

IDEAS HAVE CONSEQUENCES

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After listening to the concerns of Professor Epstein,¹ Professor Lawson² and Professor Fineman,³ I am going to take a different, perhaps pedestrian, down-to-earth look at the question what, exactly, is feminist legal theory? Professor Case's presentation paved the way for such an approach.⁴ Professor Gary Lawson suggested that the question be approached by asking how one might recognize feminist legal theory when one sees it.⁵ He then set up four general categories of definition: subject matter, method, content and a list of positions on specific issues.⁶ However, the consistent theme that has emerged from my reading of the literature is feminist legal theorists do not want to be categorized.

Feminist legal thought includes a wide range of perspectives, as is apparent from this symposium. Some vigorously and self-consciously deny classification on deconstructionist grounds.⁷ Definition is itself a patriarchal game, played by patriarchal rules, serving patriarchal ends.⁸ Others fall more easily into traditional categories, and are amenable to Lawsonian⁹ analysis and possibly even Epsteinian¹⁰ exhortation.¹¹

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1. See Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331 (1995).

2. See Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL'Y 325 (1995).

3. See Martha A. Fineman, *Feminist Legal Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349 (1995).

4. See Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369 (1995).

5. See Lawson, *supra* note 2, at 325.

6. *Id.* at 327-28.

7. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8-12 (1991) (criticizing the categorization of the law); Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 622-26 (1987) (arguing for the deconstruction of the transcendental concepts of reason, self and truth because they are only reflective of the experiences of white western males).

8. See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 39 (1987) (observing that to affirm a difference between women and men is to affirm the dominance of one gender and powerlessness of the other).

9. See Lawson, *supra* note 2.

10. See Epstein, *supra* note 1.

11. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (different-voice); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing against "notion that a unitary 'essentialist' women's experience can be isolated and described independently of race, class, sexual orientation, and other realms of experience"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (equality).

Consider, for example, the 20th Anniversary Edition of the *Women's Rights Law Reporter*.¹² The issue features articles that range from Ruth Bader Ginsburg's *Sex Equality and the Constitution*,¹³ calling for an equal rights amendment, to *When the First Quail Calls* by Stanford professor Mari J. Matsuda,¹⁴ a passionate discussion of the oppression of women and people of color, which in turn is followed by another feminist legal theorist's recitation of the dream she had after reading Ms. Matsuda's paper.¹⁵

The range of these articles represent the twenty-year journey of legal feminism. The early Ruth Bader Ginsburg brand of equality feminism was based on neutral principles.¹⁶ Men and women should be equal before the law, and the task of feminist theory was to remove barriers to the success of women, in both the public and the private spheres.¹⁷ Since up until recently, for all practical purposes, women had succeeded only in the private sphere, most of the work had to be aimed at the public sphere. Tactically, equality feminists felt the way to do this work was to stress the similarities and minimize the differences between men and women.¹⁸

But radical feminists said the differences were too great, too important to be minimized.¹⁹ Men and women approach legal and moral problems differently. Women proceed from an ethic of care, compassion, and connection; men by rights and rules.²⁰ Law must recognize and account for these differences. Then the real radicals weighed in, and exclaimed, "Forget equality, it is a

12. 14 WOMEN'S RTS. L. REP. (1992).

13. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361 (1992).

14. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992).

15. See Pat Williams, *Response to Mari Matsuda*, 14 WOMEN'S RTS. L. REP. 301-03 (1992).

16. See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 23-27, 41-42 (1975) (noting the weakness of existing constitutional provisions and doctrine and arguing that an equal rights amendment is needed if true gender equality is to be achieved).

17. See *id.*

18. See Ginsburg, *supra* note 13, at 361 (suggesting that, historically, gender-based classifications which purported to favor females actually patronized them); Law, *supra* at 1003 ("[W]e could develop a concept of equality that distinguishes between reproductive biological difference and cultural generalizations and that prohibits regulation of reproductive biology whenever it oppresses women or reinforces sex-role stereotypes."); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196, 200 (1982) (noting the potential dangers of seeking special treatment).

19. See, e.g., GILLIGAN, *supra* note 11, at 38; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-86 (1979).

20. See GILLIGAN, *supra* note 11, at 38.

patriarchal concept."²¹ Our institutions, including our legal institutions, are instruments that merely reflect a patriarchal power structure. Law must be reconstructed—I think they mean deconstructed and then reconstructed—with a recognition that it is all about power; and the real difference between men and women is that men have and wield the power—to the detriment of women.

