1-1-1991

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Recommended Citation
77 Iowa L. Rev. 19

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INTRODUCTION

Feminist legal scholarship comes in many shapes and sizes. It can include traditional legal scholarship focused on areas of concern to feminists, for example, marital property, child custody, sexual harassment, and reproductive freedom. It can include legal histories of the struggle for women's rights and biographies of early women lawyers.[1] Scholarship of these types has been with us for some time, although it has become more plentiful with the increase in the number of female legal academics. There is also a new brand of feminist legal scholarship. I refer to that body of theoretical work popularly known as feminist jurisprudence or feminist legal thought. The question I raise in this Essay is the following: How is this new feminist scholarship being received by the legal academy?

My working hypothesis is that, despite superficial signs of acceptance,[2] the legal academy as a whole has remained skeptical about the value of feminist scholarship.[3] The purpose of this Essay is to explore some of the manifestations of that skepticism and to suggest some of its causes. In Part I, I will explain further what I mean by "feminist jurisprudence" and provide a quick survey of some of the substantive issues currently being debated by feminist legal theorists.[4] My intent is to give readers who are unfamiliar with feminist scholarship some feel for its richness and diversity.

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1. *See, e.g.*, Barbara Babcock & Clara S. Foltz, First Woman, 30 Ariz. L. Rev. 673 (1988) (telling the story of California's first woman lawyer); *see also* Herma Hill Kay, The Future of Women Law Professors, 77 Iowa L. Rev. 5 (1991) (telling the stories of the first women law professors in this country).

2. For example, most prominent law reviews have published at least one "feminist jurisprudence" article. *See* Paul M. George & Susan McGlamery, Women and Legal Scholarship: A Bibliography, 77 Iowa L. Rev. 87 (1991). In addition, the Association of American Law Schools (AALS) included "feminist jurisprudence" as an example of one of the new trends in legal education at its annual meeting several years ago. AALS Annual Meeting, Los Angeles, Jan. 1987.

3. Richard Delgado focuses on this skepticism in a recent article in which he analyzes the academy's marginalization of "two groups of insurgent scholars, Critical Race Theorists and radical feminists." *See* Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. Pa. L. Rev. (forthcoming Apr. 1992) (manuscript at 5, on file with the University of Iowa College of Law Library).

4. *See* infra notes 6-52 and accompanying text.

Then, in Part II, I will address the two questions that are central to this paper: (1) Is feminist jurisprudence being taken seriously by the legal academy? and (2) If not, why not?[5]

I. What Is Feminist Jurisprudence?

A. *Definitional Problems*

It is difficult enough to define "feminism," let alone "feminist jurisprudence." No single definition could possibly capture the richness and diversity of feminist thought. Nonetheless, I offer the following as a starting point: Feminist legal scholarship seeks to analyze the law's effect on women as a class.[6] Furthermore, the 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. "Feminist jurisprudence," as a subcategory of feminist legal scholarship, refers loosely to the more theoretical writings of feminist legal scholars.

As a general proposition, I take the position that legal scholarship is not feminist unless it is grounded in women's experience, an experience which produces a feminist point of view. Substantively, there can be differences of opinion among feminists,[7] differences that result from different points of view. I do not take the position either that there is one correct feminist viewpoint or that only women can develop a feminist viewpoint. I focus on method rather than substance. One must listen carefully to women's life stories to develop *a* feminist point of view. It may be easier to develop a feminist point of view if you are a woman listener because it is often easier to understand stories similar to your own. This commonality of experience can be especially helpful to a listener when the stories are not part of the dominant discourse.[8] Nonetheless, women often listen to stories of other women who are quite different from themselves. We listen to each other's life experiences across race, class, and other lines. And I believe that men can, and sometimes do, listen across gender lines.

In its broadest sense, the feminist project is about dismantling the sex-gender system, a system that historically has privileged the male over the female. Law is part of this system, indeed a central part. Uncovering the ways in which law has privileged male over female is the immediate goal of much feminist legal writing. Listening to women is an essential step in this project.

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5. *See* infra notes 53-85 and accompanying text.

6. Katharine Bartlett has called this method "asking the woman question." *See* Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 831 (1990).

7. *See* infra notes 20-25 and accompanying text.

8. Thus, it may be that men need to work harder to hear women's stories because at least some men's stories are familiar to all. They are part of the public discourse in that they are more widely told by male authors, filmmakers, and scholars. Male stories are also more visible in our history books. Some men's stories are less visible to some women. For example, the stories of African-American or Native American men are less visible to white women.

To some, current feminist writing may appear to privilege the female voice over the male. The feminist project may appear to be aimed at a reversal of the hierarchy in the sex-gender system, a reversal that puts women on top. This is a serious and dangerous misunderstanding. Feminism aims ultimately to eliminate the hierarchy completely, to maximize equal respect for all human beings, and to ensure that previously silenced points of view are given equal voice.

There is much misunderstanding about feminist legal scholarship that has affected its reception in the legal academy. The values of the legal academy have been overly determined by a male point of view, which is not surprising when one considers that the institution has been predominantly male for so long. My aim in this Essay is to begin a conversation that might help reduce the misunderstanding and create some space for a feminist point of view in the academy.

For purposes of this Essay, I refer to two basic categories of feminist jurisprudential scholarship: (1) "Abstract theory," and (2) "connected scholarship." The starting point for all feminist theory is women's experience. Theory is created by moving beyond the specifics of individual women's experiences, that is, by generalizing from those experiences. I envision these two categories of feminist legal scholarship as occurring in layers above the ground. At the lowest layer, next to the earth, are pure descriptions of women's experience. As a scholar begins to build theory from those descriptions, she will abstract (e.g., separate) selected facts from their roots in the ground. The more generalized the theory becomes, the more abstracted from its roots it becomes. The scholarship at the top layer, in my categorization, is "abstract theory." Some would call this category "grand theory."[9] At a lower layer, closer to the ground, is the scholarship I would classify as "connected scholarship." Scholarship falling into this category, although sufficiently abstracted from facts to become theory, is also still sufficiently connected to those facts that it reveals the experience upon which the theory is based.[10]

Some feminist legal scholars engage in both sorts of scholarship. For example, some of Catharine MacKinnon's work is so clearly connected to the experiential data of women's lives that the experience itself is revealed to readers.[11] However, her more recent scholarship is less explicit about women's experience.[12] Thus, I would place this recent work in the "abstract

9. *See* Frances Olsen, Feminist Theory in Grand Style, 89 Colum. L. Rev. 1147 (1989) (describing Catherine MacKinnon's work). *See also* Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 7 (1991) ("Feminist legal scholarship . . . seems to be drifting toward abstract grand theory presentations.").

10. *Cf.* Fineman, supra note 9, at 7 (describing her approach to legal theory as a "theory of the middle range," a phrase she attributes to Robert Merton).

11. For an especially good example, see Chapter 3 in Catharine A. MacKinnon, The Sexual Harassment of Working Women (1979).

