jan. 1992).

251. Rosenau, *supra* note 54, at xiii.



come in part from allowing groups of people previously excluded, that do not necessarily share the same social contractual stories of consensus, into the study and practice of law.

## VI. IS MAINSTREAMING POSSIBLE OR DESIRABLE?

The question of whether feminists have or will have any real influence upon the development of law -- either from a substantive or a procedural perspective -- remains. It is essential for feminist legal thought to be taken seriously, as some mainstream scholars have done,<sup>252</sup> to explore the limits of our understandings of law as currently constructed and as it could be.

I continue to have some concerns about how this mainstreaming is currently occurring. Scholars of all genders and persuasions must engage with each other. As multiple cultures in law, as in society, we must find ways to translate our languages to each other.<sup>253</sup> We must examine the hardest points of contention; where we use competing metaphors of war/sport with care giving, food preparation and nurturance,<sup>254</sup> oppositional understandings of the same concept such as "consent" in rape, the harms caused by things that some people enjoy (pornography, sexual harassment)<sup>255</sup> and the redefinition of old concepts to make them capacious enough for us all to appreciate.<sup>256</sup> We must also

---

252. See Michaelman, *supra* note 90; Karst, *supra* note 144; Sunstein, *supra* note 90; SHRIFFRIN, *FIRST AMENDMENT & DEMOCRACY* (1990); Arenella, *supra* note 81; Schulhofer, *supra* note 81; Patterson, *supra* note 53 & Brest, *supra* note 82. Not all of these support particular feminist projects or readings of law--some have disagreed vigorously with various feminist claims (such as the battered spouse syndrome defense), but all have at least grappled seriously with feminist ideas.

253. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990), controversially explores differences in male and female conversational patterns. The "PC" movement threatens to inhibit what my old friend, Howard Lesnick, has labeled "collective grappling" with difficult problems.

254. There are thousands of deconstructive projects available to study the metaphors of law, legal scholarship and legal practice.

255. This is what Robin West has labeled the gender differences in our hedonic lives. See West *supra* note 118.

256. Here my favorite recent example is advice in a sex column of a woman's magazine that men should stop calling it "foreplay," which is a male definition of sex, leading up to the main event of intercourse. As the male author states, intercourse and genital orgasm are "optional" not required aspects of sex. *20 Ways to Improve Your Sex Life*, NEW WOMAN.

explore scary subjects like the fear of true meritocracy that some in power possess. Equality is the touchstone that everyone can approve, but when "equality" leads some women or ethnic minorities to be superior to white males, ugly sexism or racism returns to mask the actual class fear that is occurring.

Finally, lest appearing to blame men for all of the problems in the mainstreaming project, let me suggest that while separatism has its place,<sup>257</sup> the growing proliferation of women's law journals,<sup>258</sup> though expanding the number of pages in which feminist legal theory and practice may develop, may inhibit the conversation by allowing malestream scholars to avoid grappling with this important work.<sup>259</sup>

If feminism is to make its mark on laws and the larger social contexts in which law is experienced, then we must find ways for human conversation and translation to create a joint gendered legal culture that more fully represents the world it seeks to regulate. This Article began by saying that feminism is ultimately a humanist project. We must find ways to facilitate that human mutual understanding and knowledge that comes from understanding the world beyond the one that each of us comfortably inhabits on our own. It is you, the readers of this Article, who will do the research, bring the cases and develop the

---

257. See several studies on girl students in single-sex schools, *Shortchanging Girls, Shortchanging America* (American Association of University Women 1991); Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1987); Freedman, *Separatism as a Strategy: Female Institution Building and American Feminism*, 5 FEMINIST STUDIES 512 (1979).

258. There are separate law journals now being published at many law schools, including Harvard, Rutgers, Yale, Columbia, Wisconsin, Minnesota, Berkeley, UCLA, USC, American, Golden Gate (special issues), Stanford (broader, including race and sexual orientation), and Texas.

259. It is ironic to note here that in preparing this article, I note that the Michigan Law Review has published more articles about women's issues cited herein than any other single law review--all of this at a school that until recently (with the hire of Catherine MacKinnon) was not known for its feminist presence in theory making.

theories of law for the new century. We will explain more of the world if we include more diversified researchers, practitioners, teachers and knowers, but only if they know how to talk to each other.<sup>260</sup>

---

260. For my views on how this might look in the larger field of socio-legal studies, *see* Menkel-Meadow, *supra* note 10, at 234. *See* HARDING, *WHOSE SCIENCE, WHOSE KNOWLEDGE?* (1991) (other efforts to deal with these issues in broader philosophical contexts); A. JARDIN & S. HEATH, *MEN IN FEMINISM* (1987).