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Introduction

A. The Contours of Feminist Legal Theory

There is little mystery to the attraction of feminist legal theory. Many people are drawn to the subject because of its capacity to get beneath the surface of the law. As an intellectual field, feminist legal theory goes beyond rules and precedents to explore the deeper structures of the law. Particularly for students, practitioners, and scholars who are critical of conventional legal categories, feminist legal theory offers ways of understanding how and why the law might have come to take its present shape and an appreciation of the human conflicts and diverse interests that often underlie even the most ordinary of legal standards.

Feminist legal theory responds to a basic insight about life and law. It proceeds from the assumption that gender is important in our everyday encounters and recognizes that being a man or a woman is a central feature of most people's lives. Feminist legal theory takes this approach into the study of law by examining how gender has mattered to the development of the law and how different groups of men and women are differentially affected by the power of law. This concentrated focus on gender and the law is particularly appropriate at this point in our history when matters of sex and law are perpetually in the headlines. There is no better orientation to pressing legal topics such as sexual abuse, reproductive rights, and marriage equality than taking a course on feminist legal theory.

As a field of law attuned to perspective and the influence of experience on our understanding of events, feminist legal theory also addresses important questions related to the construction of personal identity. In my 30 years of teaching feminist legal theory and related courses to law students and graduate students from other disciplines, I have found that women are disproportionately attracted to these offerings, although a sizeable number of men have also enrolled in my courses, particularly in the last decade. Students generally like the fact that the courses pay close attention to experiences of women and other "outsiders" and that the readings do not pretend that the victim's, defendant's, or judge's gender is always irrelevant to the outcome of a legal dispute. Few courses in the law school

curriculum have a similar capacity to excite, illuminate, and enrage. For some students, the course changes their lives.

A central theme of much of the feminist scholarship discussed in this book is women's subordination through the law. In this context, the use of the term "subordination" by feminist writers is meant to convey the systemic nature of women's inequality. Many of the feminist scholars who take this subordination approach have concluded that gender bias constitutes a pervasive feature of our law, rather than merely representing isolated instances of abuse of law. In a variety of contexts, these feminist scholars have dissected legal doctrines and the language of court opinions and statutes to find hidden mechanisms of discrimination and uncover the implicit hierarchies that are contained within a body of law.

Contrary to prevailing views in the popular culture, most of the feminist scholarship discussed in this book proceeds from the assumption that gender and purported gender differences are not natural, in the sense of being simple expressions of biological predispositions or "hard wired" into our brains. Particularly in this century, many feminist legal theorists have subscribed to a "postmodern" view of identity, believing that gender is socially constructed and that the social meanings attached to gender change over time and are influenced by context. Rather than tracking asserted gender differences, these legal feminist scholars explore how gender is "produced" and try to find ways to loosen the constraints of gender and allow individuals more freedom to express their individual identities.

This book will be an eye-opener for readers who thought that gender discrimination could have only one meaning, namely, the explicit different (or disparate) treatment of men and women under the law. In this book, I go beyond discussing problems of disparate treatment to explore bias that takes the form of gender stereotyping, devaluation of women and "feminine" activities, use of biased prototypes that distort injuries and experiences, and "assimilation" demands that penalize individuals who do not conform to mainstream norms. As you will see, feminist legal theory in the twenty-first century is increasingly complex, borrowing methods and insights from other bodies of critical scholarship and sometimes indistinguishable from allied "intersectional" discourses such as critical race theory. My vision of the field is expansive, including within it new approaches, such as masculinities theory, that others may not classify as feminist legal theory.

The theme of social change figures prominently in this introduction to feminist legal theory. For the most part, feminist legal scholars tend to be advocates of change and have proposed large and small reforms of the law and the legal system in the name of gender equality. We can now reflect on the larger meanings of some of these changes. By tracing how feminists have agitated for recognition of new legal causes of action, extension of legal rights, and greater enforcement of existing laws, this book gives readers a foundation for evaluating the potential for feminism to transform the law. In some cases we will see that change does not always mean progress, as feminist scholars demonstrate how basic gender hierarchies can survive attempts at reform and how patterns of inequality are reproduced in different and updated forms. For this and other reasons, some feminists distrust legal intervention, even to further feminist goals, and warn of unintended consequences and the co-optation of progressive agendas. A good deal of feminist theory grapples with choice of strategies and with pragmatic calculations about coming up with the best change for a particular moment.

We have reached a point where feminist legal theory is a fairly commonplace offering in the law school curriculum. Most law schools have a course of this kind, whether called "Feminist Legal Theory," "Feminist Jurisprudence," or "Gender and Law." Such a course typically investigates legal doctrines, discourses, institutions, and culture through a feminist lens. However, students often come to the course with little idea of what to expect in terms of content or major themes. Particularly, students are often surprised by the great diversity among feminist legal writers. They learn that feminist legal writers differ in almost every conceivable respect: their particular visions of a just society, their strategies for change, their assumptions about human nature, and their judgments about the use of law as a method of social change. For this area of study, it is useful to speak in the plural; to talk in terms of feminist theories, feminist perspectives, feminist ideals.

