Legal Education Review

Volume 9 | Issue 2 Article 3

1-1-1998

The Development of Feminist Jurisprudence

Margaret Thornton
La Trobe University

THE DEVELOPMENT OF FEMINIST JURISPRUDENCE

MARGARET THORNTON*

This paper had its genesis in an invitation to visit Pune, India, to give a presentation on feminist jurisprudence and to suggest how its perspectives might be incorporated into the teaching of law. The paper shows that the development of feminist jurisprudence has had a chequered career in the West over the last two decades. A brief overview of the experience will be presented, which will be shown to differ according to whether one is focussing on research and publication, teaching and the curriculum, or legal practice. The uneven trajectory of social change may help to inform feminist legal debates and the teaching of feminist jurisprudence among those contemplating the inclusion of such material in their law curriculum. I draw particularly on the Australian experience, which bears many similarities with other common law countries.

INTRODUCTION: FROM PRACTICE TO THEORY

Feminism is not susceptible to a simple definition as it possesses many strands, and feminists themselves differ widely regarding issues of substance and method. Nevertheless, the feminist movement is grounded in the idea that the lives of women and girls should not be determined solely by gender, that women and girls should be able to exercise a modicum of choice in their lives, and that they should be entitled to dignity of the person. Consequently, feminism, inspired by a vision of the way things might be, is preeminently a pragmatic and reformist movement which seeks to make things better for women in all spheres of life. Following on the heels of practice is academic feminism. Critiques of the gendered construction of knowledge have been central to the feminist project in the academy. What has been progressively established in respect of the master

discourses of all academic disciplines is that the accounts that have been presented as universal and true are in fact partial because they focus almost exclusively on masculinist knowledge. Therefore, the threshold question of academic feminism has been how can rational claims to universality be made if the experiences and perspectives of women are omitted? Feminist sociologists and anthropologists were in the vanguard in developing critiques of knowledge in the new discipline of Women's Studies in the 1970s, for the social sciences generally accepted by then that gender was a legitimate category of analysis. At first, the gatekeepers of the academy were prone to dismiss feminist scholarship as "politics", or not "real" scholarship, but Women's Studies helped to give feminism a degree of academic respectability, despite the initial struggles.

From the outset, feminist scholarship was very much concerned with praxis, or the interrelationship between theory and practice. The point is illustrated by the ongoing attempts by feminists to draw attention to and disrupt the philosophical and political separation between public and private life. Indeed, one of the early aphorisms of the feminist movement was: "The personal is the political", which suggested that everything that occurred in the home and had been formerly occluded by the carapace of the private should be a matter of public concern. The feminist gaze on the private sphere has permitted not just a critique of family law and domestic violence, but it has also enabled the exploration of the symbiotic relationship between private and public spheres, that is, the ways in which women's responsibility for children, the sick and the elderly, as well as their responsibility for housework, has facilitated the participation of men in paid work, in civil society, and public life. While law is less overtly hostile than in the past, the legal academy has continued to be resistant to feminist scholarship because it challenges the well-entrenched liberal myths that the legal person is genderless, that one's life course is determined by personal choice, and that law has universal applicability. The correlative myths of law's neutrality, objectivity and non-partisanship are also deep-seated and, indeed, central to cherished legal concepts such as the rule of law and equality before the law. The ideological role of law in maintaining social cohesion and transmitting dominant values has been deeply destabilised by the

subversive nature of feminist scholarship.

WHAT IS FEMINIST JURISPRUDENCE?

Jurisprudence does not have a precise denotation but involves manifold ways of theorising about law. In the West, this theorisation has been conducted at a high level of abstraction and has been understood largely as the prerogative of a few highly esteemed men, such as the well known legal positivists, Hart, Kelsen and Dworkin. Feminist jurisprudence, a term coined as recently as 1978,[2] has completely disrupted the conventional model of jurisprudence. Informed by the reformist and experiential grounding of feminism, feminist jurisprudence has eschewed the rarefied abstractions of analytical jurisprudence. Indeed, feminist jurisprudence can be loosely understood as encompassing the entire corpus of feminist writing about law. In light of its amplitude, feminist jurisprudence cannot be said to possess a single identifiable theory or perspective, any more than mainstream jurisprudence. Nevertheless, liberal feminism has been the most influential strand and that which is most commonly identified with feminist legal scholarship.

Although initially sceptical, mainstream (masculinist) jurisprudes themselves have more recently been prepared to acknowledge the impact of feminist scholarship, along with other contemporary legal movements, such as Law and Economics, Critical Legal Studies, and Law and Literature.[3] In light of the pluralistic and multifaceted nature of feminist jurisprudence, I can do no more than identify some of the main trends in this overview.

Liberal Feminism

Liberal values, rooted in the Eighteenth Century Enlightenment and modernity, include respect for equality, freedom, and autonomy. These values have been conventionally understood as concepts that have meaning only in the public sphere. Because of the traditional assignation of women to the private sphere, the conventional realm of inequality and necessity within Western thought, the relevance of the values of freedom and equality to the lives of many women has remained elusive.[4]

Despite antipathy from the mainstream, the reformist or practical dimension of legal feminism has been significant in

highlighting and endeavouring to remedy gender inequities in rape, domestic violence, homicide, family law, employment law, and so on. Since the 1970s, legal scholars have campaigned for change and written about the gendered anomalies in the law. It made strategic sense to base claims on entitlements to equal rights within the prevailing liberal paradigm, despite the resultant contradictions and ambiguities.[5]

