



1-1-1996

The Future of Feminist Legal Theory

Patricia A. Cain

Santa Clara University School of Law, pcain@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

Recommended Citation

11 *Wis. Women's L.J.* 367

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

THE FUTURE OF FEMINIST LEGAL THEORY

*Patricia A. Cain**

I. INTRODUCTION.

In March, 1996, the third annual conference of the National Women's Law Students' Association¹ (NWLSA) was held in Madison, Wisconsin. This essay stems from my participation on a panel at this conference entitled: The Future of Feminist Legal Theory. At the conference I made the following three points:

1. The past is always an important part of the future. Thus, feminist legal theorists of the future should pay attention to feminist legal history.

2. Current disagreement amongst feminist legal scholars is a good thing. Criticism is necessary for progress.

3. We must never forget that good feminist legal theory is rooted in the experience of real women. Thus, we must guard against theory that becomes so abstract that it fails in practice to contribute to positive material change for women.

Both in Madison and in this written essay I praise a now defunct organization, the National Conference on Women and the Law, for the historical role it played in the development of good feminist legal theory that was grounded in progressive legal practice. In praising the National Conference on Women and the Law I mean to take nothing away from NWLSA, which has been responsible for three very successful national conferences. These recent conferences have been a positive force in bringing women together to share their experiences as law students. Additionally, these conferences have brought together an impressive array of theorists, scholars and practitioners to discuss important legal issues affecting women today. But the NWLSA conferences are different from the National Conference on Women and the Law. The NWLSA is a national organization of women law students. Individual schools join the national organization and send representatives to an annual meeting to do the business of the organization.

* Patricia A. Cain is a Professor of Law and Associate Dean at the University of Iowa College of Law. She is the current chair of the University of Iowa Committee on Diversity and a past President of the Society of American Law Teachers. Her scholarship and teaching focus on lesbian and gay legal issues, feminist legal theory, and federal taxation. Jill Krueger (University of Iowa, class of 1998) provided valuable research assistance.

1. The first conference was held February 18-20, 1994 at the University of Virginia. Academic papers presented at that conference were published in Volume 2 of the *Virginia Journal of Social Policy and the Law*. The second conference was held in 1995 in Boston.

This annual meeting provides an opportunity for the student representatives to plan panels on which feminist lawyers and scholars discuss their work. These panels are of tremendous educational value to the student participants. But they do not provide a framework for feminist lawyers and theorists to learn from each other or to share information about the real life problems of a broader group of women, e.g., poor women, disabled women, working class women. The National Conference on Women and the Law held annual conferences, from 1970 to 1990, which did provide such a framework.

Today's women law students know nothing of this remarkable series of conferences. Elizabeth Schneider, one of the law professors who participated in the first NWLSA conference at the University of Virginia, expressed surprise when she discovered that the law students who organized NWLSA had never heard of the National Conference on Women and the Law.² By the time of the third conference, held in Madison, which had been the site of a pivotal Women and the Law Conference in 1977, one might have expected greater student awareness of this piece of feminist legal history. Yet that was not the case. Kimberly Epstein, the student who organized the Madison conference, told me that there were probably only three or four people who had attended all three conferences. She was one of them. The law student population turns over completely every three years. A conference in which law students are the only constant participants cannot be expected to maintain a consciousness of feminist legal history.

Elizabeth Schneider's essay from the first NWLSA conference stresses "the importance for feminists in the law to have a sense of history."³ She describes the role of the Women and the Law Conference in early feminist lawyering. In this essay I will expand on some of the themes she raised. I will describe in some detail what the Conference was, what purposes it served, how it ended, and plans for its revival. But first I will comment on the history and current direction of feminist legal theory. These comments will show why I believe a revival of the National Conference on Women and the Law would be a good thing for feminist legal theory. I will also explain why the responsibility for its revival should fall on those of us who participated in the early years, rather than on today's law students.

II. FEMINIST LEGAL THEORY: A SHORT HISTORY

Law and law schools have a long history of male domination. If one thinks of the world of law as progressing in Hegelian-like fashion from "thesis" to "antithesis" to "synthesis," then the thesis of "male domination" remained in full control until at least the early 1970s. There were few women law students before 1970 and even fewer wo-

2. See Elizabeth Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past Into the Future*, 2 VA. J. SOC. POL'Y & L. 1 (1994).