I wrote this book with my students in feminist legal theory uppermost in my mind. It is intended to demystify the subject and provide a foundation for more specialized readings assigned throughout the course, whether the course is primarily focused on scholarly writings or case analysis. The text is designed so it can either be read at the very beginning of the semester as an overview of the entire course or be assigned in sections in conjunction with relevant readings. My goal is to make this very dynamic and often misunderstood subject accessible to readers who may not have a background in

feminist or critical theory and who are not familiar with specialized antidiscrimination law doctrines.

Over the years, I have been told that this book is a good resource for legal scholars who wish to acquire a grounding in feminist legal theory for their projects, whether such projects are labeled as "feminist" or not. For researchers and students in women's studies and related fields, this book is a demonstration of the continuing vitality of feminist theory in the law. It is designed to help interdisciplinary scholars understand how feminist themes play out in the legal context and to locate sources and writers in their particular areas of interest.

I also very much hope that the book will continue to be useful as an introduction to feminist legal theory for practitioners and judges who have never had the opportunity to take such a course, but who nevertheless confront difficult issues of gender and social justice in their work. Although feminist legal theory has been around for quite some time, the very idea of the subject is still intriguing and perplexing to many lawyers. I wish to satisfy a bit of their curiosity and to allow them an entry point into the vast feminist legal literature that too rarely finds its way outside academia.

The study of any new field of inquiry is often a daunting prospect, particularly a field as politically and emotionally charged as feminist legal theory. My goal is to ease "first day" anxieties by offering a compact text that provides a critical base of information. In terms of content, this book concentrates on introducing the reader to the somewhat specialized vocabulary of feminist legal theory, through both definitions and concrete examples. I have paid particular attention to identifying prominent themes explored in feminist legal writings, in the hope of providing a sense of what it means to say that an analysis or perspective on the law is feminist or is informed by feminism. Although the limits of space prevent me from citing and discussing many of the excellent articles and books I have read in the course of researching this book, I have attempted at least to introduce readers to many of the major writers in the field and to explain why their work is important to the larger field of inquiry. This presentation of the themes and writers in feminist legal theory is by its nature highly selective. For the most part, I concentrate on legal developments in the United States and on U.S. writers, although the third edition includes more comparative and international material. My major objective is to aid in comprehension, without attempting to be comprehensive.

This book is also designed to provide context. Prominent theoretical themes in feminist legal theory—such as the interplay between equality and difference, the hidden bias in objectivity, and the distorting effects of dichotomies—offer a backdrop for understanding the significance of leading cases and legislative action relating to women and gender. As most law students have discovered early in their careers, the holding of an individual case rarely tells us what the case is really about without a theoretical framework to make sense of the law in context. In this book, I have also endeavored to place the various brands or schools of feminist legal thought in historical context, focusing on some of the crucial political and cultural developments that have marked the contemporary era. My narrative of the developments of feminist legal theory, for example, ties the scholarship to current events, from early debates over the Equal Rights Amendment (ERA) to contemporary struggles over same-sex marriage, with particular attention to conflicts and changes within the feminist movement.

The book is probably most useful for readers who wish to "locate" or "situate" a particular writer or article within a broader intellectual context. Even for those of us who are inclined to mistrust rigid categorization and are wary of the arrogance that often accompanies the construction of labels and categories, the location process can be the key to acquiring a deeper understanding of a writer's ideas or viewpoint.

It should come as no surprise that, in a field as fluid as feminist legal theory, there is no clear boundary setting it off from other intellectual movements that have flourished in the law during the period studied. For quite some time, moreover, both academics and activists have been committed to exploring the intersection of different forms of discrimination and oppression—in seeing, for example, how racism, sexism, and heterosexism can operate in tandem or how even feminist-inspired legislation or rulings can overlook the importance of sexual orientation or race. For these reasons, a considerable portion of this book explores the points of connection or links between feminist theory and allied discourses in the law, particularly critical race theory and LGBT legal studies. These connections illuminate feminist legal theory because they allow us to see how analogous themes emerge in these other intellectual movements, broadening our more general understanding of the social and cognitive forces behind inequality. Identifying the connections between feminism and allied schools of

thought also underscores that feminist legal theory, like all other fields, is constantly shifting and redefining itself.

Finally, although this book is an introduction to feminist legal theory and not a defense of feminist legal theory, at various points in the text I have alerted readers to some of the varieties of criticism leveled at the field and at the work of particular feminist scholars. I believe that connecting feminist legal theory to its critics has the beneficial effect of forcing feminists to state their positions more clearly and forcefully. It also helps us to see how a difference in starting points and basic commitments can alter both what we describe as the law and our aspirations for what the law should be.

