Carol Smart

LAW, CRIME AND Sexuality

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SAGE Publications
London · Thousand Oaks · New Delhi

First published 1995
Reprinted 1995, 1999

SAGE Publications Ltd
1 Olivers Yard, 55 City Road
London EC1Y 1SP

SAGE Publications Inc
2455 Teller Road
Thousand Oaks, California 91320

SAGE Publications India Pvt Ltd
B-42 Panchsheel Enclave
PO Box 4109
New Dehli 110 017

British Library Cataloguing in Publication data

A catalogue record for this book is available from the British Library.

ISBN 0 8039 8959 8 ISBN-13 978-0-8039-8959-7
ISBN 0 8039 8960 1 (pbk) ISBN-13 978-0-8039-8960-3 (pbk)

Library of Congress catalog card number 94-069678

Typeset by Type Study, Scarborough
Printed and Bound in Great Britain by
Selwood Printing Ltd. Burgess Hill, West Sussex

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Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

Academic Press Ltd for 'Feminism and Law: Some Problems of Analysis and Strategy' from *International Journal of the Sociology of Law*, 1986, 14(2), pp. 109–23; Blackwell Publishers for 'Law's Power, the Sexed Body and Feminist Discourse', *Journal of Law and Society*, 1990, 17(2), pp. 194–210; JAI Press Inc for 'Proscription, Prescription and the Desire for Certainty?: Feminist Theory in the Field of Law', *Law, Politics and Society*, 1993, 13, pp. 37–54; Open University Press for 'Feminist Approaches to Criminology, or Postmodern Woman meets Atavistic Man' in *Feminist Perspectives in Criminology*, eds L. Gelsthorpe and A. Morris (1990) pp. 70–84; Pluto Press for 'Feminist Jurisprudence' in *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, ed. P. Fitzpatrick (1991) pp. 133–58; Routledge for 'Criminological Theory: its Ideology and Implications Concerning Women', *The British Journal of Sociology*, 1977, 28(1), pp. 89–100, 'Legal Subjects and Sexual Objects: Ideology, Law and Female Sexuality' in *Women in Law*, eds J. Brophy and C. Smart (1985) pp. 50–70 and 'Legal Regulation and Male Control' in *The Ties That Bind*, C. Smart (1984) pp. 3–23; Sage Publications Ltd for 'The Woman of Legal Discourse', *Social & Legal Issues: An International Journal*, 1992, 1(1), pp. 29–44; The University of Calgary Press for 'Law, Feminism and Sexuality: From Essence to Ethics?', *Canadian Journal of Law and Society*, 1994, 9(1), pp. 1–23; Virago Press for 'Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives' in *Sex Exposed: Sexuality and the Pornography Debate*, eds L. Segal and M. McIntosh © 1992.

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Introduction

This collection of essays has two main objectives. The first is quite simply to draw together an organized and focused collection of papers which have been published in a wide range of different journals and books. Bringing these papers together will not only make some work more readily accessible for students, but will also demonstrate that there exists a corpus of intellectual work which varied sites of publication can often disguise.

The second objective is of a different order. The papers are written by a feminist within the sociological tradition who focuses on substantive and theoretical issues in criminology and socio-legal studies. Although all these perspectives and foci come together in one person, both institutional and intellectual boundaries often mean that work defined as criminology is not read by socio-legal communities (and vice versa), what may be written for a feminist audience may not be read by sociologists, and many sociologists and feminists ignore anything which looks as if it is about law. This kind of fragmentation occurs elsewhere of course and is not necessarily problematic in as much as it represents the growth and diversification of sociology and of feminist scholarship. However, it does mean that there can be a considerable ignorance about certain kinds of intellectual developments which do not fit into standard categorizations. So this book tries to defy this fragmentation to some extent by, at the very least, bringing some elements together in a coherent whole and, at best, by revealing the relevance of specific substantive and theoretical debates to wider knowledge projects. This book will hopefully establish the extent to which this kind of feminist project is constantly informed by, and informs, wider debates in sociology, criminology, socio-legal studies and feminist theory and philosophy.