3. *Id.*

men law professors.⁴ The decade of the 1970s lay the groundwork for the “antithesis” to male domination, as women increased their numbers in the legal academy and in the practice of law. In 1970, the first National Conference on Women and the law was held at New York University.⁵ In 1971, the Supreme Court began to rule in favor of sex discrimination claims pursued under the fourteenth amendment.⁶ One year later, Congress passed the Equal Rights Amendment, and within months at least 20 state legislatures had ratified the amendment.⁷ In 1972, Ruth Bader Ginsburg, the lawyer in the 1971 Supreme Court victory, and also a law professor, helped to organize a conference, again at New York University, on The Law School Curriculum and the Legal Rights of Women.⁸

By the mid 1970s most law schools had developed courses in Women and the Law, sometimes taught by real faculty, but often taught by adjuncts or by students themselves under the supervision of a faculty member. These courses focused on criminal law, family law, antidiscrimination law, and reproductive rights. During this period, feminist litigators developed cutting edge theories to help women improve their legal status. For example, feminist lawyers argued that in determining whether a woman killed in self-defense, the defendant’s perspective as a woman in a gendered world should be taken into account.⁹ They also argued for the first time that sexual harassment was a form of sex discrimination.¹⁰ This focus on harms to women and on the unmasking of the gendered nature of these harms gave rise to a core of feminist scholarship and the introduction of specialty law school courses, in addition to women and the law courses, known as “feminist jurisprudence” or “feminist legal theory.”

4. As of 1959, there were only 13 women law professors at ABA/AALS schools. During the 1960s, 40 new women entered law teaching at these schools. See Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REVIEW 5, 8, 10, 12 (1991). In 1974, 55 new women entered law teaching, more than the total number for the prior 50 years. *Id.* at 15. A similar increase in women students occurred during the 1970s. *Id.* See also KENNETH M. DAVIDSON, ET. AL., SEX-BASED DISCRIMINATION 881-886 (1974).

5. See history in SOURCEBOOK (15th National Conference on Women and the Law, 1984).

6. *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a Utah statute that gave preference to male relatives over female ones as administrators of a deceased person’s estate).

7. See DEBORAH L. RHODE, JUSTICE AND GENDER 64 (1989).

8. This conference was officially sponsored by the Association of American Law Schools. Its purpose was to introduce materials about women’s legal rights that could be incorporated into various law school courses. See Grace Ganz Blumberg, *Women and the Law: Taking Stock After Twenty-Five Years*, 6 U.C.L.A. WOMEN’S L.J. 279, 281 (1996). For an earlier more contemporaneous account of this conference see DAVIDSON, *supra* note 4, at 886.

9. See, e.g., *State v. Warnrow*, 559 P.2d 548 (Wash. 1977) (en banc); *People v. Garcia*, 126 Cal. Rptr. 275 (Cal. Ct. App. 1975), *cert. denied*, 426 U.S. 911 (1976).

10. See, e.g., *Tomkins v. Public Ser. Elec. & Gas. Co.*, 568 F.2d 1044 (3d Cir. 1977).

Scholarship using the term "feminist jurisprudence" can be traced to early writings of Ann Scales and Catharine MacKinnon.¹¹ The 14th National Conference on Women and the Law, held in Washington D.C. in the spring of 1983 was the first conference to include a panel entitled "Developing a Feminist Jurisprudence." Panelists included LaDoris Hazzard Cordell, Catharine MacKinnon, Phyllis Segal, and Nadine Taub, a panel intended to mix theory and practice.¹² But even before the term "feminist jurisprudence" was coined, the Women and the Law Conference had panels that today would be identified as focusing on feminist jurisprudence or feminist legal theory.¹³

In 1991, I published a short essay in the *Iowa Law Review*, asking whether feminist legal scholarship was taken seriously by the legal academy as a whole.¹⁴ At the time, I feared that the subject was being marginalized, despite its prominent publication in the *Harvard*¹⁵ and *Chicago*¹⁶ law reviews. Subsequent developments have shown that my fears were not well founded. By 1996, every leading law school lacking an established feminist legal theorist was clamoring for one. Articles continue to be published in leading law reviews and there are several new feminist jurisprudence casebooks.¹⁷

Nonetheless, there are serious questions about whether this recent support for feminist legal theory or feminist jurisprudence is altogether a good thing. Specialty courses and specialty professors who teach them are still subject to marginalization even when in demand.¹⁸ The risk of marginalization concerns me, not just because of the possible tenure crisis for women professors who might engage in marginalized scholarship, but also because of the separation (via ghettoization) of feminist legal theory from realms of legal power outside

11. See Ann Scales, *Towards a Feminist Jurisprudence*, 56 *IND. L.J.* 375 (1981); Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983).

12. By my count the panel consisted of two legal academics (MacKinnon and Taub), a public interest lawyer (Segal), and a judge (Hazzard). Of course, it would be more accurate to say that all of these women were teachers, scholars and activists.

13. For example, at the 12th Conference, held in Boston in 1981, there was a panel entitled "The Law and Patriarchy," whose panelists included Zillah Eisenstein, who had recently published *The Radical Future of Liberal Feminism*, a book often included in reading lists for feminist legal theory classes of the 1980s.

14. Patricia Cain, *Feminist Legal Scholarship*, 77 *IOWA L. REV.* 19 (1991).

15. See, e.g., Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

16. See, e.g., Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1 (1987).

17. See, e.g., KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (1993), and MARY BECKER ET. AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994).