B. Organization of This Book

This book introduces feminist legal theory through two paths. After a brief description of six of the basic methods or "moves" of feminist analysis in Chapter 1, I analyze the development of feminist legal theory chronologically. Chapter 2 presents an overview and summary of these chronological developments. In Chapters 3 through 5, I examine the three "generations" of feminist legal theory that have emerged since 1971, when the United States Supreme Court first invalidated a gender-based law in *Reed v. Reed*[1]: the *Generation of Equality* (1970s), the *Generation of Difference* (1980s), and the *Generation of Complex Identities* (1990s and beyond).

These chronological chapters provide an overview of the major themes in feminist scholarship and the debates that have inspired the growth and refinement of feminist legal theory. In them, I describe six strands or brands of feminist legal thought, identifying the prominent features of liberal, dominance, cultural, intersectional, autonomy, and postmodern feminist writings. With respect to each feminist approach, I identity and dissect their chief "enemies," creating an enemies list keyed to six theoretical constructs: difference, subordination, devaluation, essentialism, victimization, and normalization. These initial chapters also contain explanations of many of the key terms and theoretical concepts used in feminist scholarship. I place concepts such as "women's agency," "essentialism," "multiple perspectives," and "identity performance" into the chronological development of feminist legal theory and show how this new vocabulary expands the core of

[1] 404 U.S. 71 (1971).

feminist theory. I also summarize the arguments of various opponents of feminist legal theory—from both the Right and the Left of the political spectrum—in order to analyze backlash forces and to locate the basic points of disagreement between feminists and their most visible critics.

The first path ends with a chapter discussing trends outside feminist legal theory. To place feminist legal theory in a larger intellectual context, Chapter 6 discusses two significant allied intellectual movements—critical race theory and LGBT studies—that often converge with feminist legal theory to produce a broader body of critical scholarship. This chapter takes up important new theoretical developments, such as the critique of post-racialism, queer legal theory, and trans theory that have captivated a new generation of scholars.

The second path into feminist legal theory focuses on substantive areas that are of particular importance to feminist scholars. To gain an understanding of what the law means for women in their daily lives, feminist theory has had to address three broad topics: money, sex, and family. These chapters provide a more in-depth summary and analysis of specific areas, and they concentrate on applied, as opposed to theoretical, feminist scholarship.

Chapter 7 surveys applied feminist legal research on the economic subordination of women, examining women's access to material resources in several contexts, including as homemakers, as employees, as litigants in tort cases, and as taxpayers.

Chapter 8 canvasses some of the vast literature on women's sexual exploitation and abuse. The chapter covers writings about rape, sexual harassment, domestic violence, and prostitution and sex trafficking.

Chapter 9 is devoted to feminist legal analyses of motherhood and reproduction. The chapter looks at the scholarship on such contentious topics as abortion, denial of reproductive autonomy, single motherhood, and welfare reform.

Chapter 10 revisits the enemies list and gives an accounting of how legal feminists have responded to their enemies through engaging the law. I conclude by summarizing the various splits among feminists and speculating on the future of feminist legal theory.

Each of the chronological and substantive chapters has a dual objective: first, to describe the contours of feminist legal scholarship; and second, to assess its impact on the law, whether in reshaping legal doctrine, generating new causes of action, or providing direction for the passage of legislation. The feminist influence on legal doctrine is

sometimes clearly visible, through, for example, a court's citation of feminist articles or the endorsement in litigation of positions advocated by women's rights organizations. At other times, the influence of feminism is inseparable from other intellectual and cultural trends. This book concentrates on major themes in feminist legal theory and related discourses, making connections to the practice and interpretation of law in the most prominent cases.

Introduction to Feminist Legal Theory

CHAPTER 1

Thinking Like a Feminist

Most legal writers or practitioners who identify themselves as feminists are critical of the status quo.[1] The root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination. Whatever their differences, feminists tend to start with the assumption that the law's treatment of women has not been fair or equal and that change is desirable. This stance separates feminists from researchers who study gender and law with the implicit assumption that the law has not produced or reproduced systematic gender inequity. This nonfeminist gender-oriented scholarship often simply describes gender differences or traces the impact of law on subgroups of men and women. Feminist legal scholarship is more oppositional; it assumes there is a problem and is suspicious of current arrangements, whether they take the form of different standards for men and women or purportedly neutral, uniform standards that nevertheless work to women's disadvantage.

