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FEMINISM IN LEGAL EDUCATION

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Recently I was in an elevator with a member of a U.S. Court of Appeals — an enlightened, intelligent, sincere and very nice man — who congratulated me on the publication of my recent book, *Feminism Unmodified.* [1] As I thanked him, he pondered the floor reflectively and said, "amazing how much you can accomplish if you just stay focused on one thing." A few floors went by before I replied that, yes, the whole law library testified to that, and one ought to be able to accomplish at least as much by focusing on the other 53 per cent of the population.

Feminism is not a monotonic, uni-dimensional, geographically bounded map of a sector of society, albeit a huge and neglected one. It is not a new partiality claiming universality. It is a multi-faceted approach to society as a whole, an engaged discipline of a diverse reality with both empirical and analytic dimensions, explanatory as well as descriptive aspirations, and practical as well as theoretical ambitions. Because it must consider not only existing law and reality, but women's exclusion from life and scholarship, and because nothing that happens to a woman or a man is presumed exogenous to it, feminism is perhaps less about "one thing" than any other approach to legal scholarship.

Feminism is an approach to society from the standpoint of women, a standpoint defined by concrete reality in which all women participate to one degree or another. This is not to say that all women are the same or that all women in all cultures and across history have been in an identical position. Rather, it is to say that the experience of women is concrete, not abstract, and socially defines women as such and distinguishes them from men across time, space and culture. This experience includes segregation into forms of work which are paid little and valued less and the devaluation of women's contributions. It includes the demeaning of women's secondary sex characteristics. It includes domestic servitude and wife battering. It includes forced motherhood in a context of lack of reproductive choice, including being sterilized against one's will and being forced to have children that one does not choose to have and cannot take responsibility for. It includes sexual harassment: unwanted sexual attention that one is not in a position to refuse, in all contexts of life, including school, work, the street and the home. It includes sexual abuse as children, starting soon after birth, and sexual abuse as adults: almost half all American women being victims of either rape or attempted rape at least once in their lives. [2] It includes sexual objectification: reduction of a person to a thing for sexual use and abuse. It includes use in denigrating entertainment and forced prostitution: being bought and sold, selling intimate access in order to survive.

Women are made a sex through these experiences which deprive them of respect, personal security, human dignity, access to resources, and access to speech and self-expression. Women as a gender are used, violated, demeaned, exploited, excluded and silenced. To describe who is doing what to whom (and this is a relentless tendency of

feminism), men are doing this to women. Men do not have to do it, but they do. Arguably they do it because they can, because they want to, for their own benefit and advantage. Whether men enjoy it or not, they surely benefit from not being those to whom it is done, and from being in the position to choose to do it or not. This is what it means to say that men have power — male power — and women do not.

Together, these experiences form a whole which is systematic, pervasive, and inescapable. No woman can escape living in a society in which this experience defines the condition of all women to one degree or another. This does not mean that each woman experiences each of these things even once in her life. It means that the condition of the group of which she is a part is defined by the fact that at any moment in her life, because of a condition of birth, any one of these things can happen to her. It does not stop until you die — and after that who knows? And nothing serious will be done about it: not by law, not by society, not at all.

In societies characterized by this male dominance and female subordination, the definition of what it is to be human, the standards and expectations of treatment, and the standpoint from which knowledge is validated is defined in terms of the male side of these experiences. A human being is thus defined as someone to whom such things cannot be done, are not done, or if they are and they say so, they are heard and believed, and something is done about it. When women say, “this happened to me,” we are not usually believed. He denies it. You cannot prove it. Nothing happened. Women’s particular experiences are not information. They are not seen as the basis for knowledge. They do not receive analysis.

Feminism calls the totality of these experiences as women, the standpoint of women. When you look at the world from this standpoint, you see the inequality of women to men. You see the exclusion and silencing of women. You notice women’s absence as well as women’s presence, women’s silence as well as women’s voice. You do not see equal differences equally reflected and you do not see disparities balanced or taken into account, because they are not there. What you see is second class citizenship.