18. Grace Blumberg has written a recent, provocative critique of feminist legal theory in the academy, in which she raises similar points. Blumberg, *Foreword, Women and the Law: Taking Stock After Twenty-Five Years*, 6 *U.C.L.A. WOMEN'S L.J.* 279 (1996).

the academy, e.g., courts and legislatures.¹⁹ Courts and legislatures are more likely than the academy to produce real change in individual people's lives. And if the ultimate goal of feminist work in the academy is to make real changes in women's lives, then feminist legal theory needs to be useful to the practice of law in real cases.²⁰ No "synthesis" in male-dominated law will ever result from a feminist "antithesis" based on scholarly work alone.²¹

III. FEMINIST LEGAL THEORY: DISAGREEMENTS AND PROGRESS

A. Introduction

When asked to think about the future of feminist legal theory, my focus becomes: how is the theory doing in practice? My short answer is that feminist legal theory, in the hands of feminist lawyers, has certainly produced some short term gains in the lives of real women, but it has not produced a feminist revolution. Nor should it be expected to have done so. Progress occurs in stages and legal change tends to be evolutionary rather than revolutionary. Feminist legal theory must be forever fine-tuning itself to respond to each new stage in the evolutionary process. In terms of the Hegelian dialectic, we might view the short-term gain position of women as a partial "synthesis" which creates a new "thesis" from which the battle begins anew. If feminist legal

19. Marginalization of feminist theory and the resulting containment of power has been documented in the academy in numerous other fields. See, e.g., Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2388 (1994) (commenting on Carolyn Heilbrun's resignation in protest from her endowed chair in the English Department at Columbia).

20. Blumberg, *supra* note 18, for example, claims "feminist legal theory does not take law seriously; law is merely an instrument of patriarchal oppression, and law will not substantially change until we wipe out patriarchal oppression." 6 U.C.L.A. WOMEN'S L.J. at 285. If it is true that feminist legal academics contribute to an atmosphere in which students are encouraged not to learn the law because it is useless as a tool of change, then I agree with her critique. But, from my perspective, many feminist legal academics do teach the law and how to use it. Additionally, I believe that scholars who are best at revealing the patriarchal underpinnings of law do so only if they know that law well. And I also believe that such revelations are valuable even when they are not part of a project aimed at law reform.

21. Catharine MacKinnon describes a contemporary women's movement that has

created a new political practice and form of theory with major implications for law. The distinctive theory forged by this collective movement is a form of action carried out through words. It is deeply of the world: raw with women's blood, ragged with women's pain, shrill with women's screams. It does not elaborate yet more arcane abstractions of ideas building on ideas. It participates in reality: the reality of a fist in the face, not the concept of a fist in the face. It does not exist to mediate women's reality for male consumption. It exists to bear witness, to create consciousness, to make change. It is not, in a word, academic.

Catharine A. MacKinnon, *Reflections of Sex Equality Under Law*, 100 YALE L.J. 1281, 1285 (1991).

theory is to continue the battle successfully and accomplish long term gains, it must be ever ready to shift in response to each new position or "thesis." In other words, feminist legal theory must be prepared to construct an immediate critique of each short term gain (the antithesis step) and, at practically the same moment, it must be prepared to construct a new thesis (the synthesis step).²²

This move from new thesis (usually a short-term solution) to critique of that thesis is required in part by the nature of law reform.²³ The law is reluctant to give up old and familiar categories. Thus once a new legal category is created, the law tends to force it into familiar old frameworks. Feminist legal theory needs to anticipate this tendency and be prepared with a critique that will help new categories resist this domesticating tendency.

Feminist legal theory might create change that was more revolutionary if it were able in the future to move from antithesis to synthesis more quickly than it has done in the past. Certainly the increase in the number of feminists in the legal academy and the various critiques that we offer (often of each other) make it possible for change to occur more rapidly.

B. *Some Examples.*

At the NWLSA conference in Madison, Martha Chamallas²⁴ identified three moves typically made by feminist legal theorists. I will use examples of two of these "moves" to demonstrate how feminist legal theory must be positioned to respond to law's tendency to push new categories back into familiar frameworks.

1. Is the Gender Classification Valid?

The first move identified by Chamallas was this: when you see a gender classification, ask whether the classification is valid. I associate this move with the first wave of feminism (which, for example, questioned the male-only vote) and with the early days of the second wave (which, for example, questioned gender restrictions in the workplace such as male-only police forces and male-only pilots). Many short-term gains have been earned by practitioners who mounted legal chal-

22. Compare my focus on feminist legal theory's need to create an antithesis to each emerging new thesis with Elizabeth Schneider's description of the dialectical relationship between theory and practice, in which "[o]ne 'moment' in the process gives rise to its own negation" and each new "idea may contain the seeds of its own contradiction." *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 599 (1986).