Unlike most other courses in the curriculum, feminist legal theory often requires an initial defense. The debate centers on the word "feminism," a hotly contested term with multiple meanings. For the most part, legal subjects tend to be described using neutral categories, unmodified by any particular viewpoint or methodological orientation. Feminist legal theory, however, is distinguished by its explicit reliance on feminism as the guiding force behind its inquiry into law. It owes its

[1] *See* Linda Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute, 25 Tulsa L.J. 775, 777-79 (1990).

existence to the second wave of the women's movement, which began in the late 1960s. Although other legal subjects also have a history and are tied to particular cultural developments — for example, courses on cyberlaw, or about new reproductive technologies — feminist legal theory stands out because of its unapologetic connection to a specific political movement and its clear focus on women and gender.

Criticism of the law from a feminist standpoint is a major undertaking. Feminist critiques can take many forms; they can consist of thick narrative descriptions, causal analyses, or advocacy of reform. Clare Dalton's definition of feminism as it relates to the study of law lists some of the possible directions that feminist critiques may take:

> Feminism is . . . the range of committed inquiry and activity dedicated first, to *describing* women's subordination — exploring its nature and extent; dedicated second, to asking both *how* — through what mechanisms, and *why* — for what complex and interwoven reasons — women continue to occupy that position; and dedicated third, to change.[2]

Dalton's definition captures the different emphases of feminist legal writing, even on a single topic. For example, the feminist literature on domestic violence illustrates the three main components of Dalton's definition. First, feminists have sought to describe the *nature* and *extent* of domestic violence. They have not only gathered statistics about the prevalence of domestic violence but also have sought a deeper understanding through narratives of women who have been battered and firsthand accounts of those who have worked in women's shelters. The picture of domestic violence generated by these stories contrasts sharply with the older conventional wisdom that regards "fights" between husband and wives as normal and maintains that families should be left alone to work out their disputes. The feminist narratives reveal a dynamic of domestic violence, a pattern of abuse, which includes not only punching, shoving, and other forms of physical violence, but also a complex of actions that one commentator calls a "regime of private tyranny."[3] The narrative descriptions contained in feminist writings show how batterers often isolate their wives or partners, cut off support from family or friends, and secure submission by

[2] Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women's L.J. 1, 2 (1988-89) (emphasis added).

[3] Jane Maslow Cohen, Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?, 57 U. Pitt. L. Rev. 757 (1996).

destroying a woman's confidence. The new feminist images are useful not only to persuade legislatures and courts to amend laws regarding domestic violence but also to change the cultural understanding of the phenomenon itself.

Second, feminist scholarship has explored *how* and *why* domestic violence continues to be a major contributor to women's subordinate status. For example, inaction by the police and prosecutors was early identified as one mechanism that allows domestic violence to thrive. Feminists argued that the criminal laws against assault and battery are simply not enforced in the domestic context and that the concept of "family privacy" has been used to justify nonintervention. Some feminist scholarship sought out deeper structural and psychological supports for domestic violence. Women's economic dependence on men was cited as a major impediment to women's freedom, while the term "learned helplessness" was used to describe the devastating psychological impact that years of violence can have on victims. Because many women value intimate relationships and may still love a violent man, feminist scholars explained that a woman need not be a masochist to hesitate to leave an abusive relationship.[4]

Finally, in their writings and political activism, feminists have advocated for *changes* in the legal system and the broader society to decrease the incidence of domestic violence and help victims of abuse. Mandatory arrest laws, special provisions for protective orders, and recovery of tort damages from abusive partners all represent reforms in formal legal doctrine inspired by feminist advocacy.[5] Feminists also argued for the creation of supportive institutional structures, including women's shelters and the provision of domestic violence advocates who help a victim find her way through a labyrinthian legal bureaucracy. Most recently, there has been an attempt to have domestic violence treated as unethical conduct that signifies a person's lack of qualifications for positions of public trust or honor.

Dalton's description of the range of feminist inquiries is expansive in that it includes both highly theoretical and practical work, personal narrative, and quantitative research. The emphasis on feminist "theory" does not mean that only abstract scholarship is valued. In fact, more than other schools of thought, feminist theories are apt

[4] *See* Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23.

[5] *See* Jennifer Wriggins, Domestic Violence Torts, 75 S. Cal. L. Rev. 121 (2001).

to emphasize the importance of concrete changes in society and to stress the interaction between theory and practice. Theory tends to be valued not for its own sake, but for its capacity to give meaning to women's experiences and to allow women to articulate their experiences more fully.

A. SIX OPENING MOVES

A good place to begin the study of feminist legal theory is to reflect on what it might mean to "think like a feminist" — to approach legal issues from a feminist stance or perspective. Law students are familiar with what has often been described as the goal of the first year of law school: getting students to "think like a lawyer." This initiation into the discipline offers few answers but emphasizes the kind of questions to which lawyers pay the most attention. Early on, law professors tell their students that mastering the specific content of the courses is not as important as learning the techniques of the lawyer: in particular, exposure to the case method, attention to factual details, separating the relevant from the irrelevant, and tracing out the logical implications of rules or principles. In a similar vein, there are some recurring techniques and insights that can help initiate students in the study of feminist scholarship. Although there is no uniform methodology or approach, feminist scholars often deploy a few recurring "moves" in their analyses, moves that help to place women at the center rather than the margins of the study of law. The following six moves are intended to give some sense of the scope and preoccupations of the critical study of law as it is engaged in by feminists. Throughout this book, we will see how these moves appear and reappear in both theoretical and applied feminist scholarship.