It should be acknowledged that feminism — the theory of this standpoint — has been more practice than theory. Feminism is a movement to end this status on all levels; a movement for equality in society, and as part of that a movement of mind to re-frame knowledge by valuing those experiences women have had and criticizing existing knowledge on that basis. This feminism has been more lived than written. Describing the coherent outlines of what feminists have done in the world is not the same as doing feminism in theory. Nor is redescribing what other people have described about what feminists have done in the world. That is academic work. Rather, it is to seek to alter the world through words. By this standard, there is precious little feminism in legal education or anywhere.

On the basis of these recognitions, feminists in law have begun to develop a critique of existing legal theories and of blackletter law, as well as to reconstruct legal tools to intervene in the practical realities of women’s situation. If one applies a critique of male power to Anglo-Canadian-American legal doctrine and practice, one sees that law is not written from the standpoint of the realities of women’s experience, but from the standpoint of the realities of men’s experience. It presupposes equality on the basis of gender. All men are not equal: for example, race and class divide them as they do women. But men are equal and more than equal on the basis of sex. The law assumes a gender neutral “person”, for whose protection and honour the laws are written, and for whom the system is designed. Thus gender is invisible in law because it is not a factor among men.

In other words, men have written the laws from their point of view based on their experiences, which have not included women’s experiences from the point of view of women. This is a relatively obvious observation based on the not terribly controversial notion that experience influences as well as grounds perspective. The result, though, is that law is written as if social equality on the basis of sex can be presumed to exist where it does not. It is also written as if the social inequality between the sexes that is socially imposed is also biologically fixed and must be legally reflected for the law to have a legitimate relation to social reality. For law to be authoritative, this view holds, it must reflect social life. Since social life is comprised of real acts of male power, law must reflect the male

experience of power to be legitimate. Hierarchy, including gender hierarchy, becomes a legitimating norm. Dominance in life becomes dominance in law, both in substance and in form.

The argument here is that a deep coherence in law, perhaps its most absolute principle and its fundamental assumed tacit basis, is male dominance over women. This must be absolute. But in order to be absolute it must be invisible, because if it is gendered it is partial, and since it must be universal it must keep its gender covered. This imperative is fundamental and consistent. Once the specificity of its gender is exposed, gaping holes yawn; for example, the fact that women have never consented to this state, nor to the rule of its law. The government was not framed by women. Rather, it was framed without consulting women. Yet it is assumed that women consent to its government even though it does not represent women nor does it act in ways that respond to women's harms, far less women's situations, values, experiences or concerns.

This argument is concrete rather than abstract: it points directly to human beings with concrete group names and discusses what they concretely do. Partly for this reason, and partly because many people with power do not like fingers pointed at their anatomy, it is not considered to be a theory at all. It is instructive that those features which make such an analysis an example of feminism in theory tend also to make it unacceptable by male standards of what a theory is.

On the basis of such analyses, feminists in legal education have criticized much existing law. Much of this critique has begun with the simple attempt to get law to apply existing rules to women in the name of gender neutrality. [3] On some days, given the ways women are defined and treated, this still seems like a big improvement. On other days, it is clear that the gender neutral person is a man, that few women have access to the prerequisites even to imitate his qualities because of sex inequality, and that gender neutrality is a deeply biased standard, blind to power. In societies in which gender has hierarchical consequences, there are no truly gender neutral persons. In such societies, neutrality is a strategy to cover up the realities of male power.