In setting out to remedy inequitable laws and to effect some semblance of sexual equality in both private and public life two decades ago, legal feminists were keen to assist courts and other key institutions grapple with new ways of seeing things. The focus was on "letting women in", or accommodating the feminine within existing paradigms. Again, this was a strategic choice, as the desire was to maximise the attainment of justice for women; there was too much to be done to allow attention to be deflected by struggles that activists perceived to be academic and peripheral. For example, there was scant regard for the ways that notions of "sex/gender" (concepts that flow into one another) are socially and historically situated.[6] Thus, while feminist legal scholars critiqued certain laws as anomalous and discriminatory, they generally accepted the prevailing liberal form of law, such as the necessity of proving a causal link between an individual complainant, a cognisable harm, and an identifiable wrongdoer. The need for an identifiable wrongdoer in the case of *systemic* discrimination, for example, may mean that it is impossible for a complainant to grove the necessary causal nexus. The uneasy relationship between the subjective, particular and experiential focus of feminist legal methods and the universality of traditional legal methods already posed practical problem for feminist reformism.[7] The need to accept prevailing paradigms inevitably posed a dilemma or blunted the critical edge of feminism.[8]

A site of contestation for feminist reform also manifested itself in the homogenisation of the category "women". For women to make out claims of inequality and sex discrimination, it had to be shown that they were in the same or similar circumstances to men, but were treated less favourably because they were women. The limitations and, indeed, absurdity of the formalistic approach became increasingly apparent in the gymnastics necessary to satisfy a requirement of comparability. In one infamous American Supreme court case, the paradigmatic female condition of

pregnancy was analogised with the male medical conditions of prostatectomy, haemophilia, circumcision and gout.[9] In the absence of comparability, it was reasoned, unfair treatment on the ground of pregnancy did not constitute sex discrimination. Comparisons of this kind induced many feminists to espouse difference, that is, to accept that the category "women" was essentially different from the category "men", and that gender difference should be celebrated, not disguised. Carol Gilligan's psychological thesis that women — as a class — speak with a "different voice"[10] resonated with the experiences of women in practice, as well as in the legal classroom and the academy.

Post-Liberalism

By the mid-1980s, some feminist legal scholars had begun to move beyond a focus on equality and the idea of reforming discrete aspects of law, to thinking about how the nature of law itself was gendered. The work of the American legal theorist, Catharine MacKinnon, was particularly influential, but other scholars began to ex lore the possibility of feminist jurisprudence in the 1980s.[11] The new approaches struck a chord with many feminist legal scholars, generating debates, seminars, colloquia, and a flurry of publishing activity. Mainstream law journals began to publish articles by feminist legal scholars, signalling a qualified degree of acceptance of feminist jurisprudence within the academy. Special issues of law journals began to be devoted to feminist jurisprudence, and then specialised feminist law journals appeared.[12] With the appearance of feminist courses in the law curriculum, monographs and collections of essays devoted to feminist jurisprudence became increasingly attractive to publishers.

The proliferation of feminist jurisprudence encouraged more sophisticated theoretical analyses, although the practical aims of feminism and the desire for equality have continued to be central to liberal legalism. Nevertheless, some feminist theorists became frustrated with the ad *hoc* nature of the gains made and began to focus on the masculinist nature of legal knowledge. I choose to use the word "masculinist" rather than "male" or "masculine" to emphasise the element of social construction, and to avoid the implication that there is some predetermined or "male" character to law.[13] Thus, women may share masculinist values, just as men may

share feminist values. The term "masculinist" can therefore be used to describe women in the academy, in the legal profession, and elsewhere, who defer to the orthodox myth that legal knowledge is neutral, objective and fair.

The major problem that emerged was that feminist legal scholars who were themselves largely white, middle class and heterosexual, sought to create, it was argued, a new legal subject in their own image. Non-English speaking, indigenous, immigrant, lesbian, disabled, and working class women began to attack the depiction of woman as possessing a single, identifiable "essence", for they did not see themselves reflected in the image. White feminists have been taken to task for prioritising gender over race,[14] and for their "ethnocentric universality" in representing Third World women as homogeneous and powerless.[15] The attack on what came to be known as "essentialism" sent shock waves through the feminist movement. No longer was it possible for a White woman to refer to women collectively as "we"; the category "woman" had been shattered into a thousand fragments.

The attack was salutary in that even the most obtuse of White Western feminists was jolted into an irrevocable consciousness regarding the enormous importance of differences between women. But a conundrum presented itself: how could there be a politically viable women's movement without a unitary category of women? This conundrum caused an unfortunate fissure to manifest itself between academic and reformist feminism. On the positive side, a significant body of feminist work began to appear from postcolonial, critical race, Aboriginal and lesbian theorists, although the essentialising tendency of these terms themselves has been noted. Mary John has said of postcolonialism, for example, that it has "turned into a universalizing description of the contemporary predicaments of the globe as a whole".[16] Some scholars are presently engaged in a project to disrupt the "cliche-ridden discourse of identity" by exploring the ways in which identities are formed.[17] The characteristics of identity, including race and gender, can themselves no longer be regarded as unqualified or fixed givens. The challenging issue in the legal context is to explore the role of law in producing and reproducing social differences.

Postmodernism

The attack on essentialism signalled the increasing acceptance of postmodern critiques of foundational and unitary causal accounts. Postmodem feminism cannot be defined in terms of a single theory, for it includes a range of perspectives that reject universality, objectivity and the idea of a "single truth". Indeed, feminism itself may be understood as a form of postmodernism because of its multifaceted assault on universalism and orthodoxy. Self-conscious postmodernism has involved a move away from "theorising in grand style", in which one or more causal factors are identified as the explanation for major social phenomena, such as women's oppression or "patriarchy". The attack on Catharine MacKinnon's work, which has focussed on the sexualisation of dominance, is illustrative. This work was, and continues to be, highly influential among mainstream theorists and the media, as well as feminist scholars across a wide spectrum of disciplines, but has come to be criticised for being one-dimensional, and disempowering for women.[18] Hence, to counter the potentially disabling effects of theorising women's lives in terms of sexualised dominance, some feminists have sought to present more positive images of women as resisters.[19] While not denying that many women are subject to exploitation in their lives, postmodernism rejects subordination as a fixed characteristic of women's identity. Instead, a fluid approach is favoured which takes account of resistance, as well as exploitation. Thus, a multidimensional and more complex picture of women's lives is produced.