1. Women's Experiences

A recurring theme in much feminist scholarship is the importance of women's experiences. This emphasis can be traced to the consciousness-raising groups of the late 1960s and early 1970s, where women were encouraged to express their subjective responses to

everyday life and discovered that "the personal was political," in the sense that their personal problems also had a political dimension. As a methodology, validation of personal experience has much to offer marginal groups who lack the power to have their understanding of the world accepted as "just the way things are." Consciousness-raising, for example, simultaneously exposed the depth of women's oppression and the systematic nature of male domination. Women began to name their grievances and reinterpret reality in a critical fashion.

Patricia Cain's definition of feminist legal scholarship centers on this grounding in women's experiences.

> Feminist legal scholarship seeks to analyze the law's effect on women as a class . . . [T]he analysis is formed by a distinctly feminist point of view, a point of view that is shaped by an understanding of women's life experiences. This understanding can come either from living life as a woman and developing critical consciousness about that experience or from listening carefully to the stories of female experience that come from others . . . [L]egal scholarship is not feminist unless it is grounded in women's experience.[6]

The emphasis on women's experiences is especially useful to identify exclusions in the law, particularly injuries that have not been recognized by courts or legislatures or have been minimized because women's experiences are not adequately expressed in the law. When used in combination with political activism, this methodology can sometimes lead to recognition of new legal causes of action.

The story of the recognition of sexual harassment is perhaps the best example of the grassroots development of a legal claim grounded in women's experiences. Although sex discrimination in employment had been outlawed as early as 1964, it was not until the mid-1970s that sexual harassment was given a name and challenged as a form of sex discrimination in employment, equivalent to unequal pay or discriminatory job assignments based on sex. In her influential book on the subject,[7] Catharine MacKinnon recalls that the term "sexual harassment" was first used in 1975 by a women's advocacy organization in connection with the case of Carmita Wood. Wood was an administrative

[6] Patricia A. Cain, Feminist Legal Scholarship, 77 Iowa L. Rev. 19, 20 (1991).

[7] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 250 n.13 (1979).

assistant at Cornell University who finally quit her job after being subjected to a pattern of offensive sexual behavior by her supervisor.

Today we would describe Wood's response to her harassment as a "constructive discharge," meaning that the intolerable working conditions left Wood no real choice but to quit. At that time, however, harassing conduct tended to be dismissed as harmless flirtations. A transformation in the cultural meaning of such conduct occurred when women workers began to express their negative responses to touching, jokes, propositions, and other sexualized conduct at work and to explain why they felt powerless to complain. Starting with women's experiences, from women's perspectives, feminists were able to cast sexual behavior in a different light: to argue that what was pleasurable or inconsequential from the harasser's viewpoint was disturbing and serious when seen from the eyes of the target.

Cain's description of the "feminist point of view" emphasizes women's experiences because she believes this source of knowledge should inform feminist scholarship. Like most feminist scholars, however, Cain does not believe that only those persons who experience discrimination or oppression firsthand can ever hope to understand it. In Cain's account, women and men who have not personally experienced sex discrimination can nevertheless gain an understanding of it by listening closely to the stories of others and avoiding the temptation to conclude that the speaker is not intelligent enough or perceptive enough to get it right. Although this definition does not preclude men from doing feminist scholarship, in fact, most feminist legal scholars are women, and many incorporate personal stories in their work.

2. *Intersectionality and Complex Identities*

Especially since the 1990s critique of feminist legal theory spearheaded by women of color and lesbian theorists, feminists have been alert to the danger of regarding women as a monolithic group and assuming that all women share certain essential common experiences. Without discarding the emphasis on lived experience, most feminist scholars now acknowledge that such experience is shaped by social hierarchies other than gender, including race, ethnicity, class, age, sexual orientation, disability, and immigrant status. These multiple dimensions intersect to create complex personal identities for vast numbers of women who are seen by and approach the world not simply as a woman, but, for

example, as an immigrant Asian female laborer. The intersectional commitment requires feminists to take into account the different social positions of various subgroups of women and to appreciate that some women may experience distinctive forms of discrimination or escape harm altogether. It also leads to the uncomfortable realization that women can and do oppress other women. Like men, women can be privileged because of their race, class, or other social advantage and can use that privilege to injure others.