12. *Compare* id. at 143-213 (deriving a theory of sexual harassment as a form of sex discrimination from the reported and described real life experiences of women) *with* Catharine A. MacKinnon, Feminism Unmodified 81-84 (1987) [hereinafter MacKinnon, Feminism Unmodified] (theorizing about rape on the basis of comments she has heard from other women, but giving no details of her sources).

theory" category. Robin West, Christine Littleton, and Frances Olsen have produced a significant amount of feminist legal scholarship, some of it in the "abstract theory" category and some of it in the "connected scholarship" category.[13] Martha Fineman and Carrie Menkel-Meadow are feminist legal scholars who have more consistently revealed the empirical data upon which their theories are built, placing them more solidly in the "connected scholarship" category.[14] Other forms of "connected scholarship" include creative telling of the stories behind the theory, whether those stories are real,[15] are derived from literature,[16] or are some combination of the real and the imagined.[17]

Both categories of feminist jurisprudential scholarship face resistance in the predominantly male legal academy. "Connected" feminist scholarship is often trivialized. Some academics argue it is too "fact oriented." "Abstract" feminist scholarship, on the other hand, is sometimes criticized for being "too theoretical." There exists a single difficulty that lies beneath both of these complaints. I call this difficulty the problem of "gendered misunderstanding." Coupled with the expectations that our male colleagues have of legal scholarship, "gendered misunderstanding" causes some academics to view the facts of women's lives as unconnected to the great jurisprudential issues of our time.[18] "Gendered misunderstanding" also leads to a misreading of much abstract feminist theory. Part II of this

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13. *Compare* Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279 (1987) [hereinafter Littleton, Reconstructing] ("abstract theory" of equality) *with* Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23 [hereinafter Littleton, Women's Experience] ("connected scholarship" telling stories of battered women); *compare* Frances E. Olsen, The Sex of Law, in The Politics of Law 453 (D. Kairys ed., 1990) ("abstract theory") *with* Frances E. Olsen, From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895, 84 Mich. L. Rev. 1518 (1986) ("connected scholarship" providing historical context for early sex discrimination cases); *compare* Robin L. West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1987) ("abstract theory" recognizing women's experience without retelling it) *with* 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) ("connected scholarship" telling stories of women's lives).

14. *See, e.g.*, Martha Fineman, Dominant Discourse Professional Language and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727 (1988); 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 [hereinafter Fineman, Implementing Equality]; Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 Berkeley Women's L.J. 39 (1985); Fineman, supra note 9.

15. For an especially good example, see Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

16. *See* Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 597 (1990).

17. *See* Stephanie M. Wildman, Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion, 64 Tul. L. Rev. 1625 (1990).

18. For example, although Roe v. Wade, 410 U.S. 113 (1973), has been central to Supreme Court jurisprudence in recent years, the academy's attention has been captured by the abstract question of "judicial review," rather than the way in which the substance of abortion decisions plays itself out in the actual lives of real women.

Essay addresses the problem of "gendered misunderstanding."[19]

B. *The Substance of Feminist Jurisprudence*

1. *The Sameness-Difference Question*

The term "feminist jurisprudence" arose in articles questioning whether the equality theory required that women be treated the same as men, or whether the equality theory should ever recognize women's differences from men.[20] Much feminist legal scholarship of the 1980s focused on this question of "sameness versus difference." Liberal feminists[21] argued that it is better to stress the similarities of men and women and to minimize the differences.[22] By contrast, radical feminists argued against the assimilation that "sameness" arguments tended to produce and called for equality theories that recognized gender differences.[23] Catharine MacKinnon argued that we ought to abandon the rhetoric of equality altogether, because it invariably compared women to men, using men as the norm.[24] In her view, the important difference between women and men is the difference in power. Using the rhetoric of dominance, radical feminists in the MacKinnon camp advocate the replacement of equality with the antisubordination theory, which is aimed at ending the difference in power.[25]

Although the "sameness-difference" debate continues,[26] it is no longer the central issue in feminist jurisprudence. Most feminists in law agree legal constructs have been created by patriarchal forces that have excluded

19. *See* infra notes 72-85 and accompanying text.

20. *See* Ann Scales, The Emergence of Feminist Jurisprudence, 95 Yale L.J. 1373 (1986) (shifting ground from her earlier work and aligning herself with Catharine MacKinnon's critique of legal doctrine, including equality theory, as male constructed); Ann Scales, Towards a Feminist Jurisprudence, 56 Ind. L.J. 375 (1981) (arguing that equality theory ought to recognize that women are different from men with respect to pregnancy); *see also* Catharine A. MacKinnon, Toward Feminist Jurisprudence, 34 Stan. L. Rev. 703, 723-34 (1982) (discussing equality theory in the context of a book review of Ann Jones, Women Who Kill (1980)).

21. The theory of liberal feminists is rooted in the belief that women, as well as men, are rational, rights-bearing, autonomous human beings. Liberal feminist theories tend to emphasize individuals and their rights. By contrast, radical feminists focus on women as a class. For a more complete discussion of the various schools of feminist thought, see Patricia A. Cain, Feminism and the Limits of Equality, 24 Ga. L. Rev. 803 (1990).

22. *See, e.g.*, Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-85) [hereinafter Williams, Equality's Riddle]; Wendy W. Williams, Notes From A First Generation, 1989 U. Chi. Legal F. 99.

23. *See, e.g.*, Littleton, Reconstructing, supra note 13, at 1279; Littleton, Women's Experience, supra note 13, at 23.

24. "A built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it." MacKinnon, Feminism Unmodified, supra note 12, at 33.

25. *See* Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003 (1986).

26. For an excellent interdisciplinary collection of essays on this issue, see Theoretical Perspectives on Sexual Difference (Deborah L. Rhode ed., 1990).

women. Thus, use of the equality theory, which has been constructed by "masculine jurisprudence," (i.e., "sameness" arguments) necessarily reinforces patriarchal values. And yet feminist litigators also understand that if they reject "sameness" arguments in favor of "difference" arguments in a court system still embedded in patriarchy, they run the risk of losing their client's cases. What to argue ("sameness" or "difference") and when to argue it has become primarily a question of strategy.[27]

2. *Feminist Method*

More recent debates in feminist legal scholarship focus on questions of method. The remainder of Part II sketches a brief overview of the feminist understanding of method. It also examines two questions arising in connection with method: The question of authentic voice and the question of essentialism.

Consciousness-raising often is cited as the original feminist method, or at least the most genuine feminist method. In her recent article, *Feminist Legal Methods*,[28] Katharine Bartlett discusses the role of consciousness-raising in building legal theory and proposes other views of feminist method that might be used in the law.[29] Consciousness-raising, as feminist method, is central to much of Catharine MacKinnon's work,[30] and its value as method has been discussed by many feminist legal scholars.[31]

Consciousness-raising is a practice associated with certain feminist groups of the 1970s. These were small groups of women sometimes consisting of friends, but sometimes of strangers, and often including women from diverse backgrounds.[32] These groups met regularly to discuss topics related to their personal lives as women. There are two main values associated with these consciousness-raising groups: (1) They helped to identify previously hidden truths about women's experience, and (2) the process itself was empowering for the individual participants.

The feminist practice of consciousness-raising of the 1970s meant listening to other women's stories and finding the commonalities. From

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27. *See* Martha Minow, Beyond Universality, 1989 U. Chi. Legal F. 115, 134-35 [hereinafter Minow, Beyond Universality]; *see also* Cain, supra note 21, at 803.