In tort law, the concepts of injury and damage are being redefined to try to encompass some of women's distinctive injuries. Accidents — those one-at-a-time fortuities in a Hobbesian universe that opens up suddenly at your feet — are re-framed in a more contextualised totality. Harms are systematic, situational, cumulative and determinate if not often in tort's usual causal way. [4] Similarly, in contract law, the doctrine is criticized for abstracting from gender by assuming arm's length atomism in contractual transactions. [5]

In the criminal law, the law of sexual assault has been reformed in some ways. For example, the rape law previously permitted a victim's sexual history with individuals other than the defendant to be introduced in sexual assault prosecutions. [6] Where the law once assumed that situations in which women wanted to have sex were relevant to situations in which women did not want to have sex, the law now assumes that allegations of consensual sex are irrelevant to allegations of forced sex. [7] Pursuing this approach, statutes were passed in Canada to keep the names and identities of sexual assault victims out of the media so that their violation would not become a pornographic spectacle. [8] In a recent feminist initiative, the fifth known victim of a serial rapist sued the Toronto police department for sex discrimination under the new sex equality provisions of the Charter of Rights and Freedoms for failure to warn, when the police knew the rapist's precise timetable, location, methods and preferences in victims. [9]

In some states in the United States, the notion of self-defence now permits the history of sex discrimination to be part of a woman's subjectivity when deciding whether she may resort to deadly force under threat. Here, apparently, the history of women's violent subjection by men means that individual women may legally kill under conditions under which individual men could not. [10] Feminists are also challenging statutes of limitations in cases involving sexual abuse of children. When a child is sexually abused, its mind typically erases the violation. It is not uncommon for a woman not to remember her sexual abuse as a child until her thirties or forties — at which point

the limitation period has long since elapsed. Much creative work has been devoted to arguing that incest and child sexual abuse prosecutions should be permitted later in life, beginning the limitation period with the age of majority or with the first conscious awareness of the injury as an adult. [11]

Perhaps the most extensive work on law by feminist legal scholars has been done in the area of constitutional law. Feminists have criticized the structure of the negative state: the assumption that law can only undo what law has done. If men can successfully subordinate women socially, positive law is not necessary. If subordination must be accomplished by law before law can undo that subordination, the most effective forms of subordination — those so socially effective that law is at most complicit rather than constitutive of them — will be beyond constitutional redress. Privacy law has been both used as, and criticized as, a sword in the guise of a shield. That is, in the guise of keeping government from intruding in the private sphere, the law of privacy has protected that sphere in which women are most harmed: the home. This, as well as the negative state, which draws a public/private line on a jurisprudential level, assume that the sexes are equal in the home and in society so long as government does not interfere. This protects from governmental action those relationships in which women are distinctively abused: sexual relationships.

The law of equality has been utilised, but it has also been scrutinised [12] and transformed [13] in the hands of feminist legal scholars. Inequality is women's fundamental social predicament; equality is both a legal norm and a legal doctrine. In feminist confrontations with this tension between life and law, the myth of social symmetry has been exposed, and with it the myth that equality itself turns on symmetry. [14] This analysis has in turn suggested that the early litigation strategy that held that the way to get things for women was to get them for men [15] may be, at the least, incomplete. Feminists have realized that the problem we face as women is that women are socially unequal to men, not the reverse. New legal claims have been developed in the equality areas specifically to address women's distinctive harms. Sexual harassment [16] and pornography [17] are examples. These initiatives balance a complicated tension between demanding access to power as currently defined on the one hand, and, on the other, criticizing the ground and definition of that power in order to change it. Both redistribution and critique of that which is being distributed are advanced at once. A difficult balance, but feminists are attempting it.

FEMINIST CRITIQUES OF LEGAL THEORIES

Feminism also criticizes existing intellectual approaches to explaining law. Feminists have exposed objectivity as a fig leaf for misogyny. The legal realists' famous aphorism — that you can tell more about what a judge will decide based on what he had for breakfast than on legal doctrine — leaves out who cooked the breakfast and who served it, far less what he did last night in bed. Critical legal studies, while taking more cognizance of women's claims, is not unproblematic. [18] Often the theories inhabit a legal world of looseness and motion that does not exist for women. Women's treatment, to put it another way, is all too determinate. [19] Nor is male power a determinant in the system as it is viewed by much of critical legal studies. It is, rather, a constraint that one occasionally encounters in a system which is otherwise determined or is in random intellectual motion.