There are of course important sub-goals as well. This is a book for students and so it intends to provide new generations of students some understanding of an intellectual history with some of its shifts and developments. I cannot, of course, claim that this collection is representative of a range of intellectual traditions but the work that is presented here demonstrates a clear development of ideas which in turn links into wider intellectual movements. We can speak of this as

a knowledge project – albeit that this may give it a false sense of purposive direction which really overestimates the author's control over her own intellectual development. But it has, with the benefit of hindsight, become a project. The kernel of this project has been to demystify law and to render its workings more transparent. This, in turn, has always been linked to a gendered emancipatory project – although the very idea of emancipation from constraints and oppressions has been transformed of late.

There are a number of things I would like students to take from this collection. The first is that theory need not be too hard or too inaccessible. I write this in the full knowledge that some of the pieces in this collection are not necessarily the most straightforward essays I have ever written. But the arrangement of the essays does allow the reader to follow the progress of ideas and to see the groundwork from which subsequent thoughts have emerged. This should provide some foundation for understanding why some ideas become particularly important and why they are taken up and developed later. For this reason it is probably better not to dip into the book as such, but at least to read an entire section and to read the introductions to each section which provide important guiding ideas.

I would also like students who do not have a great deal of knowledge of law and legal processes (including the criminal process) to take from this collection a deeply textured concept of law and how it works. Although one of my aims is to make the workings of law transparent, this does not mean that I want to make the workings of law appear simple or one-dimensional. As is the case with our understandings of economic or political systems, the more we study legal systems the more we can appreciate how difficult it may be to change them or to 'use' them for 'emancipatory' purposes. We begin to understand that the odd reform here or there (no matter how hard won) may have little impact or may even be counterproductive. And so I want students who may be committed to change (as most sociology, social policy and feminist students are) to become more sophisticated in their understanding of law. I would like many more students to hesitate before they call for legal reforms as solutions to problems they have identified.

Finally, I would want students to become more fully aware of the extent to which law is implicated in our everyday lives. There is still, I fear, a tendency to assume that law becomes relevant (sociologically as well as personally) when something has gone wrong, for example in the case of divorce, or a physical assault, or an accident. However, law does not sit on a shelf, so to speak, waiting to be lifted off when the occasion demands. It can be said to frame our lives in terms of the possibilities available to us, or we could go further (as I do in later

papers) to say that it operates as a discourse which constructs legal subjects such as rape victims or lone mothers. I hope, therefore, that readers will gain some understanding of this form of deployment of power which is too often simply treated as an epiphenomenon of something else more important (such as, the economic base) or as a minor influence in a society where institutions such as the media, the labour market or the family are seen to be automatically more significant (see Kingdom, 1991).

Knowledge, politics and action

The papers which have been selected here have been chosen to portray the development of certain themes as clearly as possible. This means that this is a book about knowledge and ideas more than a book about actual laws, actual criminal processes, the actual effects of reforms and so on. Work on such topics is important but would not have served the purposes of this collection because such work is often bound by the historical moment in which it is produced, it is not always transferable out of its immediate context and does not necessarily provide intellectual tools for readers to 'think' about law in other contexts. There is therefore much talk here of ideologies, discourses and narratives (the terms change as ideas change) and little of the terms and nuances of legislation, the impact of the rape trial on abused women, or the form that a law against pornography might take. There is little point in reading this book to find the current state of domestic violence legislation, for example, or to discover the newly developed practices of the police in this field.

This is a book about ideas with the aim of generating more ideas and debate. But these are not intended to be ideas for ideas' sake. A major concern throughout the collection is the question of the relationship between knowledge and politics. In the papers that were originally published in the late 1970s and early 1980s, it will be discovered that I found this relationship relatively straightforward. Later it becomes more difficult. But before plunging into this vexed question it might be useful to provide a guide to the epistemological developments represented in these papers. To do this I shall borrow shamelessly from Sandra Harding's typology of feminist knowledges (Harding, 1986). Harding refers to feminist empiricism, standpoint feminism and postmodern feminism. This organization of feminist thought can be seen as replacing the dominant categorizations of the 1970s and 1980s, namely socialist feminism, radical feminism, liberal feminism and so on. It is, therefore, in some ways a newer method of slicing the same cake but it necessarily gives greater weight to the construction of knowledge than the avowal of a particular politics.