28. *See* Bartlett, supra note 6.

29. Other methods include asking the woman question and practical reasoning. *See* Bartlett, supra note 6, at 831.

30. For MacKinnon's most extensive discussion of consciousness-raising as feminist method, see Catharine A. MacKinnon, Toward a Feminist Theory of the State 83-105 (1989) [hereinafter MacKinnon, Toward a Feminist Theory].

31. *See, e.g*, Christine A. Littleton, Feminist Jurisprudence: The Difference Method Makes, 41 Stan. L. Rev. 751 (1989) (reviewing Catharine A. MacKinnon, Feminism Unmodified (1987)); *see also* Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 191, 195-97 (1989-90).

32. Early consciousness-raising groups were an outgrowth of "rap sessions" held by radical women who had participated in leftist organizations of the 1960s. Consciousness-raising, as feminist method, appears to have originated with a group known as the New York Radical Women, who presented a paper explaining and defending the practice at the 1968 National Women's Liberation Conference. *See* Anita Shreve, Women Together, Women Alone 10 (1989).

these common stories, feminists gained new insights about the role of gender in women's lives. As a legal method, consciousness-raising has come to stand for any form of research or legal argument that begins with women's experience. A difficulty arises, however, in defining women's experience. More specifically, if consciousness-raising is about listening to the experiences of women in order to discover new truths and build new theories, then to which women do we listen?

Some feminists believe consciousness-raising possesses inherent limitations to its usefulness. The limitations stem from the fact that consciousness-raising relies on the ability of individual women to identify their commonalities. Consciousness-raising groups may have had their strongest impact on women who were sufficiently similar in class and ethnic background and who could recognize their lives in the lives of other group members.

If this view of consciousness-raising is correct, is it sufficient for theorists to rely on truths about women's experience learned in consciousness-raising groups of the 1970s? Or, now that we are more aware of the class and race bias that permeated the women's movement of the 1970s, must we dig deeper for stories of women's experience that may not have been uncovered yet? If we are to dig deeper, what sort of research agenda might that entail for feminists in law?

There is a related question about listening to women and building feminist theory. Because feminist scholarship focuses on the effect of gender in our society, we ought to listen to the women who can tell us the most about gender. But who are they? For example, will we learn more about the problem of gender if we listen to the common experiences of white, middle-class, heterosexual women—the rationale for such a focus being that such women suffer only one oppression, sexism? Or, will we learn more by listening to women of color, poor women, and lesbians because they are more oppressed? Does the voice of the most oppressed count more when one is trying to build theories to end oppression?[33]

3. Authentic Voice

The preceding discussion of feminist method raises another problem which I identify as "the problem of authentic voice." The question here is, after we have listened to women, whom do we believe? Who speaks the truth? For example, some women describe their sexual experiences as episodes of sexual subordination, while other women describe the same sorts of experiences as erotic. Who is speaking the truth?

This problem is reflected in an exchange that took place between Carol Gilligan[34] and Catharine MacKinnon some years ago at the Buffalo

33. *See* Bell Hooks, Feminist Theory: From Margin to Center 15 (1984); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324-26 (1987) [hereinafter Matsuda, Looking to the Bottom].

34. *See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 18-19 (1982). This book challenges earlier research by Kohlberg on the moral development of children. Gilligan's work suggests that Kohlberg's research shows a male bias, that his categories of development are male constructed, and that women often speak "in a different voice" Kohlberg does not hear. Gilligan's work spurred a wide range of feminist

Law School.[35] Gilligan said that women speak in a different voice, a voice embracing such values as care and connection to other human beings. She took the position that this different voice ought to be valued. MacKinnon responded by observing that women do not speak in their own voices. Their speech is affected by the fact that men have all the power—or as MacKinnon put it—"his foot is on her throat!"[36]

These two perspectives appear to set up a dilemma. We are to listen to women, but, if we believe MacKinnon, what women say is only what men make them say. We should not build moral truths from this different voice.[37] Some call this the problem of false consciousness and argue that consciousness-raising serves to combat false consciousness and helps to develop critical consciousness.[38] According to this view, those of us who have developed critical consciousness will know which women speak the truth because we possess the special insight that comes from recognizing our own oppression. By contrast, some feminists are unwilling to claim that any women are deluded and thus argue all perspectives held by females are equally true.[39]

Yet other feminists, including MacKinnon,[40] refuse to claim either

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critiques in various academic disciplines, including law, which challenged the dominant "male voice." For legal theorists influenced by Gilligan's early work, see Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 Berkeley Women's L.J. 39 (1985) and West, Jurisprudence and Gender, supra note 13.

35. Ellen C. Dubois et al., Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 74-75 (1985).

36. Id. at 74. MacKinnon's image of his foot on her throat may well be inspired by the words of the nineteenth century feminist, Sarah Grimke: "I ask no favors for my sex . . . . All I ask our brethren is, that they will take their feet from off our necks, and permit us to stand upright . . . ." Gerda Lerner, The Grimke Sisters from South Carolina 192 (1967) (quoting Sarah Grimke, Letters on Equality 10 (date unavailable)).

37. For example, MacKinnon writes that

> [b]y establishing that women reason differently from men on moral questions, [Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use. . . . Women may have an approach to moral reasoning, but it is an approach made both of what is *and of what is not allowed to be.*

MacKinnon, Toward a Feminist Theory, supra note 30, at 51 (emphasis added).

38. *See* Matsuda, Looking to the Bottom, supra note 33, at 359-62, nn.147-57.

39. *See* Lorraine Code, Experience Knowledge, and Responsibility, *in* Women, Knowledge, and Reality: Explorations in Feminist Philosophy 157, 169 (Ann Garry & Marilyn Pearsall eds., 1989) (discussing use of stories in building knowledge but noting that stories "are not necessarily *truer*" than stereotypes in the empirical objective sense of the word true); Lynn Hankinson Nelson, Who Knows: From Quine to a Feminist Empiricism 25-28 (1990) (discussing different theories of truth). I agree with Nelson that there is no point in making truth claims about individual experiences. Instead, one must explain how particular experience contributes to our normative theories. Kathryn Abrams makes a similar point when she argues in favor of feminist narrative scholarship that "stress[es] the elaboration of the normative content of narratives." Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 1045 (1991).

40. Because MacKinnon's theory is similar to Marxism in several respects, she has sometimes been associated with the "false consciousness" explanation that some women

horn of the dilemma. They argue that to ask "who speaks the truth?" is inappropriate. To ask the question is to adopt a patriarchal view of truth as something that is objectively verifiable. The point of feminist critique is to question all basic premises of the patriarchy, including its objectivist epistemology. Nor should feminism collapse into ethical relativism, for that too assumes there is a contrary position, ethical objectivism. While it is true, in a sense, that each woman speaks her own truth, feminism is not totally subjective. All women's experience occurs within a system of male dominance and thus tells us something about that system. The point of feminist method is to "uncover and claim as valid"[41] all female experience—experience which has been devalued by the sex-gender system.