Feminist scholarship on rape law demonstrates how an intersectional approach to a topic can change and illuminate the analysis. Early discussions of rape by white feminist writers tended to regard rape as an extreme expression of sexual oppression that allowed men to extract sex from women who did not offer physical resistance or who could be discredited as unworthy or promiscuous because of their past sexual experiences.[8] Feminists insisted that it was unfair to require women to respond to aggression in risky masculine ways and unjust to apply a double standard of sexual morality that punished women who engaged in nonmarital sex or otherwise acted in "immodest" ways. An intersectional approach to rape, however, further complicates this picture by focusing on the specific situation of women of color and also by taking race into account when describing legal responses to the rape of white women by men of color.[9] Intersectional scholars observe that the good girl/bad girl dichotomy does not seem to apply when black women are victims of rape: Regardless of past conduct or social demeanor, black women are often cast as promiscuous by nature and denied even the limited protection offered to white women. Race privilege, on the other hand, can sometimes operate to lessen the evidentiary burden on white women victims when the alleged offender is black, making it more likely that juries will believe the woman's account and reject the claim that the woman consented to sex. The intersectional move is designed to curb the temptation to speak in universal terms, a habit feminists detest in male-oriented scholarship and language.

[8] Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (1987).

[9] Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).

3. Implicit Bias and Male Norms

The focus on women's multiple experiences often leads to the question of how those experiences could have been suppressed or ignored, especially since women constitute a numerical majority of the population and no longer labor under the formal legal disabilities that kept them from exercising their rights as citizens in the past. Many feminists address this dilemma by seeking to uncover male bias and male norms in rules, standards, and concepts that appear neutral or objective on their face. Rules designed to fit male needs, male social biographies, or male life experiences have been described as "androcentric."[10] Implicit male bias can be revealed by examining the real-life impact of laws on women as a class, paying particular attention to how even noncontroversial legal concepts and standards tend to disadvantage women. In this usage, bias refers not simply to practices deliberately intended to hurt women but also to practices that have an unintended negative impact or effect. This technique of tracing out the gender implications of a social practice or rule is sometimes referred to as asking "the woman question" because it places women at the center of the inquiry, even when the rule or practice in question appears to have little to do with gender.[11]

An example of implicit male bias can be found in the standard definitions of full-time and part-time work. It is commonly accepted that the standard workweek is 40 hours and that anyone who works less than 35 hours per week is appropriately classified as a part-time worker. In today's workplace, most part-time workers are at a serious disadvantage relative to full-timers: They usually receive no pro rata fringe benefits, many types of jobs are closed to them, and they may even be paid at a base rate lower than that paid full-time workers doing the same job. The great majority of part-time workers are also women. In contrast to more mainstream studies of the workplace, a feminist analysis of the part-time workforce questions the neutrality of the 40-hour standard in part because its effect is disadvantageous to

[10] A particularly lucid and comprehensive description of androcentric standards in the law and in the larger society is given by Sandra Lipsitz Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* 39-79, 183-91 (1993).

[11] *See* Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837-49 (1990).

women workers as a class.[12] The standard of 40 hours, it seems, is not a magic number but reflects the average amount of time that *men* work. The standard for everyone is thus premised on the norm for only part of the working population. The 40-hour standard may look objective, because it is applied alike to male and female workers. What is hidden, however, is that under the standard, men's experience is privileged, and far more women than men are adversely affected by the definition of full-time work.

The implicit male bias in the part-time work standard is not surprising if we consider that it originated when there were many fewer women in the labor force and only a tiny percentage of women occupied management positions. This kind of systematic structuring of institutions to reflect the viewpoint and position of those in power is most often invisible. In fact, male-centered standards derive their force from being uncritically accepted as universal in nature. Challenging them is particularly difficult once they have gained legitimacy as an "objective" way of categorizing people and organizing people's activities and work.

The feminist critique of objectivity in the law can be seen in almost all substantive contexts. A forceful version of the critique comes from Catharine MacKinnon, who claims that implicit male bias pervades every facet of modern life:

> [V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other — their wars and rulership — defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.[13]

Feminist scholarship responding to implicit male bias and male norms in the law is sometimes *deconstructive*, that is, it shows at what

[12] I analyze this example in Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. Rev. 709, 713 (1986).

[13] Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in *Feminism Unmodified: Discourses on Life and Law* 36 (1987) (footnotes omitted).

particular points the standards are male-centered and how they fail to take account of the situation of women. It can also be *reconstructive*, insofar as it is aimed at developing more inclusive standards that fairly represent the diverse interests of all those affected by the law.[14]

4. *Double Binds and Dilemmas of Difference*

In contrast to the popular media, which often depict women as having already attained equality with men, feminist scholarship is far more skeptical about what passes for progress. After more than four decades of sustained feminist criticism of law, feminists are troubled by the resiliency of sexism in society and have not been able to forge a consensus about how to approach or solve many of the critical problems women face. One reason there is so much debate among feminists about strategies for challenging sexism in the law is that, as a subordinated group, women are often confronted with "double binds," or as the philosopher Marilyn Frye puts it, "situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation."[15] Frye sees the double bind as one of the "most characteristic and ubiquitous features of the world as experienced by oppressed people . . ." Being caught in a double bind or "catch-22" means that women constantly face dilemmas in which they are forced to predict which less-than-ideal course of action will prove to be the least hazardous.