Even today this basic debate continues. Hence the importance of this symposium, recognizing as it does that feminist legal theory, with all its richness, creativity, and ability to shock, is an influential part of our contemporary cultural and legal scenes. Thus, we should look at this body of scholarship not only as a matter of definition, but also with an eye to what effect it has had in the past, and what effect it is likely to have in the future.

We are indeed very fortunate that Professor Martha Fineman has once again ventured into the lions' den. I first met Professor Fineman at a Federalist lawyers' conference in New York. It is really interesting how little real communication, or "connection," to use the feminist nomenclature, there is on this subject. We each tend to speak only to our own choirs. Professor Fineman's acceptance of the Federalist invitation brought my attention to some of her singular work in this area. I use the term singular because it is thoughtful, clear, forthright, and comprehensible. So too with Professor Case. Their participation has opened the doors to some very invigorating and important discussion.

Throughout Professor Fineman's work,²² and indeed throughout much of the literature, the defining characteristic of feminist legal thought is the importance of taking women's experience into account.²³ Patricia Cain, Professor of Law at the University of Iowa, contends that the starting point for all feminist theory must be women's experience.²⁴ Professor Fineman defines femi-

21. See MACKINNON, *supra* note 8, at 33 (labeling sex equality "a contradiction in terms, something of an oxymoron").

22. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773 (1988); Fineman, *supra* note 3; Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 831; Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 667-69 (1992).

23. See, e.g., WILLIAMS, *supra* note 7, at 8-14; Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

24. See Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 35-39 (1991) (arguing that in order to be taken seriously feminists must do some "remedial feminist jurisprudence"—defined as "scholarship that explains its grounding in women's experience in ways that can be heard by those who are strangers to the experience.").

nist legal theory as "a theory of women's experience within law and legal institutions."²⁵ She has said that the pressing task of feminist legal theory is to challenge existing legal doctrines through the articulation of a theory of difference. Women are different than men. Women's experiences are different than those of men. Therefore, the law should reflect those differences in a way that values women's experiences and women's gendered lives.²⁶

Not surprisingly, the concept of value is seen throughout the literature. As Professor Fineman argues:

[T]he law primarily represents and reflects male values and norms. Critiquing the law from a feminist perspective requires understanding how women's perceptions and experiences differ from men's and how such differences are relevant to the development and implementation of legal doctrines and theories.²⁷

Along this line, Professor Fineman has analyzed the practical effect of divorce law reform from the point of view of women's experience.²⁸ Tracing the reform to the equality theory of feminist jurisprudence, Professor Fineman takes issue with the results of the reform.²⁹ Citing studies that found women generally worse off with the advent of so-called divorce reform, Professor Fineman contends that the experience of women is that they are seldom in a position of equality during or after a divorce.³⁰ Did

25. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 25 (1990).

26. *Id.* at 26-27, 30-37, 43.

27. *Id.* at 26.

28. See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* 53-75 (1991).

29. *Id.* at 11-13, 189-90.

30. *Id.* at 173-82. See generally Barbara R. Rowe, *The Economics of Divorce: Findings in Seven States*, in *THE CONSEQUENCES OF DIVORCE* 5-19, (Craig A. Everett ed., 1991) (noting that few women receive alimony and that child support is low and only poorly enforced); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 260 (1989) (arguing that the major marital asset, the husband's future income, should be recognized as property); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981) (concluding that the standard of living for 42% of men in California increased after divorce, while 73% of women experienced a decrease); Karen Seal, *A Decade of No-Fault Divorce*, FAM. ADVOC., Spring 1979, at 10, 13-15 (noting that California divorce legislation has had a negative economic impact on women, resulting in insufficient financial settlements and alimony awards for wives); PAMELA J. SMOCK, INST. FOR RESEARCH ON POVERTY, UNIV. WIS. MADISON, DISCUSSION PAPER NO. 984-92, *THE ECONOMIC COSTS OF MARITAL DISRUPTION FOR YOUNG WOMEN IN THE U.S.: HAVE THEY DECLINED IN THE PAST TWO DECADES?* (1992) (comparing the period from the late-1960's until the mid-1970's with the decade of the 1980's, and finding no improvement in post-dissolution status for women).

the equality theory reflect the experiences of those women? What difference did that reform make in the lives of the women and children who were affected by it?