Poststructuralism, which may be subsumed beneath the rubric of postmodernism, focuses particularly on the constructionist role of language.[20] Hence, the term "deconstruction" is also favoured. Influenced by Saussure, Lyotard and other French (generally male) theorists,[21] feminist legal scholars have been responsive to the idea of "multi-narratives" and "local discourses", including the body as a site of meaning.[22] Jacques Derrida's focus on the interrelationship between the dualistic norm and its "other" have been productive in feminist and postcolonial scholarship. To illustrate, the dominant side of a string of dualisms central to Western intellectual thought; for example, man, mind and objectivity, has been consistently privileged over their feminised counterparts, namely, woman, body and subjectivity.[23] Derrida's work shows that connotations of

subordination rigidly attaching to the latter can be disrupted by strategies such as experimenting with the performative possibilities of metaphor, or focussing on the boundary between the norm and the "other" so that conventional notions of power are challenged.[24] Drucilla Cornell, building on the work of Luce Irigaray, in addition to that of Derrida, advocates the development of an ethical relationship to the Other so that the metaphors associated with otherness can be engaged with and given new meanings through a process of mimesis.[25]

Other feminist legal scholars have been attracted by Foucault's critique of power.[26] Power is a variable that has largely been invisible within liberal legalism, albeit central to feminist critiques of patriarchy, domination and subordination. Foucault's particular insights are, first, power should not be understood only in terms of an institutional centre, for attention should also be paid to the capillaries, or micro-political sites; secondly, power should be understood as circulating and diffused, rather than as fixed so that wherever power is located, it invites resistance and destabilises conventional notions of authority; thirdly, power is thoroughly imbricated with the production of knowledge. While some feminist scholars have criticised Foucault for failing to accord sufficient weight to institutional power, and to gender, his work has possessed an appeal because of its positive and productive potential. That is, it provides a means of theorising power that avoids the traps of victim feminism and nihilism.

A Note of Caution

In a brief overview, it is impossible to do justice to the rich tapestry of feminist legal scholarship that has proliferated in the past decade.[27] My intention has been merely to highlight the diversity and dynamism of feminist jurisprudence and to capture something of the ambiguous relationship that feminists have with law which, as for formerly colonised peoples, can be simultaneously liberatory and oppressive. The short but dramatic history of feminist jurisprudence also reveals that there is not one model of scholarship, but many, just as there are many models of masculinist jurisprudence. The message of poststructuralism is that all texts, including the supposedly authoritative texts of law, as well as feminist theorisations in regard to those texts, are subject to

rereading and reinterpretation, which signals the likelihood of many more *shifts* and turns within a dynamic interrelationship. However, there is undoubtedly a danger in jumping on the latest theoretical bandwagon, and attacking yesterday's theorists, until one is oneself toppled from the cutting edge. Ann Scales cautions against what can amount to a feminist form of destructiveness.[28] Diversity among theorists should be accepted and viewed as positive, no less than the reality of diversity among women.

The major concern regarding fragmentation is that it could threaten the political and reformist imperative of feminism, thereby inducing a resiling from earlier gains.[29] Indeed, it may ahead have deflected energy from resisting the "new economy".[30] The new economy involves a contraction of the public sphere and the welfare state, the privatisation of public goods, globalisation, and a preoccupation with efficiency, economic rationalism and profits, all of which have become the hallmarks of conservative governments in Western Europe, Canada, Australia, New Zealand and the United States. It would also appear that the conjunction of "modernisation" and globalisation have had negative ramifications for many women in developing countries that are presently wholeheartedly embracing the market.[31] It has been suggested that the centralising tendency of postcolonial states tends to reinforce women's marginal socio-economic status,[32] thereby highlighting the need for constant feminist vigilance as the configurations of corporate power subtly shift.

The danger is that a preoccupation with micropolitical sites can cause feminist legal theorists to lose sight of the "big picture". The unpopularity of Marxist and socialist feminism, following the collapse of Communist regimes in Eastern Europe, has stifled the discourse of class which, like power, is virtually invisible within legal discourse. With the suppression of class, a crucial tool of analysis has disappeared in respect of women's inequality, particularly in developing countries. A socialist critique can highlight the way the changing morphology of capitalism ensures that women workers are retained as a low-paid, expendable workforce. Thus, while the postcolonial subject can be empowered through postmodern analytical tools, she may want to maintain a bridge to selective universals, which have fallen out of favour. As Jordan and Weedon observe:

> The postmodern critique of universals, metanarratives, essential

> subjectivity and the fixing of meaning has much radical potential but it is not without its dangers. Many postmodern thinkers and writers decidedly privilege plurality and pleasure over power and effective resistance. The postmodern celebration of difference becomes dangerous once it is divorced from the structural power relations that produce it.[33]

As law is intimately concerned with the structures of power relations, it is essential not to lose sight of those structures and how best to manage them. The prevailing neoconservatism is so detrimental for many women workers that it may be necessary for them to organise as a class for reasons of what Gayatri Spivak calls "strategic essentialism". In the face of a common threat, the key issue for feminists is not likely to be who can speak for whom, but who can speak at all?

CHALLENGING CURRICULAR KNOWLEDGE

Scholars who have worked on a piece or pieces of the jigsaw that make up the trajectory of feminist jurisprudence have sought to incorporate some of the pieces into their teaching. There are two obvious ways that have been utilised to develop feminist jurisprudence within the law curriculum: either by setting aside a special course, or by integrating feminist perspectives into the curriculum as a whole. I shall outline these two approaches, which may be of interest to those contemplating curricular changes.