The case of Ann Hopkins against Price Waterhouse[16] presents a classic example of a double bind. Hopkins was an ambitious female manager in a large accounting firm who consistently outperformed men on a number of conventional standards, such as generating high-paying clients, working extra-long billable hours, and gaining client approval. She nevertheless was denied a partnership in the firm because the male partners objected to her lack of social graces and her unfeminine style. For their taste, she was too aggressive, abrasive, and macho. The double bind for Hopkins arose because even if she had

[14] *See* Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 58-72 (1988).

[15] Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* 2 (1983).

[16] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). For a fuller discussion of the case and its implications for feminist theory, see Martha Chamallas, Of Glass Ceilings, Sex Stereotypes, and Mixed Motives: The Story of *Price Waterhouse v. Hopkins, in Women and the Law Stories* 307 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

been able to soften and feminize her appearance and style, she might still not have made partner. The problem is that in male-dominated settings such as elite accounting firms, feminine women are often regarded as lacking the competitiveness, technical competence, and ambition to make the grade. Either course of action was precarious for Hopkins because there is no predetermined script for success for women in such contexts.

In the short run, Hopkins was able to evade the double bind. She prevailed on her Title VII claim of sex discrimination when the United States Supreme Court ruled that it was unlawful to demand that a woman (but not a man) be feminine and yet still possess the traditional masculine traits associated with partners in large accounting firms. Hopkins's predicament, however, demonstrates the double bind of professional women who are required to conform simultaneously to conflicting stereotypes.

At a broader level, Martha Minow has theorized about the double bind that faces reformers who want to correct for past exclusions by opening institutions to "different" groups of people.[17] The dilemma stems from the fact that most large institutions follow practices and policies saturated with implicit male bias. Simply to follow these "neutral" rules and ignore gender reproduces patterns of exclusion and paradoxically assures that gender will continue to matter in the world. However, to pursue a different strategy and implement an "affirmative action" program that focuses explicitly on gender also may backfire. The danger of taking gender into account is that it will stigmatize the group as different and inferior, and thereby reinforce gender difference. This "dilemma of difference" means that neither ignoring nor highlighting gender will necessarily translate into progress for women. Instead, feminists find themselves grappling with how to fundamentally alter the way people think about difference and how to resist the cultural tendency to equate difference with inferiority.

5. Reproducing Patterns of Dominance

A phenomenon related to the double bind and identified by feminist scholars as contributing to the resiliency of sexism is the

[17] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* 20 (1990).

reproduction — in altered or updated forms — of patterns of male dominance. The theme of some recent feminist scholarship can be described as "the more things change, the more they stay the same." In fields as diverse as employment law, family law, and tort law, feminists have looked behind claims of progress to uncover important continuities in women's subordinate status. The point often made is that change is not inherently progressive and that even substantial shifts in rhetoric and rules may not bring about major improvements in women's lives.

In the realm of employment, for example, feminists have long sought ways to integrate occupations as a way of improving the status and pay of women workers who tend to be concentrated in predominantly "female" jobs. Challenging gender hierarchy in employment has been especially tricky, however, because "gains" in integrating occupations can easily be offset by counter-trends, including the reconfiguration of jobs. Barbara Reskin, a sociologist who specializes in occupational segregation, has questioned the conventional wisdom that great progress has been made in women's employment status.[18] Her empirical research indicates that the apparent trend toward sex integration of occupations is misleading because there is also a trend toward sex segregation of jobs within occupations, with the more elite jobs being held predominantly by men. For example, women's entry into the field of pharmacy has been confined largely to the retail sector, while men work in the more lucrative and more prestigious commercial, research, and academic settings. Reskin's research also shows that what might at first seem to be "integration" of an occupation may actually be the beginning of job shifting, that is, changing a male occupation into a predominantly female occupation, with lower pay and less autonomy. Feminization has occurred in fields that have already started to deteriorate in status.[19] The net result may be that even as women successfully enter formerly male-dominated fields, they remain disadvantaged as workers relative to men.

Reva Siegel's scholarship on domestic violence also emphasizes how the law has managed to continue to immunize this type of abuse of

[18] Barbara F. Reskin, Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work, 2 Gender & Soc'y 58 (1988).