Law and economics can be criticized from a feminist perspective for reducing relations between people to relations between things. First, it reduces women to things. Take, for example, the decision by Frank Easterbrook who found that pornography harms women and yet he protected it as speech. The harm pornography does shows the importance of protecting it. [20] A traffic in women thus becomes the marketplace of ideas — the marketplace being more literal than figurative — by first reducing abuse of women to ideas, then marketing it/them. The dynamics of pornography, law and economics, and the first amendment converged here. I must confess some suspicion that one of the reasons critical legal studies is not more sharply criticized is that none of its members, to my knowledge, is on the bench. Few mix in practice at all.

FEMINIST CRITIQUES OF LEGAL EDUCATION

Feminism has also been critical of the process of legal education. [21] For example, law is usually taught as if the norm of respect for precedent is neutral. All precedents have, in fact, been constructed in a system which excludes women and is based on the silence of women. To suggest that, by pointing this out, women are raising the issue of a gendered point of view for the first time, is really rather extraordinary. Women have been excluded from legal education. The fact that there are so few women doing it means that the women doing it are tokens. They experience a funny combination of presence and absence, an exaggerated attention combined with nearly total invisibility, meaning one is seldom listened to but always centre stage.

The silence of women students is pervasive in legal education. Disrespect for what women have to say is systematically communicated by tactics of intimidation. Our women students are sexually harassed by our male colleagues. The perpetrators are seldom, if ever, held accountable and virtually never in public. Because students are individually transient although the student class is permanent, predators are ensured a fresh supply and the victims have group amnesia. Feminists have also criticized the so-called Socratic method, which is actually a rip-off from Athena, who disavowed her mother to turn to the legal system. The Socratic method as practised, is not Socrates' dialogic method of knowing what one knows not, but an adversarial method of, "guess what I'm thinking." It is premised on humiliation and its dynamic is fear. It schools in hierarchy and it teaches respect for authority. Students learn the opposite of respect for their own thoughts, that is, the ability to think. Feminists have criticized the conflict and confrontation mode more broadly, as a peculiarly ejaculatory means both of teaching and of conflict resolution.

Why is there so little feminism in legal education? The existence of the few women in legal education is extremely precarious. Law is an elite profession; women are not elites. Further, the standard of scholarly merit applied to women's work is, if you will pardon the analogy, like men's standard for women's breasts. No woman can meet it short of surgery. Breasts are supposed to be big, but also shaped "right": tight, pert, rigid and firm. If your breasts are big enough, they sag and cannot possibly be shaped right. But if they are shaped right, they cannot possibly be big enough. Women's scholarship is also supposed to be big: grand, audacious, broad and with vision. But it must also be shaped right: narrow, technical, rigorous, hard-edged. If it is rigorous enough to be shaped right, it is not big enough, not visionary enough, not theoretical enough, not audacious enough and not grand enough to be big. But if it is big enough, it is too soft, too soggy and too political to be shaped right. It is threatening.

This produces self-censorship in legal academic women which works somewhat like terrorism works under Latin American dictatorships where the real opposition is silent or dead. Self-censorship is not a conscious process but a survival response to necessity. Women in the legal academy are, first and foremost, like women everywhere, trying to survive. The tragedy is — and this is true of all oppressed peoples — their survival strategies often contraindicate the changes that would make survival possible.

I have a list. I will know feminism exists in legal education when these things occur. When gender literacy is a requirement across the board. When women and women's point of view is represented and respected in texts and in class. When students are taught responsibility for the inevitability of their social engagement — that everything you do is on one side or another of a real social divide — rather than being taught conservatism in the guise of simply representing your client. When women students (and faculty) are not sexually harassed by our colleagues. When there are as many male secretaries as women and as many women faculty members and deans as men. When criminal law professors stop being obsessed about rape and start thinking about it; when they stop making vicious rape hypotheticals the subjects of 100 per cent finals; and when they begin their classes on rape noting not only that women in the class must have been raped but that men in the class must have raped. When women students speak with comparable ease and presumption of place as men students in class. And when one's intellectual and personal integrity, one's contribution to life and thought, is not something one has to choose at the price of one's

ability to make a living. In other words, when it no longer takes courage to be a feminist in the legal academy.