This latter position is difficult to explain in a world which values objectivity and a coherent rule of law, as does the legal academy. Yet, feminist practice, by rejecting objectivity and by paying attention to context and multiple perspectives, can uncover the partiality and subjectivity of supposedly objective legal truths. There should be room for feminist practice of this sort within the legal academy, for, as Martha Minow has claimed, "[T]here is . . . more than one context relevant to evaluating fairness. This, of course, is a basic insight informing the adversary system, and democracy itself."[42]

The debate over epistemology continues within the feminist community. Some feminists worry that a complete rejection of objectivity will undercut the strength of feminist claims about what is morally right. To resolve this debate, feminists would have to agree upon a common epistemological theory,[43] an event unlikely to occur any time in the near future.[44]

4. Essentialism[45]

Essentialism can have a number of different meanings, and feminists are not always clear about which meaning they are attacking or, less frequently, adopting. In ancient realist philosophies "essentialism" means

misperceive their own reality. *See generally* Olsen, supra note 9, at 1168 (comparing MacKinnon's theory to Marxism and noting that "[w]orkers and wives may suffer from 'false consciousness' if they misperceive their true interests."). MacKinnon, however, explicitly rejects this "false consciousness." MacKinnon, Toward a Feminist Theory, supra note 30, at 115-16.

41. MacKinnon, Toward a Feminist Theory, supra note 30, at 116.

42. Minow, Beyond Universality, supra note 27, at 137.

43. *See* Bartlett, supra note 6, at 829 (discussing various epistemological theories in feminist legal methods); *see also* Barbara Flagg, Women's Narratives, Women's Story, 59 U. Cin. L. Rev. 147 (1990) (reviewing Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989)); MacKinnon, Toward a Feminist Theory, supra note 30.

44. *See* Marsha P. Hanen, Feminism, Objectivity, and Legal Truth, in Feminist Perspectives 29, 44 (Lorraine Code et al. eds., 1988) (concluding it is too early to develop new "more humane and co-operative forms of knowledge" because we are still too busy deconstructing the objective truths of the past). *But see* Nelson, supra note 39, at 37-42 (arguing against "standpoint theories" of knowledge in favor of a concept of knowledge derived from multiple experiences and verified by communities).

45. Judith Resnik also raises the issue of essentialism in this symposium. *See* Judith Resnik, Visible on "Women's Issues," 77 Iowa L. Rev. 41, 48 (1991).

that all things have an existence independent of human thought and have a true inner essence.[46] The question for feminists is whether all women share some natural essence of womanhood, an essence that is independent of experience.[47] Is there such a thing as the essentially female? When we engage in the feminist method of consciousness-raising, are we searching for knowledge about the essential nature of women? And if "woman" does have a true inner essence, what does the discovery of this essence mean for individual women? What does it mean for legal theories about woman's role in society?

Many feminists reject the idea that women do in fact share something called "woman's nature." These feminists subscribe to the social construction theory that "woman" as a category is created by society. There is no hidden inner nature to be discovered beneath the social construction. Rather, there is only the possibility of a different construction, the possibility of creating a new definition. Some feminists who subscribe fully to the social construction theory question whether there can be a unitary category "woman" which accurately describes all women. Focusing on the importance of experience in constructing the category, these feminists ask whether there is an *essential* woman's experience. Angela Harris points out how the search for a unitary concept "woman" has tended to privilege white women's experience over black women's experience.[48] I have argued elsewhere that theories built on the notion of *a* female experience have been resoundingly silent about lesbian experience.[49] Thus, for social constructionists, the attack on essentialism is really an attack on false universals.[50]

Drucilla Cornell has attempted to rescue the concept of the essentially feminine from charges of biological determinism or naturalism, as well as from the claim that the concept results in false universalization.[51] Cornell's feminist project seeks to construct a better image of the feminine, one that transcends nature and includes possibilities for all women. She calls her project "ethical feminism" and distinguishes it from the feminism of Robin West and Catharine MacKinnon.

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46. In Plato's notion of forms, for example, the circle's essence is its "sphere-ness." *See* 3 Dialogues of Plato, Theaetetus 287 (B. Jowett trans., 1953); 2 Dialogues of Plato, Republic 369, (B. Jowett trans., 1953); 1 Dialogues of Plato, Phaedo 449, 459-60 (B. Jowett trans., 1937).

47. *See, e.g.*, Robin West, Feminism, Critical Social Theory and Law, 1989 U. Chi. Legal F. 59, 88-96 (suggesting certain inner essences of woman are destroyed by patriarchy).

48. Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).

49. *See* Cain, supra note 31, at 191.

50. *See* Minow, Beyond Universality, supra note 27, at 130-31 (arguing that for feminism to take all women seriously, it should respect "women's own conceptions of themselves and their interests" rather than forcing them to share an agreed upon category called "woman").

51. *See* Drucilla Cornell, The Doubly-Prized World: Myth, Allegory and the Feminine, 75 Cornell L. Rev. 644 (1990); *see also* Susan Williams, Feminism's Search for the Feminine: Essentialism, Utopianism, and Community, 75 Cornell L. Rev. 700 (1990) (replying to Professor Cornell and comparing Cornell's project to communitarian political theorists such as Frank Michelman and Cass Sunstein).

The debate over essentialism has accomplished some consciousness-raising about the differences among us as women. I think that is good. Some theorists fear, however, that by focusing on differences among us, the debate will divide us politically and obscure the real gender issues that all women face.[52]

C. *Summary*

Feminist method, authentic voice, and essentialism are only some of the interesting substantive issues currently being debated among feminist legal scholars. As with feminist scholarship on equality, the current debates among feminist legal scholars reflect a diversity of substantive viewpoints. No one familiar with this literature could claim that all feminists believe women are naturally caring and men are not, or that all feminists reject the notion of verifiable truth. Yet these are two of the most common criticisms about feminist scholarship. Cursory readings of scattered selections of feminist scholarship are likely to result in serious misunderstandings about what is a very rich and diverse body of work.

II. How Is Feminist Jurisprudence Perceived by the Legal Academy?

A. *Is Feminist Jurisprudence Taken Seriously?*

At the beginning of this Essay, I divided feminist jurisprudential scholarship into two categories: (1) "Abstract theory," and (2) "connected scholarship."[53] Although different institutional barriers to the production of each category exist, there is no meaningful difference in the degree of institutional acceptance enjoyed by either category. As a general rule, institutional responses are greatly influenced by those in power. Thus, male law professors largely determine the institutional response to feminist scholarship. I would characterize the institutional response, law review editors aside, as ranging from silent dismissal to polite questions revealing a significant lack of understanding.[54] There are individual men at individual institutions who are neither silent nor dismissive, but they are rare. For example, Cass Sunstein has cited feminist legal scholarship extensively and has written a positive review of Catharine MacKinnon's book, *Feminism Unmodified*.[55] Carl Tobias has relied heavily on feminist writings in his

52. *See* Karen Offen, Feminism and Sexual Difference in Historical Perspective, *in* Theoretical Perspectives on Sexual Differences 13 (Deborah L. Rhode ed., 1990); Martha L. Fineman, Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship, 42 U. Fla. L. Rev. 25, 40 (1990).

53. *See* supra notes 9-18 and accompanying text.