Professor Fineman concludes that unequal treatment is essential to assure equitable economic results. Under such a feminist vision, equality is substantive rather than procedural. It is equality of outcome.³¹ At the same time, I do not assert that process or method is unimportant to what I would call post-equality feminists. To many, method is experience and experience is method.³² Thus the stories of women must be told, heard and acted upon.

Professor Cain emphasizes the importance of "consciousness-raising",³³ which has come to stand for any form of research or legal argument that begins with women's experience. Katie Roiphe, in her book *THE MORNING AFTER*, tells of the take-back-the-night rallies which are taking place on college campuses today, and the effect of this kind of consciousness-raising on the culture of colleges today.³⁴ Of course, consciousness-raising is often problematic. Can every woman's voice be heard? Which are authentic? Who is representative? Can women ever speak truth, conditioned as we are by the patriarchal institutions which create false consciousness? Indeed, is there any such thing as objective truth? Catharine MacKinnon once took the position that women are unable to speak in their own voices.³⁵ Their voices are affected by the fact that men have all the power, or as MacKinnon put it: "his foot is on her throat."³⁶ I disagree.

That feminist legal theory takes process seriously is evident in the current attempts to reinvent civil procedure. Professor Elizabeth Schneider stressed the importance of what she calls the "dynamic nature of process" in contemporary feminist legal theory:

31. FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 28, at 11-13, 173-75, 189-90.

32. See West, *supra* note 23, at 98; Cain, *supra* note 24, at 38-39.

33. See Cain, *supra* note 24, at 38-39.

34. See KATIE ROIPHE, *THE MORNING AFTER* 29-50 (1993) (arguing, in part, however, that women's sexual freedom is being curtailed by false hysteria over rape).

35. See MACKINNON, *supra* note 8, at 45 ("Take your foot off our necks, then we will hear in what tongue women speak.")

36. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 74-75 (1985) (transcript of conversation quoting Catherine A. MacKinnon); see also Elizabeth A. Bartlett, *Introduction to SARAH GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND OTHER ESSAYS* 10 (Elizabeth A. Bartlett ed., Bartlett reprint by Yale University Press, (original Grimke work published by Isaac Knapp) 1988) (1838) (observing that men tended to dominate women in the Society of Friends in spite of Quaker beliefs in the moral autonomy and equality of women).

The very notion of procedure as a fixed set of rules, a static framework, or even a linear unraveling denies the complexity, richness, and the *ad hoc* nature of the procedural system in action. Learning the "rules" or "doctrines" of civil procedure without attention to the textured, chaotic, and dynamic aspects of the process violates the fundamental nature of procedure itself.³⁷

Is Professor Schneider, and others who would feminize civil procedure, saying that civil procedure is, from a woman's perspective, too rigid, linear, or doctrinaire? One must ask if the rule of law can survive these iconoclastic assaults.

These assaults are not destructive if one does not desire that the rule of law survive. Historically, feminist legal theory has run the gamut from being firmly rooted in legal tradition and scholarship to that which rejects tradition, scholarship, and even law. Unfortunately, what is all too often in the forefront today is that which often seems to be an exercise in academic nonsense—and that which only academics could take seriously.

We should take all feminist legal theory seriously. It has a profound effect on the law, the law schools, and the hearts and minds of women (and even some men). Moreover, it affects our culture. Ideas have consequences—even those that may be thought by some to be silly, and even those that seem to be put forward merely for their shock value. Most radical feminist theory attacks the foundations of the rule of law, of relationships between men and women, of our most fundamental institutions, and of our culture. Martha Fineman is right: culture is hard to change.³⁸ She and I disagree, however, about the extent to which radical feminists are making inroads into our culture.³⁹ Remember: Ideas have consequences, and our law schools are giving credence and credibility to some of these ideas. We cannot allow these ideas to continue to go unchallenged.

37. Elizabeth M. Schneider, "Feminist Jurisprudence"—The 1990 Myra Bradwell Day Panel, 1 COLUM. J. GENDER & L. 5, 12 (1991); see also Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223, 1227 (1993).

38. Martha A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349 (1995).

39. See *id.* at 352.