23. Catharine MacKinnon, who has a gift for capturing ideas in words, says, "Treacherous and uncertain and alien and slow, law has not been women's instrument of choice. Their view seems to be that law should not be let off the hook, is too powerful to be ignored, and is better than violence—if not by much." MacKinnon, *supra* note 21, at 1285.

24. Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389 (1997).

lenges to gender classifications which resulted in the expansion of public benefits (e.g., jobs and education) to previously excluded individual women.

To accomplish these gains, one thesis in need of challenge was that men belonged in the public sphere as worker whereas women belonged in the private sphere of home and family.²⁵ One critique of this thesis (the antithesis) was that if contributions to the public sphere of work were based on ability and merit, then there was no justification for excluding women who proved to be as able and meritorious as men.²⁶ In the short run, this "women are as competent as men" argument won and created short term gains for women who were as competent as men, so long as they were also unburdened by family needs.

In 1964, Congress bought this argument and enacted Title VII, prohibiting sex discrimination in places of employment.²⁷ As originally introduced, Title VII barred only race discrimination in employment. The amendment to ban sex discrimination as well was introduced by Representative Howard Smith of Virginia on February 8, 1964. It is often reported that Smith's true intent was to defeat the bill as a whole on the theory that no one would support a bill that required employers to hire women. Alternatively, some scholars report that the inclusion of "sex" in the final bill was intended as a joke.²⁸ While it is true that many legislators who voted to include sex along with race did end up voting against the final bill and while it is also true that several legislators could not resist speaking humorously about the abilities of the "fairer sex," the situation was a bit more complex than most of these reports indicate. The vote to include "sex" was not purely a joke, nor was it solely the work of southern opponents of racial integration. The National Women's Party had lobbied for the amendment and it was supported by key female legislators. On the other hand, the Women's Bureau and the President's Commission on the Status of Women opposed the amendment to add sex, arguing that race and sex should be kept separate. These opponents were concerned in part about the work/family conflicts that would arise for

25. It was this thesis of separate spheres that was celebrated by Justice Bradley in his infamous concurrence in *Bradwell v. Illinois*, 83 U.S. 130 (1872), holding that the state of Illinois could refuse Myra Bradwell's petition to practice law solely because she was a woman.

26. Another critique was that "woman," as the more understanding and forgiving sex, would add a positive element of empathy and sympathy to public sphere activities controlled by men. See, e.g., SUSAN GLASFELL, *A JURY OF HER PEERS* (1917).

27. Title VII, prohibiting sex discrimination in employment, was passed on July 2, 1964, but most provisions did not become effective until July 2, 1965. 42 U.S.C. §§2000e et seq. (1994).

28. See, e.g., Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966); MacKinnon, *supra* note 21, at 1283; Martha S. West, *Gender Bias in Academic Roles: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 73, n.13 (1994).

women in the workplace and thought that adding "sex" to Title VII would not address this issue. Those who supported including sex had supported the Equal Rights Amendment and saw Title VII as an opportunity to accomplish in the workplace what the ERA would have accomplished in cases involving governmental discrimination.²⁹

The enactment of Title VII might be viewed as a new thesis that resulted from feminist arguments about equality in the workplace. Title VII was not the only victory for feminist equality arguments. In the early 1970s, a variety of anti-sex-discrimination laws were passed by Congress. Bella Abzug, a member of Congress in those days, reported that there was virtually no opposition to the concept of equal rights for women in those days.³⁰ Those laws gave women the right to claim public benefits, but gave no thought to the existential reality of women's lives. Thus, there were no provisions dealing with pregnancy and childcare, issues that were certain to arise once more women moved into the workforce.

It is worth noting that these early legislative victories occurred long before the legal academy had become populated with women. Indeed, they occurred long before anyone had coined the phrase "feminist legal theory." Once "feminist legal theory" did appear on the scene, its role in addressing workforce gender barriers appeared to be one of responding to the problems of pregnancy and childcare after those problems arose.³¹ The explanation for this "responsive" stance, as opposed say to a "predictive" stance, was not that early feminists in the academy were incapable of predicting what the problems would be once male-only workforce rules were removed, but rather, that there were so few feminists in the academy and that courts and legislatures seemed to listen only to those feminist arguments they could understand in terms of existing categories.

Sex equality was the new thesis, but the creators of this new law, courts and legislatures, explained the new thesis using old, familiar doctrines. The radical notion that the law should ignore or undo distinctions made on the basis of sex quickly became the doctrine that women who were similarly situated to men should be treated the same as men, and nothing more. Pregnancy was a fact that made women different from men and thus, pregnancy was outside the new doctrine

29. For a discussion of the facts surrounding the passage of Title VII, in particular, the amendment to include sex, see CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945-1968*, at 176-182 (1988). For an additional account of the context surrounding enactment of Title VII and some excellent insights about how this legislative history has affected judicial interpretation in sex discrimination cases, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14-25 (1995).