Separatism

A dedicated elective, such as Women and Law, Gender and Law, Sex Discrimination, Sexuality and Law, or Feminist Jurisprudence, permits a detailed treatment of issues which disproportionately impact on women. The disruption of the category "woman" has rendered the phrase "Women and Law" obsolete. Even the "second generation" phrases may now be supplanted by trendier postmodern titles, such as Law and Culture.

Although an elective does carry with it the likelihood of preaching to the converted, it usually allows considerable latitude in respect of the syllabus, including topics selected, theoretical perspectives favoured and degree of focus on legislation, case materials, policy analysis, commentary, and creative texts, without regard to a specific doctrinal area of knowledge. A typical course might begin with readings on equality or some provocative

instances of inequality in order to stimulate the interest of students, and to establish the aims of the course. The primary topics within the feminist jurisprudential "canon" have tended to involve violence, the family, and reproductive and economic rights, closely parallelling the history of the reformist agenda.[34] The concern with reproductive rights has mirrored the general feminist view that a woman has a right to control her own body. While the focus was initially on laws criminalising abortion,[35] Issues of embodiment, including sexuality, lesbianism, the nature of desire, and sex work, have received more attention in recent years, parallelling the popularity of postmodern discourses. Nevertheless, violence against women (particularly, sexual assault, wife battering, and homicide) has continued to be of perennial concern to feminists everywhere,[36] as has motherhood and child care. Economic rights have related primarily to the inequities in paid employment — the lack of equal opportunity, conditions of work, pay, as well as the way concepts, such as skill, merit and authority, have been constructed in masculinist terms.[37] Sexual harassment in the workplace has been an issue of ongoing interest and concern.[38]

More recently, there has been something of a turning away from issues pertaining to violence and the family. Instead, we find a greater focus on the public sphere and civil society, including the meaning of citizenship. This public turn has been prompted, in part, by the widespread contraction of the welfare state in Western Europe, Canada, Australia and New Zealand, as well as republican debate in Australasia. A look at women in legal education, the legal academy and the legal profession has also moved onto some syllabi, reflecting feminist theorists' desire to look in the mirror and interrogate their own practices.

The variations in theoretical, methodological and pedagogical approaches are legion, as already suggested. An interdisciplinary focus challenges the autonomy of law and disturbs the positivist paradigm. The law and literature movement, for example, has encouraged the deconstruction of legal texts themselves, as well as the use of creative writing — drama, poetry, novels, feminist crime fiction, and autobiography. The inclusion of creative literature within a law course disrupts the idea that the juridical voice is the only *authentic* and *authorised* voice in law. While a focus on Law *and* the Humanities is productive, *Law as* a *Humanity* goes further.

An historical approach has been favoured by many, for it

conveys a fluid sense of the way in which gender has been constructed, as well as an understanding of the struggles that have been undergone.[39] Nevertheless, an historical narrative can carry with it a danger of progressivism, that is, the idea that life is always getting better for women and that it is only a matter of time before the ideal end state is reached. It can convey the impression that it is simply a question of there being enough women present for institutional change to occur, as in the legal profession or the academy.[40] A progressivist approach, which emphasises legal enactments, also downplays the effect of other social institutions, and may deflect attention away from factors that serve to immunise cultural and religious practices from scrutiny, practices that have all too often shielded beneath the rubric of "private".[41]

The pedagogy of feminist jurisprudence challenges the liberal separation between public and private spheres in a very direct way, in that students often speak frankly about their lives and the topics under discussion in a way that is rare in the legal classroom. Discussion as to why affectivity is conventionally excluded from legal discourse can be illuminating for students. It can also be painful if it means that a consideration of violence, rape, or incest resonates with their personal experience. Some teachers of feminist jurisprudence have been keen to encourage the sharing of the experiential in the belief that feminist theory is necessarily grounded in the micro-experiences of individual women. Other teachers, caught by the objective allure of legal positivism, are less comfortable with this methodology. Again, there is no "right" or "wrong" approach; teachers must be guided by what they are comfortable with in conjunction with the dynamic of a particular class.

Various experimental approaches have been adopted regarding the writing component of courses in feminist jurisprudence, given that the lecturer still has a formal obligation to assess students. For example, students may keep a journal in which they write their own impressions and analyses of class discussions in order to emphasise the subjectivity of knowledge. Feminist jurisprudence also lends itself to creative and imaginative research projects. Students can achieve a high level of satisfaction by completing an original project which they have themselves devised. While a single semester does not allow sufficient time to carry out extensive fieldwork, small projects based on media studies, archival material,

or interviews are feasible. In addition, feminist jurisprudence provides scope for the exploration of a wide range of topics based on conventional library research which address critical issues in regard to constitutionalism, education, development, and so on. To reduce the competitive individualism that typifies legal pedagogy, group projects are recommended as a means of encouraging a more collaborative approach to learning.[42] As an alternative to essay writing, in a setting where interdisciplinarity is highly desirable the use of film or other creative media might be explored.

It may be possible to develop a more advanced feminist legal theory subject in order to pursue selective issues in greater depth, although this is dubious in an economic rationalist environment. Original in-depth research can nevertheless be encouraged through higher degree candidature.

lntegration

In the alternative pedagogical approach, feminist jurisprudence is not treated as a separate optional subject but is integrated into the law curriculum. Such an exercise may be initiated either through institutional curriculum reform or at the government level.[43] Integration means that all students study feminist ideas in order that they might be sensitised to the ways in which gender has operated and continues to operate as an organising principle within law, religion, culture and public life, most particularly to the detriment of Third World, Aboriginal, lesbian and poor women. While a separate subject is desirable to complement the integrated approach and to allow depth of treatment, integration means that gender issues are less easily "ghettoised" and relegated to the realm of the "other". It also means that hostile and resistant colleagues must confront the question of whether they are continuing to teach warped notions of legal knowledge.