This does not mean that there are no politics in Harding's categories but the political implications of these different feminist positions are less easy to construe. For this reason I shall map the question of politics onto her typology and I shall explain later why I think it is important to do this.

Harding's typology does not represent a simple chronology although there is a sense in which feminist empiricism can be said to come first, with standpointism building on its insights. Then postmodernist feminism seems to emerge out of some of the dissatisfactions of standpointism and realism.[1] Notwithstanding this progression, it is clear that all three types of feminist knowledge exist at once even if this is a conflictual co-existence. Yet it is also the case that individual writers may slide between these divergent epistemological stances. Perhaps it is most common for standpoint feminism and postmodern feminism to rely, every now and then, on the products of feminist empiricism, even while being particularly disdainful of this epistemological mode. These categories are therefore rarely absolutely 'pure' and it is important to acknowledge this. They operate more like ideal types than strictly discrete entities. Thus certain papers in this collection 'tend' more towards one particular mode than another and I doubt whether the reader will find pure examples of any.

Feminist empiricism

I associate feminist empiricism most closely with the work produced during the late 1970s and early 1980s. Obviously theoretical work was being produced then, but this was the era when, in sociology and criminology at least, one of the main concerns and demands of feminism was for more studies *on* women. Women were absent; there was a clear sense in which we had no sociological knowledge about the lives of women. Feminist scholars rushed to fill these gaps, even while appreciating that the sociological methods available might not be ideal. Women were, in a sense, a new and uncharted territory and there was an eagerness for knowledge of them (us).

This knowledge was never regarded as neutral knowledge, however. Feminist empiricism has been criticized for presuming the possibility of objective knowledge or, at least, the existence of empirically verifiable facts. These criticisms have weight but, to some extent, miss the point. While feminist empiricism did subscribe to the notion of an objective, directly knowable social world, it was none the less committed to a political agenda and to the production of change. It may have been epistemologically conservative (from our vantage point now) but it was not necessarily conservative in other ways. Denise Riley (1992) for example argues that feminist research

in the 1970s was directly geared to making demands on the state. This empirical research developed within a particular framework of understanding in which it was presumed that empirical knowledge could be presented to the state and that 'emancipatory' policies might eventually emerge. Although success was never naïvely presumed to follow automatically, none the less the research was seen as part of a political project for change. Riley argues:

> the British women's liberation movement formulated demands to a (solidly unresponsive) State, so that there was nothing academic about this interest [in research]; it was understood to be sharply political. Those of us who could somehow manage to research these questions saw our investigations as 'at the service of' feminist politics and campaigns. (1992: 124)

Thus feminist empirical work *on* women, was always intended to be *for* women, even though the relationship between this *on* and *for* was never fully explored and did not become a focus of attention until a clearly formulated standpoint feminism emerged. (The best example of this early approach in this collection is Chapter 2.)

Standpoint feminism

In Harding's typology the shift to standpointism asserts even more clearly the need for knowledge to be *for* women. But standpointism is differentiated from empiricism more in terms of its focus on the status of knowledge and the importance of methodology. For standpointism, feminist politics does not reside in the ultimate impact of knowledge upon the world (although this is important) but in the way that politics produces knowledge which will 'inevitably' forward the interests of women because it is generated from the perspective of women. From this epistemological position it is argued that if knowledge is generated correctly it will do good or, at the very least, will unassailably be in the service of the feminist project.[2] This is what Jane Flax has referred to as 'innocent' knowledge:

> By innocent knowledge I mean the discovery of some sort of truth which can tell us how to act in the world in ways that benefit or are for the (at least ultimate) good of all. Those whose actions are grounded in or informed by such truth will also have *their* innocence guaranteed. (1992: 447)

Unlike feminist empiricism, standpointism articulates quite carefully the way that knowledge and politics are related. But this relationship is identified at the *point of production* of knowledge (that is, knowledge from the perspective of women) rather than being explored at the *point of dissemination*. That is to say, an effect is presumed. The taken-for-grantedness of this effect rests on the assumption that there is a 'body' upon whom the knowledge will

impact. Typically this 'body' is the state or an arm of the state or, at the very least, some bloc of interests which can be influenced instrumentally.