54. My characterization is not unique. Martha Minow has similarly observed a lack of attention to feminist legal scholarship by nonfeminist scholars and has suggested that the silence conveys a critique of its own. Minow, Beyond Universality, supra note 27, at 117. "Inattention itself does communicate a message of relative disinterest or complacent disregard." Id. *See also* Delgado, supra note 3 (listing a number of ways in which feminist scholarship is treated dismissively, e.g., including it in a string cite rather than coming to grips with its content).

55. Cass R. Sunstein, Feminism and Legal Theory, 101 Harv. L. Rev. 826 (1988).

recent scholarship.[56] Judge Richard Posner also has been willing to engage in serious academic debate with feminist scholars.[57]

Although I have no hard data to support my claim that feminist scholarship is not being taken seriously in the legal academy, I rely on more than mere intuition in making this claim. My conclusion stems from both my personal observations and anecdotal evidence from feminists at other institutions. For example, we have all heard stories of feminist scholars who have had tenure problems. Whether the cause of those problems was the feminism in their scholarship or something else is a question that, given the nature of tenure decisions, cannot be answered on the basis of hard data. The stories we hear about these cases nonetheless support my claim that much feminist scholarship is misunderstood.

A close look at who is citing whom for which principles would tell us a great deal about how feminist scholarship is being received in the legal academy. Indeed, there is some support for the proposition that feminist scholarship is not being taken seriously. A simple search through the *Westlaw* database for texts and periodicals[58] reveals results consistent with my impression that, for the most part, feminist scholars are citing each other.[59]

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56. *See* Carl Tobias, Interspousal Tort Immunity in America, 23 Ga. L. Rev. 359 (1989); Carl Tobias, Respect for Diversity: The Case of Feminist Legal Thought, 58 U. Cin. L. Rev. 175 (1989). Other male legal scholars have been influenced by feminist scholarship. *See* Cass Sunstein, Feminism and Political Theory (1990); Richard Chused, Gendered Space, 42 Fla. L. Rev. 125 (1990); Kenneth Karst, Woman's Constitution, 1984 Duke L.J. 447; Frank Michelman, Private Personal But Not Split: Radin Versus Rorty, 63 S. Cal. L. Rev. 1783 (1990). *But see* David L. Kirp et al., Gender Justice (1986) (criticizing leftist feminists and supporting policies that reflect the values of classical liberalism).

57. Judge Posner and Robin West had an exchange of viewpoints regarding liberal theory and Kafka in the *Harvard Law Review* several years ago. *See* Richard Posner, The Ethical Significance of Free Choice: A Reply to Professor West, 99 Harv. L. Rev. 1431 (1986). More recently, Judge Posner participated in a feminist symposium at the University of Chicago Law School. *See* Richard Posner, Conservative Feminism, 1989 U. Chi. Legal F. 191 (taking a libertarian, free-market approach to sex discrimination issues and questioning the wisdom of legal policies purporting to favor women); *see also* Richard Posner, An Economic Analysis of Sex Discrimination Laws, 56 U. Chi. L. Rev. 1311 (1989).

One can take feminist jurisprudence seriously without agreeing with its premises or conclusions. The fact that Judge Posner virtually stands alone in his critique of recent feminist jurisprudential writings illustrates that the scholarship is not taken seriously enough.

58. Admittedly, the searches were cursory as I did not intend to use the results as a basis for strong conclusions. I used the texts and periodicals database in *Westlaw* during the month of October 1990. I ran one search to determine how often female-authored feminist articles were being cited by men and by women. I omitted cites by students (when I could tell the authors were students) and subsequent cites by the author to herself. I counted jointly authored pieces as male-authored only if all authors were male and I did not count any authors whose gender was not obvious to me. I did a second search to determine how often male-authored feminist works were being cited by men and by women. I did a third search focusing on articles about topics of interest to feminists (e.g., abortion) in order to compare the number of male authors who cited other male authors, but did not cite key female authors.

59. *See, e.g.*, Fineman, Implementing Equality, supra note 14, at 789 (23% of 26 cites are by men); Ann E. Freedman, Sex Equality, Sex Difference, and the Supreme Court, 92 Yale L.J. 913 (1983) (33% of 25 cites are by men); Sylvia Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984) (27% of 62 cites are by men); Littleton, Reconstructing, supra note 13, at 1279 (23% of 21 cites are by men); MacKinnon, Feminism Unmodified, supra note

In a sense, this is neither surprising nor unwarranted. Tax scholars cite each other because they share the same subject matter.[60] Leftist scholars cite each other because they share an ideology. Yet, while it is true that common interests and ideology may explain why feminists cite each other, I do not think it adequately explains why others do not. Many feminist issues involve key constitutional and jurisprudential questions. Most teachers and scholars of constitutional law and jurisprudence are male.[61] Given the breadth of some of the feminist articles I included in my search, it would have been appropriate for them to have been cited by a wide range of constitutional law and jurisprudential scholars.[62] Yet none of them were

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12 (41% of 74 cites are by men); Martha Minow, The Supreme Court 1986 Term—Foreword: Justice Engendered, 101 Harv. L. Rev. 10 (1987) [hereinafter Minow, Justice Engendered] (42% of 77 cites are by men); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women's Rts. L. Rep. 175 (1982) (24% of 33 cites are by men).

60. The implied comparison between tax and feminism is not perfect. Feminism is not really a subject matter area. Feminists write about subject matter areas that raise gender issues. Most gender issues affect men as well as women, yet my impression is that more women write about sex equality and sex discrimination than do men. I consider this further evidence that feminist concerns are not being taken sufficiently seriously. A *Westlaw* search asking for "sex discrimination," "Reed v. Reed" and "Craig v. Boren" turned up 49 articles, only 21 of which were male-authored.

61. Indeed, during most of the years that coincide with my *Westlaw* search years, over 80% of all law professors were male. *See* Richard H. Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537 (1988) [hereinafter Chused, Hiring and Retention]. *See generally* The AALS Directory of Law Teachers 1989-90, 927-35.

62. Martha Minow's Foreword, for example, is an article that should have been more widely cited by male scholars. *See* Minow, Justice Engendered, supra note 59. There is no way to determine the "correct" number of male cites. Forty-two percent of the cites to Minow in my sample were by males. That may look low, given the gender breakdown of constitutional law scholars. But in absolute numbers, her article was cited 32 times by men. Maybe that's the "correct" number (i.e., evidence of sufficient seriousness). Maybe the seemingly low percentage (42%) results from the fact that she frequently is being cited by female scholars who are not writing about constitutional law, but about feminism. I did compare Minow's absolute number of male citers to the absolute number of male citers for Frank Michelman's Foreword, published in the *Harvard Law Review* a year earlier. Beginning from a period roughly 6 months after the Minow article was published, Michelman caught the attention of 49 male authors, whereas Minow caught the attention of only 24.

I also ran a similar comparison between John Hart Ely's abortion article, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973) and Sylvia Law's article, Rethinking Sex and the Constitution, supra note 59. During the same period of time, Ely was cited by 80 men while Law was cited by 18. Also, I should point out that only 17 female scholars cited to Ely during that time period and 45 females cited to Law. Given the number of women writing about reproductive freedom, I was surprised by the small number of female citers to Ely. On the other hand, 17 females out of 97 (17.5%) is roughly equivalent to the gender breakdown among law professors generally. *See* Chused, Hiring and Retention, supra note 61, at 537 (using 1986 statistics and showing 16% of tenured or tenure-track law faculty were women).