30. See *What the Gender Gap is Really About*, ATLANTIC MONTHLY 76 (July 1996).

31. See, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

of sex equality. Feminists responded in different ways to this conservative doctrine. Some argued that pregnancy was just another condition of the human body that could easily be analogized to conditions experienced by men. In other words, they argued that men and women were similarly situated and thus the conservative doctrine was available to provide benefits for pregnant women similar to benefits provided for temporarily disabled men.³² Other feminists argued that pregnancy was a difference that the law ought to address, and that affirmative action was necessary to create sex equality, given the difference of pregnancy.³³ Still other feminists questioned the core notion of sex equality as it was being developed by the courts, arguing that courts were applying pre-existing male norms.³⁴ Thus, they claimed, an altogether new theory of sex discrimination that questioned pre-existing norms was required.

To answer the question is the gender classification valid, one must have a theory of sex discrimination. Some theories would strike down every explicit classification, arguing either that gender is always irrelevant or that it is unjust to bar all women when there are always exceptions.³⁵ Other theories prefer to retain flexibility and argue that, unlike race discrimination, sex differences are sometimes relevant.³⁶

32. Wendy Williams made this argument in the first pregnancy case to reach the Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974). The argument was rejected by the Court, both in *Geduldig* (a 14th amendment equal protection case) and later in *General Electric v. Gilbert*, 429 U.S. 125 (1976) (a Title VII case). After *Gilbert*, Title VII was amended to provide that discrimination on the basis of pregnancy was discrimination on the basis of sex. The wording of the amendment forced pregnancy discrimination issues into existing conservative doctrines. It required no affirmative action regarding pregnancy, thereby leaving pregnant workers in a potentially disadvantageous position vis-à-vis male workers. An employer was free to provide no benefits for men or women. The California legislature passed legislation requiring unpaid maternity leave, which given the conservative doctrine of sex equality embedded in Title VII, led to the argument that such affirmative action for women with no comparable affirmative action for men was actually a violation of Title VII. The Supreme Court held otherwise in *California Federal Savings and Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). The case, however, caused feminist legal scholars to air their differences in what came to be known as the equal treatment/special treatment debate. See, e.g., Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev L. & Soc. Change 325 (1984-85).

33. See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy* 1 BERKELEY WOMEN'S L.J. 1 (1985).

34. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101-141 (1979) (critiquing the "difference" approach to sex equality which requires women to be similar to men before discrimination will be recognized, and also comparing how legal theories of equality apply differently in race and sex discrimination cases). See also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

35. MacKinnon, in finding this theory inadequate, says "[t]he harm of sex discrimination distinctively focused by this approach — the harm of facial classifications — has been largely the harm of stereotyping" MacKinnon, *supra* note 21, at 1292.

36. Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39 (1985).

In my opinion, however, the theories that are likely to create lasting change, even revolutionary change, although perhaps at an evolutionary pace, are those theories that attempt to explain what the harm of sex discrimination is.³⁷ The harm of sex discrimination is something much more complex than legally imposed gender classifications. Legal rules, explicit or implicit,³⁸ that burden women are but one means of inflicting the harm of sex discrimination. To determine whether to strike those rules, reform them, or create new, compensatory rules, one must identify the harm that needs to be remedied and must understand the context in which the current remedy is being applied.

2. When Proposing Legal Solutions to an Identified Gender Problem, Pay Attention to Women's Real Life Experiences

Another feminist move identified by Chamallas is the consideration of women's experiences in formulating legal remedies. One of Catharine MacKinnon's most lasting contributions to feminist legal theory is her dominance theory of sex discrimination.³⁹ Dominance theory does not focus on whether women are similar to men, rather it focuses on how men use women's difference to dominate them. Another of MacKinnon's great contributions to feminist legal theory is the application of this theory to the real life experience of women who have been sexually harassed in the workplace.⁴⁰

Naming the harm of sexual harassment, making it visible as an employment issue for women, and convincing lawmakers and courts that the harm was covered by Title VII were events of the 1970s and early 1980s. Before there was any published scholarship on the topic, at Women and the Law Conferences throughout the mid 1970s panelists discussed cases in litigation and shared their theories about sexual harassment law. The first Supreme Court case to recognize sexual har-

37. I include in this group, the following theorists: Catharine MacKinnon (the harm of sex discrimination is the creation of a hierarchy in which woman is always on the bottom), *see, e.g.*, CATHERINE MCKINNON, *FEMINISM UNMODIFIED* 40 (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (the harm of sex discrimination is subordination of women); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (one harm of sex discrimination is the assignment of gender identity in accord with biology, i.e., that biological females are expected to be feminine rather than being free to construct their own identity).