There are drawbacks to the integrationist approach, however, in that the core, or foundational, subjects which conventionally include property, contract, torts and commercial law, and which uphold the capitalist imperative, are privileged over those concerned with the affective and the corporeal, such as family law, human rights and discrimination law, as well as subjects focussing on gender and sexuality. That is, it is somewhat paradoxical from a feminist perspective that those areas which permit the least space

for the feminine and affectivity have the highest institutional value attached to them. Not only are those subjects likely to be compulsory, while the latter are likely to be optional, but the compulsory cluster are very adept at sloughing off unruly knowledges through a focus on the technocratic, a process I have termed "technocentrism".[44]

Large quantities of doctrinal law — which admitting authorities may require to be assimilated and examined — leave little space, it will be argued, for alternative perspectives. Unsympathetic colleagues may seek to hide behind the convenient rubric of "academic freedom" or the necessity of "getting through the course" to evade the discomfort of confronting the sexed, raced and heterosexed nature of legal knowledge. Anxious to establish their expertise as good technocratic lawyers and to present themselves as such in the market place, students may also be resistant to feminist knowledge. To be acceptable to the mainstream, therefore, feminism may be forced to relinquish its oppositional stance in favour of blandness; the "success" of the integrationist effort then involves a questionable assimilationist element.

Some topics within the canon of common law jurisdictions lend themselves more easily than others to the development of feminist perspectives, reflecting the historical trajectory of feminist concern, such as family law, labour law, and criminal law, as already outlined. Many courses on legal theory, or jurisprudence, now include at least a segment on feminist jurisprudence as a "perspective" on law, along with "Law and Economics" and "Critical Legal studies".[45] Subjects such as constitutional law, contracts, torts, corporations, and taxation are more of a challenge because the legal person has been invariably conceptualised as neutral and degendered. As pointed out, however, the primary mission of feminist jurisprudence has been directed to deconstructing this assumption of neutrality and exposing the masculinist partiality of law, which means that there is an ever-expanding feminist literature from which the innovative teacher can draw. I shall briefly gesture in the direction of the possibilities of feminist jurisprudence in the more traditional and intransigent areas of the curriculum.

Constitutional law has presented a challenge for feminist scholars because it is suffused with a powerful rhetoric of universality. Indeed, I would contend, the very point of maintaining

a high level of abstraction in constitutional discourse is to keep particularity at bay, whether it be in regard to sex, race, sexuality, or other dimension of identity. The concerns of citizenship have thereby come to be equated with those of benchmark masculinity. Nevertheless, this *modus operandi* of constitutional law can be deployed productively as a site of critique in the classroom. Articles 14–16 of *Constitution* of *India 1950,* which guarantee equality and proscribe discrimination, provide an obvious mode of entry for feminist critique, as is the case with the Fourteenth Amendment of the United States Constitution, and S 15 of the Canadian *Charter* of *Rights and Freedoms.* In contrast, the Australian Constitution makes no reference to equality, although there has been an attempt to read such a prescript into the Constitution.[46] Nevertheless, it is important that any critique transcends issues of gender inequality to consider questions pertaining to constitutionalism, citizenship,[47] relations with the state,[48] and the meaning of democracy.[49] In the context of "the nation", race, culture, class, religion and postcolonialism intersect with sex/gender in important ways.[50]

In the teaching of contract law in the West, the most notable omission has typically been any reference to either of the most fundamental forms of contract, that is, the social contract or the marriage contract.[51] Thus, to start off a contract course with these unique forms of contract is to problematise and expose the masculinist underpinnings of law. Specific forms of written gendered contract, such as nuptial and pre-nuptial contracts, challenge the notion of separate spheres.[52] Indeed, comparing commercial with non-commercial contracts highlights the way law underpins and facilitates capitalism and market activities, while diminishing those values associated with the private *quasi* domestic sphere. The intersection between imperialism, race, class and sex could also be theorised within a framework that problematises this liberal separation between public and private.

In view of the key role played by corporations in today's global and postcolonial world, it is desirable to go behind their facilitative role in teaching "corporations law" to consider the impact of the intersection of gender and race. A study of the law of corporations includes not just the relentless search for profits and power but the ways in which corporations themselves are bureaucratised and hierarchised, with women and the racially disfavoured invariably

occupying the pyramidal base, and a few privileged men dominating the apex.[53]

Rebelling against a simple transmission of orthodox legal rules, feminist scholars have carried out critical and transformative work in conventional areas of law, including tort law,[54] property law[55] taxation law[56] and evidence law.[57] A philosophical exploration of notions of property and labour allow focus to be directed to the value attached to "women's work", which is universally undervalued as Marilyn Waring has compellingly shown.[58] Feminist critiques of the issues of dower, dowry and family property would also appear to be fertile fields in the Indian context.[59] Clearly, it is possible to include imaginative teaching materials that encourages law students to confront and think more deeply about the enterprise in which they are engaged in every area of knowledge.

Apart from being conscious of the differences between women, I would also add a few general caveats. First, to ensure as far as possible, that selected cases and materials depict women and "others" in diverse and positive roles — as authoritative actors and agents of legality, that is, as lawyers, judges and legal commentators. Secondly, to present positive experiences and resistant possibilities for women and "others". While violence and depressed economic circumstances represent the reality for many women, the representation of women as the invariable victims of law can be disabling and dispiriting for students. Thirdly, to avoid the "essentialist" tag by including material that is inclusive of and sensitive to diversity among women, and which acknowledges the multifaceted nature of women's experiences. The possibility of dislodging the Eurocentric, heterosexist, able-bodied, middle-class hegemony of feminist legal scholarship is tantalising, but it has to be recognised that these descriptors apply to law generally.

CONCLUSION: WHAT ABOUT LEGAL PRACTICE?

In my overview of feminist jurisprudence, I have sought to convey a semblance of the intellectual vibrancy and diversity that has characterised this approach to law within the academy. I have made some suggestions for effecting change to the law curriculum, although I recognise that such proposals are likely to bring resistance in their wake. Contestation can occur at many sites.