Because most of the feminist articles I ran through *Westlaw* focused on issues of equality, I chose to gather data on a male-authored "equality" article as well. The male-authored article on equality that is cited most often is Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). Westen's article is cited by 12 women and 58 men. As with the Ely article, the small number of women surprised me at first. However, 12 out of 70 (17%) is representative of the gender breakdown of law professors. *See* Chused, Hiring and Retention, supra note 61 at 537. In contrast to the small number of women who cite Westen, 17 women and 15 men cite

cited by more men than women.[63] Furthermore, I was shocked at how few men have cited some of the articles that I consider among the best feminist scholarship.[64]

When feminist scholarship is not ignored, it is often trivialized. I base this claim on anecdotal evidence from others, which is confirmed by my own personal experience. Despite the fact that major law reviews are now quite open to publishing articles that are self-described as feminist, and despite the fact that many law schools now offer courses in feminist jurisprudence or feminist legal theory, I hear a surprising number of trivializing comments about feminist scholarship. What troubles me is that many of these comments come from persons one would expect to be sympathetic. Here is an example:

> A colleague reads an article and says: "I know this is called feminist method—or feminist theory—but what makes it particularly feminist? Why is it not just like other radical theory?"

I call this the "so what makes it feminist?" question. My early response to such questions was a genuine attempt to explain what I thought feminism was (a struggle to end sexist oppression) and how the particular article or book being questioned fits into my definition of feminism (e.g., a focus on the effect of gender in a particular setting and an explanation of how that effect contributes to sexist oppression). I now think, however, that many of these questions are not asked to elicit genuine information. These questions often carry with them the following charges:

"But the realists said this fifty years ago . . . ."

"This is nothing more than warmed-over Marxism . . . ."

"This sounds just like pragmatism . . . ."

Such charges claim feminism offers nothing original. I hear that allegation from women as well as men, from the left as well as the right, and I hear it beyond my own institution. I never hear anyone say, "Hey, this feminist legal theory is important. It asks some of the same questions raised by legal realists fifty years ago; it borrows from well-recognized legal and social theorists." Instead, I hear feminist legal theory being relegated to the "nothing new" category. It is trivialized.[65]

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to Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. Rev. 581 (1977).

63. I am not making a claim that men do not cite women generally. My claim is that feminist scholarship is more often cited by women than men. Because the legal academy is predominantly male, my data suggests that the legal academy generally is not sufficiently familiar with this scholarship.

64. *See, e.g.*, Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118 (1986) (cited by only 7 men compared with 22 women); Williams, Equality's Riddle, supra note 22, at 325 (cited by only 3 men compared with 29 women).

65. Martha Minow adds the following examples: (1) If feminist pedagogy is about making the classroom more humane, then how does it differ from humanistic, clinical, and critical legal studies? and (2) If feminism is about establishing women's legal rights then is it not just like any other civil rights efforts? *See* Minow, Beyond Universality, supra note 27, at 129. *See also* Delgado, supra note 3 at 39 (including in his list of mechanisms for marginalizing feminist and critical race scholarship, a mechanism entitled "Assimilation/co-optation—We have been

B. *Why Is Feminist Jurisprudence Not Taken Seriously?*

1. *The Common Excuses*

Some of the most common excuses for ignoring or trivializing feminist legal scholarship are:

(1) Reader lacks time: "It is difficult enough to keep up with scholarship in my own field of interest. There simply is not enough time to expand my reading and become expert in other fields."

(2) Scholarship is inaccessible: "Feminist writing is too theoretical. It adopts the vocabulary of critical theorists who cite dead Europeans whose work I also cannot understand."

(3) Scholarship is ideological: "Feminist writing seeks to further women's political position. It is self-interested. As such, it is not true scholarship."

(4) Scholarship is irrelevant to law: "Feminist writing is too abstract and sometimes too personal. It tells me nothing about how courts should decide cases."

(5) Scholarship insults men: "This scholarship has a counterproductive us-them tone. How do you expect me to react when I am characterized as part of the problem?"

Some of these charges are true with respect to some feminist scholarship. Some are also true with respect to some nonfeminist scholarship. But not all charges are true as to all feminist scholarship.

In addition to these specific explanations for not taking feminist scholarship seriously, there is a more general explanation. This explanation is the "gendered misunderstanding" that, at the beginning of this Essay, I suggested might be at the core of the legal academy's negative reaction to feminist scholarship. Gendered misunderstanding occurs because men and women have different life experiences. Thus, they sometimes fail to understand conclusions drawn by the opposite sex that are based on those different life experiences. The potential for misunderstanding is greater in the case of conclusions based on women's experience because much of women's experience has been buried from male view.[66] Part of the feminist project is to uncover these buried experiences.

The risk of gendered misunderstanding is high, especially as to the most abstract and theoretical feminist scholarship, scholarship which in its rush to theory may not fully reveal the female reality upon which it is based. Such scholarship may be difficult to understand due to its highly abstract nature. In some cases, the difficulty may be compounded by the author's reliance on critical theory and its specialized language. Much male-authored scholarship is difficult to understand for some of these same reasons. Feminist theoretical scholarship, however, runs the further risk of being misunderstood because it expresses a gendered view of reality.

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saying this all along").

66. One might take the position that male reality similarly is hidden from female view, but the claim loses strength if one believes that our knowledge of the world has been constructed in accordance with male reality.

My thesis is that the negative institutional response to feminist jurisprudence can be explained in part by the fact that the legal academy primarily is male and male readers have difficulty understanding theory that has been borne of women's experience. Of course the burden for clear communication normally falls on the author, and I do not mean to shift it unduly to the reader. But if the misunderstanding is a gendered misunderstanding, then the reader's obligation to listen empathetically is as crucial as is the author's obligation to communicate across gender lines.

I am willing to venture that some gendered misunderstanding arises because feminist scholars fail to explain fully the grounding of their theories. In turn, I believe that their failure to do so is attributable in large part to institutional expectations about legal scholarship, expectations that are at odds with my view of feminist method.[67] I propose no solution to the problem of gendered misunderstanding, but I recommend beginning a serious dialogue about the problem. To begin the dialogue, I will offer some observations about the institutional constraints that affect one's ability to engage in properly grounded feminist scholarship. I then will conclude with an expanded discussion of my claim that feminist scholarship is subject to gendered misunderstanding.

2. *Institutional Constraints*

The first institutional constraint is the problem of time and the tenure clock. If feminist method includes listening to women, then before we theorize, we need to listen. Although this listening process may be analogized to empirical research methods, it is different from other empirical work in important ways. Feminist method is more interactive than merely collecting data. It is a process intended to uncover experiential data about which women have long been silent. This type of research requires time.[68] To be a full-time law professor, to teach, to do committee work, to have any sort of personal life, and to engage in the extensive collection of experiential data requires time. Increased institutional pressure to write more articles encourages us to write on topics we can look up in books. If we rely on other's research and theorize a little on our own, we can spin out multiple articles. The point of feminist method, however, is to uncover new stories and to build theory on previously silenced experiences. If tenure and

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67. *See generally* Geoffrey R. Stone, Controversial Scholarship and Faculty Appointments: A Dean's View, 77 Iowa L. Rev. 73 (1991). For example, abstract theory is often valued in the legal academy and empirical work is frowned upon in the same way that facts are deemed inferior to law. *See* Martha L. Fineman, Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship, 42 U. Fla. L. Rev. 25, 29-30 (1990).