38. The second feminist "move" that Martha Chamallas identified at the conference was: when you see a neutral rule, look for the hidden gender bias. Chamallas, *supra* note 24, at 390. Countless examples come to mind regarding the workplace. Height and weight restrictions are one obvious example. Requiring workers to work late at an office in an unsafe neighborhood is another, perhaps less obvious, example. One needs the same sort of theory of sex discrimination to deal with these hidden gender biased rules. If the purpose of reform is to eradicate sex discrimination then it matters little whether rules are explicitly sexist.

39. *See* MCKINNON, *supra* note 34, at 32.

40. *Id.*, at 143-218. [leinOnline](#) -- 11 Wis. Women's L.J. 376 1996-1997

assment as a form of sex discrimination under Title VII was decided in 1986.⁴¹

Women's experience helped to name the harm and to show that the harm was sex-based. But feminists had little say about appropriate remedies once the harm was classified as sex discrimination under Title VII. Those remedies had been statutorily set with no attention paid to women's experience. Women who had suffered sexual abuse for years on the job, and who, when they finally resisted, were fired, found themselves with a cause of action that provided only two remedies: reinstatement and back pay. For many women in this position, reinstatement was totally undesirable. In *quid pro quo* cases, back pay was not available since the only reason she had suffered the abuse was to gain the benefit of better pay. Much of this problem has been remedied by the Civil Rights Act Amendments of 1991,⁴² but the existence of the problem for the first 15 years of sexual harassment litigation does demonstrate the difficulty in forcing new feminist causes of action into pre-existing legal categories.

Another problem that has arisen in sexual harassment law results from the Supreme Court's treatment of the legal claim as one more akin to sexual assault than to sex discrimination in employment. In *Vinson*, although the Court ruled that sexual harassment was covered by Title VII, it also ruled that evidence regarding the plaintiff's choice of provocative clothing was admissible for the purpose of showing whether the harassment was welcome. Comparing the element of "welcomeness" to that of consent in rape law, Susan Estrich and other feminists have argued that the issue of "welcomeness" should be entirely eliminated from Title VII claims.⁴³

There has been little disagreement among feminist legal theorists who have called for the reformation of sexual harassment law.⁴⁴ We have been outraged by judicial responses that have ignored the radical

41. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

42. Pub. L. No. 102-166, 105 Stat 1071 (1991). Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq., as amended by the Civil Rights Act of 1991, now provides for compensatory and punitive damages in cases of "unlawful intentional discrimination." CRA § 102(a)(1). Compensatory damages include damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." CRA § 102(b)(3). Compensatory and punitive damages are not available for cases of disparate impact and are not available where the party can otherwise recover under Section 1981. CRA § 102(a)(1).

43. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 828-29 (1991). Estrich argues that the unwelcomeness standard puts the blame on the woman in the same way that lack of consent does in rape law. As in rape cases, the jury is asked to focus on the harassed woman's conduct, not her words. And, as in rape cases, no can sometimes mean yes. See also Gillian Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995) (arguing that if courts apply a rational woman test in sexual harassment cases, the focus on unwelcomeness will be eliminated).

44. There has been some debate over whether the standard for determining actionable cases of hostile environment should be the "reasonable woman" standard, but all participants in the debate appear to agree substantially that the woman's per-

potential of sexual harassment law.⁴⁵ In this arena, we seem agreed that the point of naming the harm and providing a cause of action was to change the nature of the workplace, to rid it of sexual harassment.

C. *Summary.*

The new thesis of sex equality was introduced by Congress in 1964 and recognized as a constitutional issue by the Supreme Court in 1971. For 20 years, most courts embraced a conservative notion of sex equality based on women's similarity to men. In response to this position, feminist legal scholars have developed new theories of sex equality and sex discrimination to counter that conservative stance. Feminist scholars have also challenged the objectivity of legal standards and have argued in sexual harassment cases that the woman's perspective must be considered.⁴⁶ In the last five to ten years, courts have begun to incorporate some of these theories and produce more positive outcomes.⁴⁷ Despite these successes, feminist legal theorists must remain prepared to critique successful cases, ever looking for the domesticating tendency of law to force what today may seem radical or progressive into a more conservative framework. Feminist legal theorists must not lose touch with the real life experiences of the women whose lives they hope to improve.

IV. THE NATIONAL CONFERENCE ON WOMEN AND THE LAW

A. *Introduction.*

The National Conference on Women and the Law, during its 22 year history, provided two main advantages to persons interested in feminist legal theory and practice. First, it provided the opportunity for academics and activists to meet and exchange information and ideas. Second, participants, although primarily progressive in their political outlook, were in many other ways quite diverse. Active participants included community activists as well as legal activists. From the early days, the conference was meticulous in its efforts to include panelists from different races, sexual orientations, and physical abilities. The legal issues of poor women, immigrant women, women with

spective needs to be considered. See Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 49-52 (1993).

45. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (adopting a boys will be boys attitude and holding that Title VII was not meant to change the social norms of the workplace).

46. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994).