Standpoint feminism has therefore been especially powerful as a mode of 'knowing' in the field of feminist legal theory and feminist criminology. This is in part because the law (whether civil or criminal) has tended to be viewed as just such a bloc (of male interests) or as an arm of the (patriarchal) state. Pringle and Watson (1992) have cautioned against precisely this formulation of the state:

> Marxists and many feminists [have] assumed that the state has an objective existence as a set of institutions or structures; that it plays a key role in organizing relations of power in any given society; that it operates as a unity, albeit a contradictory and complex one; and that there is a set of coherent interest, based on underlying economic or, in the case of some feminisms, sexual relations, which exist outside the state and are directly represented by or embodied in it. (1992: 55)

The problem with standpointism, therefore, is not that it misconstrues the deeply political nature of the construction of knowledge, but that it assumes that this (good/innocent) knowledge goes out to work on or influences an organized, objective, purposeful institution or set of institutions.

From the vantage point of the 1990s this sort of feminist scholarship can be seen to be problematic in another crucial way. Put simply, it tends to speak in a 'falsely universalising voice' (Barrett, 1992: 207). This means that early standpointism, like the Women's Movement from which it was derived, spoke unproblematically of 'we' and of the category of women. This issue is discussed in greater depth in later chapters and so will not be fully developed here. It has also, since Riley (1988) wrote *'Am I That Name?'*, become a major focus of concern for both standpointism and postmodern feminism alike. The discovery of difference has meant that many of us who were writing in the 1980s look back with some anguish on the unselfconscious references to 'us' or 'we', and to bold policy statements which it was presumed would meet the needs of women-in-general. (The best examples of this standpoint orientation can be found in Chapters 4, 8 and 9.[3])

Postmodern feminism

This is the title Harding gives to her third 'type' of feminist epistemology. However as authors such as Barrett (1992), Butler (1992) and others have argued,[4] this title can be problematic. It often confuses poststructuralism with postmodernism, and then proceeds to treat an incredibly diverse range of writers as if they were the same and were dedicated to the same project. This project is often then

depicted as the desire to undermine feminism, or at least to rob feminism of its political relevance and purpose by denying the existence of women. Rather than reproduce arguments that are available elsewhere or which appear later in this volume, however, it may be more useful to provide a very straightforward guide to what I regard as the key issues of both poststructuralism and postmodernism since many of the chapters that follow fall predominantly into this framework. Necessarily this means that I am presenting the elements of both which I have drawn upon and found insightful, rather than attempting an overview.

The poststructuralism which influences the papers that follow derives in many ways from the work of Michel Foucault because it was in his accumulated work that there was the earliest and clearest articulation of a poststructuralist project. The influence is incremental but starts with the questioning of Marxist concepts of power and the idea of a unified state from which all power derives. These ideas are reflected in my early rejection of the idea of law as a unity which in turn reflects the interests of a patriarchal state or a bloc of male interests (see Chapter 8). Linked to this rejection of a Marxist approach is the refusal to posit a general theory of law and patriarchy. Instead there is a clear preference for more specific, local or historical analyses of connections between laws, events and persons. As Pringle and Watson argue:

> Foucault shifts the emphasis away from the intentionality of the state to pose questions about its techniques and apparatuses of regulation. . . . He aims to show how these mechanisms and technologies get annexed and appropriated to more global forms of domination. But these interconnections are not to be read off from a general theory; in each case they have to be established through analysis. (1992: 56)

This means that poststructuralism does not have to lose sight of the global, but it is never taken-for-granted nor is it presumed that everything inevitably operates to reproduce it or can be understood in terms of some derived purpose indelibly etched into the global scenario.

The Foucaultian concept of power has sometimes been seen as the complete antithesis of feminist notions of power (Alcoff, 1988; Di Stefano, 1988). However, not all feminists agree and many point to the way in which feminism has always identified diverse types of power and the power that women themselves can deploy. Poststructuralism, therefore, does not seek always to depict women as the powerless ones, while none the less recognizing that there are specific modes of deploying power in ways which are expressly gendered. The assertion that women can and do deploy power does not therefore mean that poststructuralists are asserting that women 'have' as much

power as men or that because both 'have' power we can take power out of the equation and treat men and women as if they were the same. The deployment of power is not random and what feminists have added to Foucault's work is the recognition of the gendered nature of the patterns that are formed (see Bell, 1993).