In addition, most legal scholarship is written in the third person objective voice, which assumes a common experience and point of view of the writer and reader. If I were to write objectively assuming that all men shared my world view, I might well be misunderstood by many male readers. However, if I were allowed to explain my personal world view before I began my analysis of an issue, I should be able to move more readers onto my "wave length."

68. Law and society scholars who rely on original data in their scholarship also share this problem.

merit increases are too strongly keyed to quantity, I believe "good" feminist legal scholarship—scholarship grounded in women's experience—will suffer.

A second constraint is the absence of feminist community within many law schools and universities. Feminist method requires collaboration. I have been fortunate for the past seven years to share my life with another full-time law professor who is also female and feminist. I was also fortunate to teach at the University of Southern California in Los Angeles for two years, where I was part of a group of feminist law teachers and scholars who met regularly. Many feminist law professors, however, must rely on telephones and airplanes to create a feminist community.

The problem is more than one of isolation.[69] Once feminist scholars have created or discovered a feminist community which allows them to collaborate, they may find themselves faced with the dilemma that legal scholarship is judged on an individual merit system at most institutions. Co-authored articles often are not counted at all toward tenure and promotion. Individually authored articles reflecting "too much collaboration" sometimes are viewed as suspect.[70] Common reactions include the following: "How do we know which part of this Article is her own original thought?", "It's a creative piece, but she got the idea from someone else.", and, "She's only responding to what other feminists have said. She has not set her own agenda for research." Although I now see less of the latter type of reaction, reduced credit for explicitly co-authored articles remains a problem.[71]

3. Gendered Misunderstanding of Feminist Scholarship

I wish to expand on my earlier observations regarding the problem of

69. Many scholars live a life of isolation with respect to their academic specialties. It is, after all, quite natural for a university to have one specialist in each field. To be the only professor of tax would be one form of isolation, but to be the only feminist on a law faculty is more of a strain, especially if your scholarship questions many of the basic assumptions of your colleagues. Fortunately, I am not the only feminist on the Iowa Law faculty. I should note, however, that during my 17 years on the Texas Law faculty, the number of tax professors far exceeded the number of feminists.

70. For example, I have heard questions raised about Catharine MacKinnon's work on pornography, asking how much should be attributed to MacKinnon and how much to Andrea Dworkin.

71. Very few feminist jurisprudence articles are co-authored, which reflects the dominant academic standard. For examples of dynamic co-authorship by feminists, see Judith O. Brown et al., The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 Bluff. L. Rev. 573 (1987); Patricia A. Cain & Jean C. Love, Stories of Rights: Developing Moral Theory and Teaching Law, 86 Mich. L. Rev. 1365 (1988) (reviewing Judith J. Thomson, Rights, Restitution & Risk: Essays in Moral Theory (1986)); Martha Chamallas & Linda Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814 (1990); Delores A. Donovan & Stephanie M. Wildman, Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation, 14 Loy. L.A. L. Rev. 435 (1981); Martha L. Fineman & Anne Opie,The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, 1987 Wis. L. Rev. 107; Hon. Ruth Bader Ginsburg & Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, 1989 U. Chi. Legal F. 9; Carolyn Heilbrun & Judith Resnik, Convergences: Law, Literature and Feminism, 99 Yale L.J. 1913 (1990); Martha Minow & Elizabeth V. Spelman, In Context, 63 Cal. L. Rev. 1597 (1990).

gendered misunderstanding because I believe it is one of the most serious problems for feminist scholarship at this point in time. Although the phenomenon affects the institutional acceptance of all feminist scholarship, I believe it is most apparent in the case of "abstract" feminist legal theory.

Now that top law journals publish feminist scholarship, it may be more widely read (even if it is not widely cited). However, is it being read with a similar understanding by men and women? Robin West and others have written of the fact that women and men have different life experiences.[72] For example, women are victims of male sexual violence. Women go through life fearing that violence. Men, other than the perpetrators, rarely are present when such violence occurs. Men may not understand our fear of sexual violence. When we write about things from our "women's experience" point of view, what can we do about the fact that our audience includes many persons who do not share our experience?

Let me tell a story to demonstrate my point. Sandy Levinson wrote an essay on the Second Amendment right to bear arms that was published in a recent issue of the *Yale Law Journal.*[73] This Essay, titled *The Embarrassing Second Amendment*, like most of Levinson's writing, focuses on interesting interpretation questions. Levinson attempts to rescue the Amendment from its current political association with the National Rifle Association (NRA) by arguing for a republican interpretation valuing the right of civic resistance to state power. I need not explain his thesis as part of my story. It is an interesting Article, as I find all of Levinson's articles to be, and I commend it to you.

My story begins with Wendy Brown's reply to Levinson's article, published in the same issue of the *Yale Law Journal.*[74] Brown's main point is that Levinson's interpretation is a gendered one; that the republican subject, if he exists, is clearly a *HE*.

At the end of her article, Brown tells us an anecdote. She just tells it—she does not connect it with the rest of her article. The reader must make the connection, leaving a lot of room for interpretation. Here is the anecdote: At the end of a week-long trek in the Sierra Nevada mountains, Wendy Brown and her friends discovered their car's battery had died. After a short panic, they found a young man in a Winnebago awaiting the first day of deer-hunting season. As Brown described him, he was drinking beer, reading a pornographic magazine, and wearing an NRA cap. Despite all these noted differences from Brown, he did respond to her plea for help and spent a couple of hours working to get her car started. Thus, they were comrades for a short period of time, despite the differences.

Brown tells us that when she first read Levinson's essay on the Second Amendment, this incident came back to her. She tried to imagine herself

72. *See, e.g.*, West, The Difference in Women's Hedonic Lives, supra note 13; *see also* Deborah Tannen, You Just Don't Understand (1990) (national bestseller written by a linguistics professor about the difficulty of male-female conversations across gendered life experiences).

73. Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).

74. Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale. L.J. 661 (1989).

and the deerhunter sharing a commitment to republican virtue and joining in the resistance of illegitimate state authority. Then she says, "I remember something that gives me pause . . . . It occurred to me then, and now, that if I had run into him in those woods without my friends or a common project for us to work on, I would have been seized with one great and appropriate fear: rape."[75]

I read this and said to myself, "How true." Her fear and my fear raise a point about the right to bear arms in a society in which males are sexually violent to women. I hate guns, and the only time I think of bearing one is to protect myself against male violence. But in fact, they have the guns, not I; I do not think of guns as something men and women share in resisting illegitimate authority.

The overwhelming reaction of my male colleagues, however, was different. Apparently, the faculty lounge discussion of Brown's article went something like this: "How dare she malign men like that? She is unfairly stereotyping us all as potential rapists."