[19] Barbara F. Reskin & Patricia Roos, *Job Queues, Gender Queues: Explaining Women's Inroads into Male Occupations* 11-15 (1990).

women, despite substantial reforms in formal doctrine.[20] The early legal doctrine of "chastisement" officially gave husbands the right to use a "reasonable" degree of force to compel their wives to submit to their authority. When this right to use force was abolished, however, courts developed the doctrine of "family privacy" to justify their refusal to intervene in cases charging domestic violence. The new rhetoric of privacy had the effect of continuing the older regime of male prerogative, albeit in gentler, less direct terms. Feminist scholarship such as Siegel's historical study recognizes the possibility that massive changes can occur over time without fundamentally altering basic gender hierarchies. The emphasis is on uncovering how male dominance is reproduced and how new rationales and discourses develop to justify the continuing gender disparities.

Finally, Ellen Bublick traces this phenomenon in her pathbreaking study of third-party rape cases, in which rape victims sue landlords or other institutional defendants for failing to detect or remedy dangerous conditions.[21] In such cases courts must decide whether to reduce or deny recovery to a rape victim because of her own "unreasonable" failure to protect herself against the risk of rape by, for example, going out alone at night to hail a cab. Applying feminist principles to question methods of apportioning fault and damages, Bublick uncovers sexist assumptions behind revised rules on comparative fault, showing how they tacitly carry over traditional notions that women have primary responsibility for preventing their own rapes and reinforce a discriminatory status quo in which rape and the fear of rape are pervasive features of women's lives. Her dissection of how the various states have dealt with victim "fault" in third-party rape cases after making the transition to a comparative fault system shows how gender hierarchy can be reproduced through new rules and procedures and does not always depend on retention of older doctrines.

6. *Unpacking Choice*

In contemporary society, women's inequality presents a paradox. Many who would endorse gender equality as an ideal nevertheless resist the

[20] Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117 (1996). Siegel is discussed infra at pp. 344-47.

[21] Ellen M. Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, 99 Colum. L. Rev. 1413 (1999).

idea that discrimination is the principal cause of women's inequality. Instead, women's subordinate status is often ascribed to women's own choices, and women are held responsible or blamed for their own disadvantages. The old notion that women are not intelligent enough or lack the moral accountability to be leaders in business, politics, or the academy has been replaced by justifications centered on women's choice. This explanation of women's disadvantage is particularly prominent in the discourse on women in the workplace. The conventional wisdom is that because women place more importance on their families, they voluntarily choose to subordinate their career and job aspirations for the sake of their children or their partners. This rationale allows employers to make the paradoxical claim that women actually prefer lower-paying jobs or jobs that offer little opportunity for advancement.

A growing body of feminist scholarship is devoted to unpacking the concept of "choice" and investigating the constraints under which women commonly make choices. The very use of the word "choice" implies that the actor has alternatives, and often suggests that the choice represents the actor's authentic preference. Moreover, in law, responsibility is commonly placed on the person who chooses. An employer, for example, will typically not be responsible for the disparate choices of male and female workers because the sex-linked pattern is thought not to be caused by the employer's own actions. Instead, the law typically presupposes that women's choices derive either from biological imperatives, especially the desire to nurture, or early socialization, which supposedly motivates women to pursue traditionally female activities as adults.

Feminists who resist this emphasis on choice often point to the role that institutional structures and culture play in shaping women's choices. The counter-theory is that choices are not made in a vacuum, and that in making choices, women are influenced by the opportunities presented to them and the dominant cultural attitudes of those with whom they interact. Scholars such as Vicki Schultz explain how certain blue-collar jobs are still regarded as "masculine" and inappropriate for women.[22] This cultural coding of jobs is reinforced by the persistent and often virulent harassment of women who try to break through

[22] Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1802 (1990).

gender barriers. Absent some affirmative indication by employers that women are welcome and will be supported in nontraditional work—through, for example, a special training and recruitment program for women—it is likely that the percentage of women in such jobs will remain extremely low, that women will "choose" not to enter this line of work or will quit once they realize what they face.

This account of why women are unrepresented in blue-collar jobs places less emphasis on women's motivations and orientations before they enter the workplace and more emphasis on experiences women have as adult workers. This shift in emphasis complicates the notion of choice, making it a function of present opportunities and contexts as well as preexisting preferences. The shift also means that forces outside the psyche of the individual woman—employer policies, legal programs, employee training—help shape a woman's decisions and bear some responsibility for the patterns that emerge. The critical stance toward choice liberates feminists to recognize women's *agency*, that is, the capacity for self-direction, without denying or minimizing the distinctive constraints placed on women in a male-dominated society.

B. SUMMARY

The six *moves* described above are theoretical tools that legal feminists have found useful to critique legal doctrines and categories in each of the three generations of feminist legal theory. As I will define them, the generations reflect broader cultural and political struggles that emerged most prominently in the specific period under study, particularly the right of access to formerly male-dominated institutions, the treatment of pregnant women and mothers under the law, and the connection between gender discrimination and discrimination based on other subordinating identities, such as race or sexual orientation. During each period, the six theoretical moves enabled feminists to think more deeply about the basic concepts of equality, difference, and identity that continue to shape law and legal discourse in this area.