The next key element of poststructuralism of course is its focus on discourse and the idea of the discursive construction of the subject. This emphasis shifts attention away from the idea of pre-given entities (for example, the criminal, the prostitute or the homosexual) towards an understanding of how such subjects come into being at certain moments. This entails a significant shift in perception away from the idea that people exist in an a priori state, waiting for institutions to act upon them, towards thinking about subjects who are being continually constituted and who also constitute themselves through language/discourse. Poststructuralism thereby destabilizes the 'individual', allowing him/her to become more fluid and diverse. This notion of diversity has, of course, been given even greater attention by writers more usually described as postmodern.

Finally, the other most important element of poststructuralism is its focus on knowledge and its disinterest in Truth but fascination with the processes and methods of distinguishing Truth from Falsehood. Foucault's insights into what we might call ways of knowing and his insistence that these are modes of deployment of power has provided a new focus for political action. Thus we can shift our understanding of law(s) away from the concept of it being an institution, towards the idea of law as discourse which is, in turn, a significantly powerful discourse because of its situation in the hierarchy of knowledges and its power to subjugate other discourses (namely, law's version of rape versus women's versions of rape).

At this stage we have moved quite close to what I regard as the key elements of postmodernism, and indeed there is a great potential for overlap. However, although we can construct poststructuralism and postmodernism on a philosophical continuum, so to speak, there remains for me one very important distinction. Postmodernism is a critique of epistemology. It makes us rethink and reconsider the foundations of what we think we know. But poststructuralism is more intimately involved with the construction of local knowledge. I am invoking an old distinction here which may not be entirely appropriate but, when I think about feminist work which is postmodern, I conjure up intellectual work which theorizes about theories and subjectivities. When I think of poststructuralism, I conjure up intellectual work which theorizes about discourses, relationships, subjects, documents, representations, bodies and so on. I think the former is vital because it is challenging how we can think and how we

can do. But it is equally important to be doing the latter, namely reading the documents, talking to the subjects, analysing discourses, viewing representations, denaturalizing concrete bodies and so on. As Hekman argues, 'Foucault's analysis does not abandon the subject, but reconsiders subjectivity; his analysis is neither abstract nor subjectless, but, rather, an exploration of concrete bodies and their situations' (1990: 69).

The distinction I am making is not meant to be an old fashioned 'slur' on postmodernism or a new way of saying that postmodernism is concerned with the ephemeral while poststructuralism is concerned with the real. Both deny such simplistic dualisms and depictions. But ultimately I would argue that for the feminist sociologist, if not the feminist philosopher, there is a need to keep returning to social relationships. This does not mean a return to empiricism (meaning a naïve belief in a direct access to an unmediated reality) but a continual process of 'establishing through analysis' the status/locus of one's knowledge.

So what are the key elements of postmodernism? The first element that comes to mind is the place where postmodernism and poststructuralism most overlap and this is in the rejection of the Cartesian human subject from whom action and thought are assumed to flow, and who exists in an a priori sense, in essence, outside culture.[5] The postmodern critique of this subject is probably best expressed in the work of Susan Hekman (1990) but has been taken forward by Judith Butler (1990) in her critique of feminism's retention of essential sexual difference. It is Butler, although not she alone, who has done most to challenge the universalizing concept of Woman. Criticisms of this universal woman pre-date Butler's formulation of course. The argument that feminism hailed Woman when really it only spoke to a small group of white, middle-class western women has long been a grassroots political complaint. But Butler's formulation of the problem has gone beyond the idea of building a rainbow coalition of women as a political response to the criticism. Instead, she explores the presumed natural differentiation between men and women, ultimately to argue that we are not sexed by nature and then gendered by culture, but that in the process of being gendered we are also sexed. In challenging this fundamental binary divide (as fundamental to much feminism as well as conservatism) Butler invokes a very fluid subject who was sexed as well as gendered, but who had no essential being, and certainly no opposite pole (man) from which to derive meaning and identity.