Legal positivism, for example, which remains in the ascendancy in most law schools, as well as in legal textbooks, despite disavowals, is very effectively able to disqualify countervailing knowledges with its claims to being apolitical and ahistorical.[60] However, it is legal practice, particularly corporate practice, that represents a significant site of resistance — a site, furthermore, that significantly, but subtly, shapes legal education.

While approximately fifty per cent of law students and thirty per cent of lawyers in Australia are women (a picture that is reflected in other parts of the Western world), this "letting in" is by no means synonymous with an acceptance of either the reformist or the critical dimensions of feminist jurisprudence.[61] Women lawyers have been accepted in increasing numbers over the last two decades in an endeavour to satisfy the unstoppable demand for the delivery of legal services at both the national and the international levels. As a result, they have tended to be slotted into increasingly bureaucratised mega-firms. Endowed with minimal autonomy, they are expected to serve the needs of corporate capital, certainly not a feminist agenda for reform. The corporate law firm, with its norms of hierarchy and depersonalisation, quickly sheds the social, the subjective and the affective. Although the corporate law firm in Australia is now likely to have sexual harassment and maternity leave policies in place, such policies invariably fall short of the rhetoric in practice. Indeed, the evidence of the influence of feminist jurisprudence in legal practice, particularly corporate legal practice, would seem to be minimal. Corporate law firms are compelled to serve the interests of their corporate clients. If not, those clients will transfer their business elsewhere. Billable hours and the maximisation of profits leave little time for feminist reflexivity.

Legal practice is being transformed by corporatism and economic rationality, key characteristics of the "new economy", whereby the welfare state is being progressively dismantled, and public services are being privatised and contracted out. The latter include public sector legal services where many women have felt that they could practise law in a manner that accorded with feminist principles. This scenario is characteristic of corporatism and the "new economy" — neoconservative phenomena presently spreading around the globe like wildfire.

Thus, in the West, it would seem that a paradoxical situation

has arisen. That is, although feminist jurisprudence might be at the cutting edge of legal theory in the academy, there is a marked disjuncture between it and legal practice. The oppressive nature of corporate global capitalism is difficult to resist and I can proffer no simple solution. Nevertheless, I draw attention to this challenging dimension of modernisation for debate and discussion in law schools in the ongoing struggle for gender justice and human rights.

Some Casebooks and Collections on Feminist Jurisprudence

H Barnett, *Sourcebook* on *Feminist Jurisprudence* (London: Cavendish Publishing, 1997).

KT Bartlett and R Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Boulder, Col: Westview Press, 1991).

M Becker, CG Bowman and M Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (St Paul, Min: West Publishing, 1994).

A Bottomley ed, *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing, 1996).

K Crenshaw, N Gotanda, G Peller, K Thomas eds, *Critical* Race *Theory: The Key Writings that formed the Movement* (New York: New Press, 1995).

R Delgado ed, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995). MJ Frug, *Women and the Law* (Westbury, NY: Foundation Press, 1992).

R Graycar and J Morgan, *The Hidden Gender of Law* (Sydney: Federation Press, 1990).

N Naffine and RJ Owens eds, *Sexing the Subject* of *Law* (Sydney: LBC Information Services, 1997).

F Olsen, *Feminist Legal Theory*, 2 vols (New York: New York University Press, 1995).

JA Scutt, *Women and the Law* (Sydney: Law Book, 1990). P Smith ed, *Feminist Jurisprudence* (Oxford: Oxford University Press, 1993).

M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995.

DK Weisberg, *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press,1993).

DK Weisberg, *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work, and Reproduction* (Philadelphia: Temple University Press, 1996).

AK Wing, *Critical Race Feminism: A Reader* (New York and London: New York University Press, 1997).

* Professor of Law and Legal Studies, La Trobe University, Melbourne. This paper

was presented at the Winter Workshop on Law, Development and Gender Justice, ILS Law College, Pune, India, 11–20 January, 1998. I would like to thank Dr Jaya Sagade for organising the workshop. I would also like to thank Ms Vaijayanti Joshi, the Principal of ILS Law College, Ms Laxmi Paranjape and Ms Sathya Narayan, as well as Dr Sagade, for their hospitality.
 (1998) 9 *Legal Educ Rev* 171.

[1] For a collection of articles commemorating the struggles to establish Women's Studies in Australian universities in the 1970s and 1980s, see (1998) 13 *Australian Feminist Studies* 47–136. For *a* discussion of Indian feminism, see ME John, *Discrepant Dislocations: Feminism, Theory, and Postcolonial Histories* (Berkeley: University of California Press, 1996).

[2] LC McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence (1992) 65 *Southern California Law Review* 1171, at 1173.

[3] For example, G Minda, Jurisprudence at Century's End (1993) 43 *Journal of Legal Education* 27.

[4] M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995); K O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

[5] See, for example, R Kapur and B Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage, 1996).

[6] M Gatens, A Critique of the Sex/Gender Distinction, in S Gunew, A *Reader* in *Feminist Knowledge* (London: Routledge, 1991). For a discussion of American Supreme Court cases, for example, see TE Higgins, "By Reason of their Sex": Feminist Theory, Postmodernism, and Justice (1995) 80 *Cornell Law Review* 1536.

[7] For a critique of conventional legal methods, see MJ Mosanan, Feminism and Legal Method: The Difference it Makes (1986) 3 *Australian Journal of Law and Society* 30. For a consideration of feminist legal methods, see KT Bartlett, Feminist Legal Methods (1990) 103 *Harvard Law Rev* 820.

[8] However, as Carol Smart points out, alternative accounts could emerge in women's writings and feminist groups, if not in court. See C Smart, *Feminism and* the *Power of Law* (London & New York: Routledge, 1989) at 88.