47. See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2402-2408 (1994). But see, MacKinnon, *supra* note 21, at 1292, n. 50 (describing the victory in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as limited because it did not question the male standard that was applied for obtaining partnership).

AIDS, sexually abused women, and women in prisons were given as much attention as issues affecting professional women and middle-class married women. For those of us attending from the legal academy, teachers and students alike, this three day immersion into the real life problems of women different from ourselves was an important reality check on an otherwise sheltered perspective.

During most of this history there was no other national event that provided such an opportunity to blend theory and practice. There was certainly no conference so large and so diverse. At the 14th Conference, held in Washington D.C., for example, over 2600 people attended, more than 200 different workshops were offered. The Sourcebook,⁴⁸ published by the organizers of the Fourteenth Conference, was 465 pages long.

The size of the conference and the scope of topics covered seems amazing in retrospect. This is especially true when you consider that law students did the organizational work and activists, already overcommitted in their daily lives, wrote outlines, met deadlines (sometimes), and worked with the law student organizers to make each panel a success.

B. *A Personal History*

The first National Conference on Women and the Law was held at New York University Law School in 1970. Approximately 50 women attended. The second conference, in 1971, was held in Chicago. I attended my first conference in 1974, the Fifth National Conference, in Austin, Texas. My most vivid recollection of that conference was the panel on *Roe v. Wade*.⁴⁹ The decision had been handed down shortly before I graduated from law school, and after I had completed the course in constitutional law. At my law school there had been no female professors, only a handful of female students, and virtually no feminist consciousness about law or legal issues. At the time of the Austin conference I was practicing tax law in Montgomery, Alabama, where feminist consciousness of any sort was minimal. I had come to Austin, Texas to interview for a job on the law faculty at the University of Texas and had scheduled my trip to coincide with the conference so that I could meet friends from law school and so that I had an

48. Each year, beginning with the Eighth Conference in Madison, the students in charge of the conference published a Sourcebook that contained outlines of material prepared by the panelists. Many of these outlines provided the only up to date sources for lawyers doing cutting edge feminist litigation. The creation of this type of publication was one of the major contributions of the Madison student organizers. Prior to that time, the Conference publication tended to be a collection of a few scholarly articles, similar to those published in law reviews. See, e.g., *Women and the Law: Symposium on Sex Discrimination*, published by the Women's Law Caucus of Temple University School of Law, hosts of the Seventh National Conference on Women and the Law (1976). The publication contains 6 articles, including one by now Justice (then Professor) Ruth Bader Ginsburg.

49. 410 U.S. 113 (1973).

explanation for the trip to offer my boss. I include these facts to help explain how a young female lawyer, who considered herself a feminist, had no knowledge of abortion rights litigation or the story of how *Roe v. Wade* came to be one of the most celebrated feminist cases of the era. The panelists included Sarah Weddington, the Texas lawyer who had argued the case before the Supreme Court, and other feminist lawyers who had attended the oral arguments and written amicus briefs in the case.

It was immediately apparent to me that my law school experience, which I had viewed quite positively, had been woefully inadequate in important respects. The world I was introduced to through the stories of feminist litigators at that conference was like nothing I had known before. In short, the experience was transformative.

As important as the Austin conference was, and as much as it gave me a new sense of feminist commitment, it somehow did nothing to inform my teaching when I joined the University of Texas law faculty the following fall. Instead, I kept my teaching and feminist politics separate, not intentionally, but more as a matter of course. There was no feminist community within the University of Texas law school at that time, in sharp contrast to the very active feminist communities throughout the state of Texas.

I did not attend another Women and the Law Conference until 1977, the Eighth Conference, held in Madison, Wisconsin. Again, the experience was transformative. And this time the experience infiltrated my teaching and my life at the law school. At the Madison conference, for the first time, workshops were organized in clusters which included an entire cluster on lesbian issues. I was a lesbian, and although I wasn't vocal about the fact, it was not something I had ever hidden. But the occasion to discuss gay and lesbian legal issues with my University of Texas colleagues had rarely arisen.⁵⁰ And now, at workshop after workshop, I participated in discussions about discrimination, estate planning, and custody issues. After I returned to Texas, I quickly introduced the students in my Wills class to a hypothetical lesbian couple and asked them to think about how that couple's situation differed from the husband and wife hypotheticals discussed throughout the text. Before long, I was giving seminars, both in and out of the law school, on estate and tax planning for gay and lesbian clients.