It is this kind of argument which has caused alarm to a feminist scholarship which has always presumed that it was ultimately producing knowledge for women and that women constitute a fairly

clearly defined and uncontroversially given interest group. As Butler argues, for many 'politics is unthinkable without a foundation' (1992: 3). She goes on to argue that this form of politics, based as it is upon the humanist idea of the a priori, rights-carrying subject, is only *one* conceivable form and not the only form that politics can take. She also, with others, argues that anti-foundationalism (that is, the rejection of this human subject) does not mean that real women do not exist. As she argues, being constituted as opposed to given in nature, even if this constituting is never fully complete or finalized, does not make the subject a chimera.

It is this debate about the supposedly vanishing Woman that I find generates so much antagonism against postmodern feminism and so much irritation among students. This is discomforting for feminists who are part of this intellectual movement because, as Flax (1992) has argued, the adoption of this position is often equated with a kind of treachery and abandonment of all that is held dear to feminism. It is seen as a form of 'guilty' knowledge; a kind of Trojan horse in the heart of feminist endeavour. In a way this is surprising because it seems clear to me that postmodernist/poststructuralist emphases on diversity and fluidity, have their roots in feminist thinking and feminist critiques of orthodoxies about women as a homogeneous, biologically given category. The fear of postmodernism/poststructuralism derives in large part from the misconception that it is an 'alien' form of philosophizing, imposed from outside by a few trendy (probably French) male theorists and taken up by some fifth columnists who were always shaky in their commitment to the cause anyway. This 'image' of postmodernism/poststructuralism is ironic in some ways because it perpetuates the disavowal of women's scholarship. These ideas are attributed to a few high status men, and the fact that many women were working with these ideas already and formulating ideas around difference and tackling epistemology, is ignored. The intellectual graft is credited to the famous men, and the women theorists are disdainfully regarded as mere acolytes or intellectual groupies.

This is not to say that postmodern/poststructuralist thought is not disruptive; it clearly is. What it most disrupts is the assumption that scientifically produced knowledge fuels politically correct actions and strategies. It disrupts the idea that women's experience can be read as an oracular utterance which can be harvested to produce a Truth which alone carries political force. As Jane Flax has argued, this proposition is based on two problematic assumptions. The first is the assumption that there is a supremely satisfying methodology which will not only produce Truth, but which will persuade all doubters of its veracity. This ignores the way that the production of knowledge is

always contested and rests on a hope that there will be a final contest in which diversity will coalesce. Second, it is based on the presumption that in politics it is Truth which prevails. This is, arguably, a naïve view of politics and underestimates completely the influence of values and conviction[6] and the way in which Truth (evidence) can be disregarded.

Standpointism has perhaps taken feminism up a difficult alley where politics is concerned. Standpointism gives priority to knowledge produced in the academic context. It requires that this production follows quite precise rules and it also requires a feminist academic to act as interpreter and disseminator of this knowledge (namely, Maureen Cain's work discussed in Chapter 12). It participates in creating hierarchies of knowledge and legitimizes this by reference to the promise of a good political outcome. In contrast postmodern/poststructuralist feminism offers no such guarantees and I suppose that it is this which most frustrates its critics. There is no clear emancipatory project here in the sense of programmes of action and Utopian visions, and this feels like a betrayal for many. But perhaps we should consider why the promise of something manifestly improbable (since we cannot transcend power) holds such sway. We should also ask how long we must wait for the good political outcome, and how we will know it when it comes, for surely such a promise must have a time limit and some criteria for judging success?

My doubts about standpoint feminism and about realism in general are most clearly articulated in Chapters 12 and 3 respectively. But they also inform most of the papers originally published after 1989. I leave it to the reader to judge whether these later papers abandon the link between knowledge and politics or whether they are struggling towards a new articulation of this complex relationship. Certainly this relationship is a major preoccupation of mine and the papers that follow are therefore a kind of series of case studies, each written from within a historical moment and each engaging an aspect of the key concerns of feminist thought current at the time. What should become clear is that feminist scholarship has developed from a form of grappling with the mainstream, in which there were no or few women's voices, to transforming (to some extent) this mainstream and starting to grapple with itself as it becomes more aware of its (our) own role in the production of knowledge. There are now many feminisms and engagement between these forms is inevitable and productive, even if painful. This collection is intended to be a contribution towards this painful engagement.