[9] *Geduldig v Aiello* 417 US 484 (1974), per Brennan J. Some feminists, such as Wendy Williams, continue to support the symmetrical approach. *See* WW Williams, Notes from a First Generation [1989] *University of Chicago Legal Forum* 99*;* WW Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate (1985) 13 *New York University Review of Law and Social Change* 325.

[10] In *a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982).

[11] For example, P Cain, Feminist Jurisprudence: Grounding the Theories (1989) 4 *Berkeley Women's Law Journal* 191; C Smart, *supra* note 8; M Thornton, Feminist Jurisprudence: Illusion or Reality? (1986) 3 *Australian J Law & Society* 5; H Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence (1986) 1 *Berkeley Women's Law Journal* 64; A Scales, Towards a Feminist Jurisprudence (1981) 56 *Indiana Law Journal* 375.

[12] There are presently at least two dozen such journals published in Australia, Canada and the United States, including: Australian Feminist Law Journal, Canadian Journal of Women and the Law; Columbia Journal of Gender and Law; Feminist Legal Studies (UK); Yale Journal of Law and Feminism. More than twenty feminist law journals are published in the United States alone. See M Minow, The Young Adulthood of a Women's Law Journal (1997) 20 *Harvard Women's Law Journal* 1.

[13] I have elaborated on this distinction in my study of women in the legal profession: M Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996). See also W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 167ff.

[14] For example, J Huggins, A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement, in N Grieve and A Burns eds,

Australian Women: Contemporary Feminist Thought (Melbourne: Oxford University Press, 1994); A Parashar, Essentialism or Pluralism: The Future of Legal Feminism (1993) 6 *Canadian J Women and the Law* 328; M Mahoney, Whiteness and Women in Practice and Theory: A Reply to Catharine MacKinnon (1993) 5 *Yale J Law and Feminism* 217; AP Harris, Race and Essentialism in Feminist Legal Theory (1990) 42 *Stanford Law Rev*, 581; M Kline, Race, Racism, and Feminist Legal Theory (1989) 12 *Harvard Women's Law J* 115.

15 CT Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses in CT Mohanty, A Russo and L Torres eds, *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991); GC Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993); GC Spivak, *In Other Worlds: Essays in Cultural Politics* (New York: Routledge, 1988).

16 ME John, *supra* note 1, at 1. But compare S Suleri, Woman Skin Deep: Feminism and the Postcolonial Condition, in KA Appiah and HL Gates eds, *Identities* (Chicago & London: University of Chicago Press, 1995).

17 KA Appiah and HL Gates, Editors' Introduction, in KA Appiah and HL Gates, *supra* note 16, at 1. See also G Prakash ed, After *Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton, NJ: Princeton University Press, 1995).

18 For example, K Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory (1995) 95 *Columbia Law Review 304;* C Smart, *supra* note 8, at 76–82.

19 For example, S Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention in J Butler and JW Scott eds, *Feminists Theorize the Political* (London: Routledge, 1992). The issue of resistance has been complicated by a conservative backlash which has resulted in attacks on women for having formally complained of sexual harassment or assault; they have been accused of being "over-sensitive" and of destroying the lives of "good" men who have momentarily erred. See, for example, H Garner, *The First Stone: Some Questions about Sex and Power* (Sydney: Picador, 1995), which sparked a major controversy in Australia. *See* also, J Mead ed, *Bodyjamming: Sexual Harassment, Feminism, and Public Life* (Sydney: Vintage Books, 1997). But compare K Abrams, *supra* note 18, at 343–44.

20 For discussion, see, for example, M Davies, *Asking the Law Question* (Sydney: Law Book, 1994); C Weedon, *Feminist Practice and Post-Structural Theory* (Oxford: Blackwell;1987).

21 I note, in passing, that significant French women theorists, such as Irigaray and Kristeva, appear to have exerted less influence on Anglophonic feminist theory than their male compatriots. *See*, for example, L Irigaray, *This Sex Which is Not One* (Ithaca, NY: Cornell University Press, 1985); T Moi ed, *The Kristeva Reader* (Oxford: Blackwell, 1986).

22 For example, P Cheah, D Fraser and J Grbich eds, *Thinking through the Body of the Law* (Sydney: Allen & Unwin, 1996); I Karpin, Reimagining Maternal Selfhood: Transgressing Body Boundaries and the Law (1994) 2 *Australian Feminist Law Journal* 36; R Mykitiuk, Fragmenting the Body (1994) 2 *Australian Feminist Law Journal* 63.

23 For an overview of gendered dualisms, see F Olsen, Feminism and Critical Legal Theory: An American Perspective (1990) 18 *International Journal of the Sociology of Law* 199.

24 For example, J Derrida, *Margins of Philosophy* trans Alan Bass (Chicago: University of Chicago Press, 1982).

25 D Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York & London: Routledge, 1991) at 147 ff. See also L Irigaray, *supra* note 21, at 76.

26 M Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, 1972–1977 ed C Gordon, trans C Gordon et a1 (New York Harvester Wheatsheaf, 1980) at 98. For an example of Foucauldian feminist scholarship, see A Howe, *Punish and Critique: Towards a Feminist Analysis of Penality* (London:

Routledge, 1994).

[27] For a somewhat different conceptualisation of the stages of feminist legal scholarship, see N Naffine, Assimilating Feminist Jurisprudence (1993) 11 *Law in Context* 78; N Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

[28] A Scales, Disappearing Medusa: The Fate of Feminist Legal Theory (1997) 20 *Harvard Women's Law Journal 34.*

[29] But compare A Parashar, *supra* note 14, at 348.

[30] HW Arthurs and R Kreklewich, Law, Legal Institutions, and the Legal Profession in the New Economy (1996) 31 *Osgoode Hall Law Journal* 1.