I missed the initial round of conversation on this point. It was reported to me by those of my colleagues who sought the feminist view of the matter. I only could respond that I had not viewed the young man in the story as a real person whom she was maligning. Instead, I saw him as a metaphor for male sexual violence. The men who help us also rape us. And, at some very basic level, I did not understand the reaction of my male colleagues. I heard Wendy Brown say she would have feared rape had she met this young man under different circumstances. My colleagues heard her accuse them, along with the young man in the story, of being potential rapists.

One of my male colleagues has written a comment on Brown's article.[76] The comment focuses on the danger of stereotyping, accusing Brown of unfairly stereotyping the young man in her "remarkable anecdote."[77] To stereotype all men as rapists, he claims, poses costs on the innocent majority of men who are not rapists.[78] His more serious concern is that Brown is making unfair assumptions about this particular man solely because he wears an NRA cap, hunts deer, drinks beer, drives a Winnebago, and enjoys reading pornography. I admit stereotyping all male deerhunters is more problematic than stereotyping all males, but that is beside the point. The point is that I can read one line in a feminist article and identify with the author's fear of rape whereas my male colleagues read the same line and hear the author accuse them of rape.[79]

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75. Id. at 666.

76. Douglas Laycock, Vicious Stereotypes in Polite Society, 8 Const. Commentary 395 (1991).

77. Id. at 397.

78. Id. at 398.

79. The fear of rape is widespread among women. Some feminists report that at least one out of every three females will be subjected to a violent sexual attack sometime in their lives. *See* MacKinnon, Feminism Unmodified, supra note 12, at 23; Deborah L. Rhode, Justice and Gender 246 (1990); *see also* Allan Griswold Johnson, On the Prevalence of Rape in the United States, 6 Signs 136, 145 (1980) (estimating that, measured from the age of 12, there is a 20-30% chance a girl will suffer a violent sexual attack sometime during her life); Diana E. H.

The problem of gendered misunderstanding arises largely because feminist jurisprudence reflects women's experience. When feminist legal scholars write *abstract* legal theory in the "grand style,"[80] there is much room for misinterpretation by those who are strangers to women's experience. When feminist legal scholars do *connected* feminist scholarship—when they reveal the experiences upon which their theory is based—there is less room for misinterpretation. Nonetheless, a certain level of gendered misunderstanding remains. For example, some feminist legal scholars collect and analyze empirical data. Others write personal narratives or borrow narratives from literature. Yet, as I suggested earlier, even this "connected scholarship" is not fully understood by many of our male colleagues. Often it is devalued as insufficiently theoretical or unrelated to important legal issues.

The problem of gendered misunderstanding might be exacerbated by the fact that we as feminist scholars spend so much time talking with each other that we have begun to speak our own language. We may disagree substantively. We may focus on different sorts of female experiences in our theories. But we understand each other fairly well. In our conversations with each other, some of them in law journals, this understanding enables us to skip full descriptions of experience and move directly to theory. Thus, when we feminists speak to each other, we lose other audiences. To reach out to these lost audiences, I suggest that we consider devoting some time to doing what I call "remedial feminist jurisprudence." My conception of "remedial feminist jurisprudence" is scholarship that explains its grounding in women's experience in a way that can be heard by those who are strangers to the experience. I do not mean "remedial" in a negative sense.[81] I mean to suggest a positive remedy that would help integrate the separate conversations I see developing in our published scholarship.

The task I have in mind for feminist legal scholars is to translate the experiences unearthed by feminist method into a communication that conveys new knowledge to someone who is a stranger to those experiences. It is the sort of task great filmmakers set for themselves. It is a call to creativity. Some feminist scholars may object that to stop and explain our

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Russell & Nancy Howell, The Prevalence of Rape in the United States Revisited, 8 Signs 688, 695 (1983) (revising Johnson's statistics to show a 46% probability that a woman will be a victim of completed or attempted rape at some time in her life).

Given these statistics, it is not surprising that women fear rape. Laycock attaches an appendix to his comment that reports rape statistics lower than those reported by feminist legal scholars. Laycock, supra note 76, at 405. Nonetheless, Laycock is quick to express his concurrence that Brown's fear of rape from an unknown man in the wilderness is reasonable. Laycock and I do not disagree about the fact that women fear rape, nor that they are prudent to do so. He and I identify with different actors in an anecdote. The result is that we interpret the anecdote differently.

80. *See* Olsen, supra note 9, at 1147 (characterizing Catharine MacKinnon's work as grand style feminist theory).

81. "Remedial" calls to mind a superior teacher working with an inferior student to overcome a deficiency in the student. The student is slow to learn. The teacher must be patient.

project will distract us from the central quest of building better theory.[82] However, I think it is worth taking the time to attempt such explanations. We should engage in two types of feminist scholarship: (1) Scholarship that is addressed to each other—the exciting, yet often tentative, discoveries and thoughts that engage us in debate; and (2) scholarship aimed at capturing the attention and gaining the understanding of those who do not see the world as we see it—scholarship intended to help others see the world through our eyes, at least momentarily.

I may be wrong about the value of this latter task. I may be wrong about the possibilities for success in this endeavor. I may be wrong because of the nature of the misunderstanding. A feminist professor of philosophy, Susan Sherwin, says:

> It may just be that there is no way to do genuinely feminist research and have it thoroughly respected by one's nonfeminist colleagues. Feminism, after all, is ultimately extremely radical, challenging the status quo in thought as well as in practice. Feminist philosophy does not just offer new truths, or new perspectives on truth . . . . I believe that feminism demands a distinct way of doing philosophy and challenges the very practice most philosophers pride themselves on having mastered.[83]

Professor Sherwin's observations about feminism and philosophy may be equally true regarding feminism and law.[84] In other words, the problem may not be one of gendered misunderstanding, but rather one of fear and self-protection.[85] I hope this is not the case. I am sure it is not the case for all of our male colleagues. At any rate, I look forward to the challenge of doing more "connected" feminist scholarship. I hope my female colleagues will join me. Similarly, I hope my male colleagues will listen and join the conversation.

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82. Some feminist scholars may claim that the explanations are already there. The problem is that they have been ignored. To the extent this is true, I am calling for a recreation and a regrounding.

83. Susan Sherwin, Philosophical Methodology and Feminist Methodology: Are They Compatible?, *in* Women, Knowledge and Reality, supra note 39, at 24.

84. Consider the following story reported by Carl Tobias: A male faculty member opposes a feminist faculty candidate because she "rejects both legal method and scholarship as 'male-dominated.'" To hire her "would be a betrayal of our essence." Carl Tobias, 58 U. Cin. L. Rev. 175, 178-79 (1989).

85. Fear is often expressed as anger. I have been in mixed (i.e., male and female) groups that read feminist scholarship and I have been in mixed audiences that listened to feminist speakers. Although Catharine MacKinnon seems to produce more anger in men than do other feminists, she is certainly not alone in invoking that emotion. I can recall several MacKinnon speeches at which women in the audience nod their head knowingly while men turn red in the face. Her "abstract theory," which is founded on the notion that men (as a class) dominate women (as a class) is heard by males in the audience as a personal attack on them—not unlike my male colleagues' reaction to the Wendy Brown anecdote.