At the Ninth Conference, held in Atlanta in 1978, and sponsored by my alma mater, the University of Georgia School of Law, I was a panelist for the first time. I worked with some of my students from the University of Texas to put in a bid to host the Tenth Conference. The

50. I did raise *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd*, 425 U.S. 901 (1976), with my colleague, Barbara Aldave, when the Supreme Court issued its summary affirmance. She explained to me that the Court had very carefully limited privacy rights within the context of marriage and procreation. The result in *Doe* was thus no surprise. End of discussion.

bid was successful. The Tenth Conference was held in San Antonio because the attendance at these conferences had grown too large for Austin.⁵¹

Because the University of Texas was the host school, the national steering committee for that year included several women on the Texas faculty. Each year the students who put on the conference selected a national steering committee that served as an advisory group to the student planners. The committee typically met one weekend in early fall with the student organizers (called the core committee) to discuss general plans for the conference. That fall (1978), the meeting was held at my house in Austin. Many of the women I worked with at that meeting, and throughout the year of planning for the conference, became life-long friends. Those relationships were a source of feminist nourishment for someone like me, whose local legal and law school communities provided so little.

I attended most of the remaining conferences, often participating as a panelist.⁵² Through this experience I met feminist practitioners from all over the country who were doing the sort of work that I was only teaching about. This connection to the practice of law was terribly valuable to me. I came back from these conferences energized and full of new insights, focusing on problems in a new way and infusing my teaching with examples based on these problems.

Finally, the Women and the Law Conference came to an end. I was not there for its demise and I now feel guilty about that absence. The Conference had been such a positive force in my life and yet for the last two years of its existence, I did not attend and I gave it no support. (I should feel guilty!) Perhaps it ended because too few people like me continued to support it. Perhaps it ended because other conferences had begun to fill some of the needs that the National Women and the Law Conference had filled on its own for so long.⁵³ And perhaps it ended because the burden of organizing the conference fell too heavily on women law students, who were becoming more and more removed from the feminist experience and concerns of those women who had organized the early conferences.

C. *Revival and Reunion*

The good news is that the demise of the National Conference on Women and the Law may not be final. There are plans for a revival.

51. Similarly, the Ninth Conference had been held in Atlanta rather than Athens.

52. The 1980 conference was in San Francisco. The 1981 conference in Boston; 1982 in Detroit; 1983 in Washington, D.C.; 1984 in Los Angeles; 1985 in New York; 1986 in Chicago; 1987 in Washington, D.C.; 1988 in Austin; 1989 in Oakland; 1990 in Detroit.

53. For example, the Lavender Law Conference which began in 1988 now provides many of the workshops that were in the lesbian cluster at the Women and the Law Conferences.

Mary Dunlap, teacher, artist, lawyer, activist, and long-time participant in the Women and the Law Conference is the key force behind this event. I spoke with her shortly after the NWLSA conference in Madison and put her in touch with NWLSA officers. It is our hope that the revival of the National Conference on Women and the Law and the existing student-centered annual meeting of NWLSA will join forces in the spring of 1998. Mary Dunlap has posted the following notice, which I pass on to the readers of this journal:

* * * * *

22nd National Conference On Women and The Law in San Francisco in spring 1998!

Thanks to a seed money grant from Golden Gate University Law School, a group of women lawyers and law students based primarily in San Francisco are working to revive the National Conference on Women and the Law, at least for one Conference in the near future. The organizers intend to hold the 22nd National Conference on Women & and the Law in San Francisco in spring 1998.

A brief historical sketch: Organized annually by women law students, with extensive participation from lawyers, law professors, judges and other legal professionals, the National Conference on Women and the Law has held twenty-one sessions, starting in New York City at NYU Law School in 1970 (attended by approximately 50 persons) to Detroit in 1990 (several thousand attending). The National Conference on Women and the Law was a unique, crucial source of inspiration, idea-sharing and coalition-building among feminists in law for all of those years; keynote speakers over the years included Eleanor Holmes Norton, Ruth Bader Ginsburg, Herma Hill Kay, Vilma Martinez, Charlotte Bunche, Mary Morgan, Judy Heumann and many other renowned feminist leaders. Beginning in Madison in 1978, there were regular and significant panels, workshops, speeches and other forms of visibility and participation by lesbians in and about law. Women of color and First World women participated in the Conference from its inception, with issues of race, ethnicity and national origin becoming increasingly important over the years of the Conference. Access and accountability to and for disabled women, and women's health issues, opened up considerably within the Conference as of the late 1970's.

The 22nd National Conference's temporary executive director is San Francisco attorney, law teacher, and lesbian activist Mary C. Dunlap. For more information about the conference, write to 22nd National Conference on Women and the Law. c/o Mary Dunlap, 399 Joost Avenue, San Francisco, CA 94131, or telephone 415-585-9038.

* * * * *

The latest report from the conference organizers confirms that the 22nd National Conference on Women and the Law is scheduled

for March 19-22, 1998 and will be held at the Civic Center in San Francisco. The organizers are currently working on a web site which should be up and running by summer of 1998. Look for Womlaw on the web.

I look forward to the revival of the Conference. I hope it will provide that energetic "shot in the arm" I got from many past conferences. But more important, I hope it will provide a legacy from the past to today's generation of law students and legal activists. The future of feminist legal theory will be strengthened as we share our knowledge of (and wisdom from) the past.