[31] For example, Naihua Zhang with Wu Xu, Discovering the Positive within the Negative: The Women's Movement in a Changing China in A Basu with the assistance of CE McGrory eds, *The Challenge of Local Feminisms: Women's Movements in Global Perspective* (Boulder, Col & Oxford: Westview Press, 1995).

[32] B Cossman and R Kapur, Women and Poverty in India: Law and Social Change (1993) 6 *Canadian J Women and the Law* 278, at 300.

[33] G Jordan and C Weedon, *Cultural Politics: Class, Gender, Race and the Postmodern World* (Oxford: Blackwell, 1995) at 563–564.

[34] For critical studies of the discrimination against Indian women arising from the conjunction of family law and religion, see Kapur and Cossman, *supra* note 32; A Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage, 1992).

[35] Nivedita Menon points out that the question of the *right* to abortion has not been problematic in India, but it is the selective abortion of female foetuses that has made the issue one of concern to feminists. See N Menon, Abortion and the Law: Questions for Feminism (1993) 6 *Canadian Women and the Law* 103. For a discussion of the way the issue has permitted "First World" intervention into the "Third World", see R Luthra, The "Abortion Clause" in U.S. Foreign Population Policy in AN Valdivia ed, *Feminism, Multiculturalism and the Media: Global Diversities* (Thousand Oaks, Cal: Sage, 1995).

[36] For example, K Rosa, *Women of South Asia* (Colombo, Sri Lanka: Friedrich Ebert Stiftung, Gala Academic Press, 1995) at 41–42 *et passim;* P Diwan and P Diwan, *Women and Legal Protection* (New Delhi: Deep & Deep, 1994).

[37] M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Melbourne: Oxford University Press, 1990).

[38] The trailblazing work of Catharine MacKinnon in this area has to be acknowledged. See CA MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979).

[39] For example, A Basu with the assistance of CE McGrory, *supra* note 31.

[40] M Thornton, *supra* note 13.

[41] A Parashar, Reconceptualisations of Civil Society: Third World and Ethnic Women, in Thornton, *supra* note 4.

[42] For other suggestions, see Commission on Women in the Profession, American Bar Association, *Elusive Equality:* The *Experiences of Women in Legal Education* (Chicago: American Bar Association, 1996).

[43] Following an intense period of media focus on "gender bias in the judiciary" in 1993, the Australian Government funded the preparation of "gender sensitive" materials for law schools on the themes of Citizenship, Work, and Violence. The Citizenship materials were prepared by Professor Sandra Berns, Ms Paula Baron and Professor Marcia Neave, and the Work and Violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan. The writer chaired the overseeing committee. See R Graycar and J Morgan, Legal Categories, Women's Lives and the Law Curriculum OR: Making Gender Examinable (1996) 18 *Sydney Law Review* 431. The materials are available on line at http://uniserve.edu.au/law.

[44] M Thornton, Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same (1998) 36 *Osgoode Hall Law Journal* 369.

[45] For example, S Bottomley, N Cunningham and S Parker, *Law in Context,* 2nd ed (Sydney: Federation Press, 1997); R Hunter, R Ingleby and R Johnstone eds,

Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law (Sydney: Allen & Unwin, 1995).

[46] *Leeth v Commonwealth* (1992) 174 CLR 455, per Deane, Toohey and Gaudron JJ.

[47] For example, M Thornton, Embodying the Citizen in Thornton, *supra* note 4.

[48] For example, MA Baldwin, Public Women and the Feminist State (1997) 20 *Harvard Women's Law Journal* 47.

[49] TE Higgins, Democracy and Feminism (1997) 110 *Harvard Law Rev*, 1657.

[50] For example, H Bhabha ed, *Nation and Narration* (London & New York: Routledge, 1990).

[51] For example, C Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); K O'Donovan, *Family Matters* (London: Pluto, 1993); P Goodrich, Gender and Contracts, in A Bottomley ed, *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing, 1996).

[52] C Dalton, Deconstructing Contract Doctrine (1985) 94 *Yale Law Journal* 997; MJ Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) 34 *American University Law Review* 1065.

[53] See, for example, S Berns and P Baron, *Company Law and Governance: An Australian Perspective* (Melbourne: Oxford University Press, 1998); A Belcher, Gendered Company: Views of Corporate Governance at the Institute of Directors (1997) 5 *Feminist Legal Studies* 57; S Corcoran, Does a Corporation have a Sex? Corporations as Legal Persons in N Naffine and RJ Owens eds, *Sexing the Subject of Law* (Sydney: LBC Information Services, 1997); KA Lahey and SW Salter, Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism (1985) 23 *Osgoode Hall Law J* 543.

[54] For example, J Conaghan, Tort Law and the Feminist Critique of Reason and P Peppin, A Feminist Challenge to Tort Law in Bottomley, *supra* note 51; L Bender, An Overview of Feminist Torts Scholarship (1993) 78 *Cornell Law Rev* 575.

[55] For example, A Bottomley, Figures in a Landscape: Feminist Perspectives on Law, Land and Landscape and K Green, Being Here: What a Woman Can Say About Land Law, in Bottomley, *supra* note 51.

[56] For example, J Grbich, Taxation Narratives of Economic Gain: Reading Bodies Transgressively (1997) 5 *Feminist Legal Studies* 131; Writing Histories of Revenue Law: The New Productivity Research (1993) 11 *Law in Context* 57; The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship (1991) 4 *Canadian J Women and Law* 512.

[57] For example, R Hunter, Gender in Evidence: Masculine Norms v. Feminist Reforms (1996) 19 *Harvard Women's Law Journal* 127; R Hunter & K Mack, Exclusion and Silence: Procedure and Evidence in N Naffine & RJ Owens, *supra* note 53.

[58] M Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Wellington: Allen & Unwin, 1988).

[59] For example, Diwan and Diwan, *supra* note 35.

[60] Thornton, *supra* note 44.

[61] Thornton, *supra* note 13.