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[1] C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

[2] DEH Russell & N Howell, The Prevalence of Rape in the United States Revisited (1983) 8 *Signs: J of Women in Culture and Soc'y* 688 .

[3] Examples are BA Brown et al, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women (1970–71) 80 *Yale LJ* 871; W Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism (1982) 7 *Women's Rts L Rep* 175.

[4] See generally L Bender, A Lawyer's Primer on Feminist Theory and Tort (1988) 38 *J Legal Educ* 3 and citations therein. See also *Thurman* v *City of Torrington* (1984) 595 F Supp 1521.

[5] C Dalton, An Essay in the Deconstruction of Contract Doctrine (1985) 94 *Yale LJ* 997, at 1106–1107; MJ Frug Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) 34 *Am UL Rev* 1065, at 1125-1134. See also E Mensch, Freedom of Contract as Ideology (1981) 33 *Stan L Rev* 753. For a stunning contribution to the critique of contractarianism generally, see C Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

[6] See CE LeGrande, Rape and Rape Laws: Sexism in Society and Law (1973) 61 *Cal L Rev* 919, at 91 9–941.

[7] See S Estrich, Rape (1986) 95 *Yale LJ* 1087; CA MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurispudence (1983) 8 *Signs: J of Women in Culture and Soc'y* 635. See generally C Boyle, *Sexual Assault* (Toronto: Carswell, 1984).

[8] Criminal Code (Canada) R.S., c. C-34, s276(4).

[9] *Jane Doe v Board of Commissioners for Police* for *Municipality of Metropolitan Toronto* (unreported) judgment of Henry J, Supreme Court of Ontario, 31 March 1989.

[10] *State v Wanrow* (1977.) 88 Wash 2d 221, 559 P2d 548; EM Schneider, Equal Rights to Trial for Women; Sex Bias in the Law of Self-Defense (1980) 15 *Harv CR-CL L Rev* 623; see also CA MacKinnon, Toward Feminist Jurisprudence (1983) 34 *Stan L Rev* 703 — review of A Jones, *Women Who Kill* (New York: Holt, Rinehart & Winston, 1980).

[11] See, for example, MG Salten, Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy (1984) 7 *Harv Women's LJ* 189.

[12] Good examples include N Taub & E Schneider, Perspectives on Women's Subordination and the Role of Law, in D Kairys ed, *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982) and FE Olsen, The Family and the Market: A Study of Ideology and Legal Reform (1983) 96 *Harv L Rev* 1497.

[13] Reports of some of the most creative efforts to date are to be found in, Feminist Perspectives on the Canadian State (1988) 3 *Resources for Feminist Research.*

[14]

See, for example, MacKinnon, *supra* note 1, at 32–45.

[15] An example of this reasoning is *Weinbuger v Wiesenfeld* [1975] USSC 58; (1975) 420 US 636 (holding that a statute that gives survivorship benefits to the children, but not husbands, of female wage earners, while giving such benefits both to wives and children of male wage earners, violates equal protection of the laws).

[16] C MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979).

[17] A Dworkin & C MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

[18] See critiques of critical legal studies, especially M Matsude, Looking to the Bottom: Critical Legal Studies and Reparations (1987) 22 *Harv CR-CL L Rev* 323; and P Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights (1987) 22 *Harv CR-CL L Rev* 401.

[19] On the critical legal studies notion of "indeterminacy", see M Kelman, *A Guide* to *Critical Legal Studies* (Cambridge: Harvard University Press, 1987).

[20] *American Booksellers* v *Hudnut* (1985) 771 F2d 323.

[21] The entire symposium in the *Journal of Legal Education* is illustrative. Symposium, Women in Legal Education: Pedagogy, Law, Theory and Practice (1988) 38 *J Legal Educ* (March / June).
