AT THE BOUNDARIES OF LAW

Feminism and Legal Theory

Edited by
Martha Albertson Fineman and
Nancy Sweet Thomadsen

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FEMINIST THEORY

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NANCY SWEET THOMADSEN

Routledge □ New York London

Dedication

From Martha: To the memory of my Mother, the promise of my daughters and the joy of my granddaughter.

From Nancy: To my parents, Arthur and Shirley Sweet and to Larry, Raph, Jordie T. and Kevin P.

Acknowledgments

I would like to thank the governing board of the Institute For Legal Studies for their continued financial support for the Feminism and Legal Theory Conference which produced these (and other) wonderful papers. I particularly want to thank Dorothy L. Davis for her patience and supportive assistance as the Institute's Administrative Assistant and Cathy Meschievitz, Associate Director, without whom no Conference budget could have been formed. Margo A. O'Brien Hokanson and Sherry Lund also provided essential assistance. David M. Trubek as Director of the Institute consistently supplied needed encouragement and helpful criticism of the feminist legal theory project from its beginning. My student, Anne MacArthur, provided invaluable assistance and essential support in running several of the conferences as did Belinda Bennett the year she was my graduate student.

M.A.F.—Madison, 1990

Introduction

Martha Albertson Fineman

This book is the product of an increased interest in feminist scholarship as it relates to legal issues. Law is an area relatively untouched by the post-modern currents that have washed through other disciplines, but now appears to be caught within tides of critical methodologies and conclusions that threaten its very roots. This collection of papers was selected from a larger group presented over a four year period at sessions of the Feminism and Legal Theory Conference at the University of Wisconsin. They reveal that feminist legal theory represents both a subject and a methodology that are still in the process of being born. There are no "right" paths, clearly defined. This scholarship, however, can be described as sharing the objective of raising questions about women's relationships to law and legal institutions.

Theory and Practice

Given the newness of the inquiry, many practitioners of feminist legal theory are more comfortable describing their work as an example of feminist "methodology" rather than an exposition of "theory." Some in fact believe that method *is* theory in its most (and perhaps only) relevant form.

In my opinion, the real distinction between feminist approaches to theory (legal and otherwise) and the more traditional varieties of legal theory is a belief in the desirability of the concrete. Such an emphasis also has had rather honorable nonfeminist adherents. For example, Robert Merton coined the term "theory of the middle range" to describe work that mediated between "stories" and "grand" theory. He described such

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This Introduction is based on a presentation made at the University of Florida in 1989. It will be published in the Florida Law Review in 1990.

scholarship as being better than mere storytelling or mindless empiricism as well as superior to vague references to the relationships between ill-defined abstractions (Merton, 1967, p. 68).

Feminist scholarship, in nonlaw areas at least, has tended to focus on specifics (Weedon, 1987, p. 11). Feminist legal scholarship, however, recently seems to be drifting toward abstract grand theory presentations. Carol Smart has warned that feminist legal theorists are in danger of creating in their writing the impression that it is possible to identify from among the various feminist legal theories that are in competition one specific form of feminist jurisprudence that will represent the "superior" (or true) version. She labels this totalizing tendency, evident in the work of many of the most well-known North American legal feminists, as the construction of a "scientific feminism," and she is explicitly critical of such grand theorizing (Smart, 1988, p. 71). The papers presented here avoid such theorizing and are connected with the material and concrete.

Grand theorizing represents the creation of a new form of positivism in a search for universal truths discoverable and ascertainable within the confines of the methodology of critical legal analysis. Middle range theory, by contrast, mediates between the material circumstances of women's lives and the grand realizations that law is gendered, that law is a manifestation of power, that law is detrimental to women. These realizations have previously been hidden or ignored in considerations of those laws that regulate women's lives. As the articles in this collection illustrate, such inequities in the legal treatment of women are best exposed by referencing and emphasizing the circumstances of their lives.

One cannot help but be aware of the difficulty of trying to do work using middle range feminist methodology within the confines of legal theory, however. Not only is there the pull toward grand theory that operates to categorize less grand scholarship as "nontheoretical," but I fear that feminist sensibilities become lost or absorbed into the morass of legal concepts and words. I, for one, am a legal scholar who has lost faith. Feminism, it seems, has not and, perhaps, cannot transform the law. Rather, the law, when it becomes the battleground, threatens to transform feminism. This is true I believe because of the obvious pull and power of the law as a "dominant discourse"—one which is self-contained (though incomplete and imperfect), self-congratulatory (though not introspective nor self-reflective) and self-fulfilling (though not inevitable nor infallible).

In order to even have a chance to be incorporated into and considered compatible with legal theory, feminist thought must adapt, even if it does not totally conform, to the words and concepts of legal discourse. Feminism may enter as the challenger, but the tools inevitably employed are those of the androphile master. And, the character of the tools

determines to a large extent the shape and design of the resulting construction. It seems to me, therefore, that the task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the existing totalizing nature of grand legal theory. Such a feminist strategy would set its middle range theory in opposition to law—outside of law. That is the task that has also defined the creation of this collection.

Feminist Methodologies

In these articles, there are several characteristics that in various permutations and combinations provide examples for the construction of feminist legal analyses that challenge existing legal theory and paradigms. First, feminist methodology is often critical. The critical stance is gained from adopting an explicitly woman-focused perspective, a perspective informed by women's experiences. I personally believe that anything labeled feminist theory can *not* be "gender-neutral" and will often be explicitly critical of that paradigm as having historically excluded women's perspectives from legal thought. "Gender-sensitive" feminism, however, should not be viewed as lacking legitimacy because of an inappropriate bias. Rather, it is premised on the need to expose and correct *existing* bias. "Gender-sensitive" feminism seeks to correct the imbalance and unfairness in the legal system resulting from the implementation of perspectives excluding attention to the circumstances of women's gendered lives, even on issues that intimately affect those lives.

There is a tendency in traditional legal scholarship to view the status quo as unbiased or neutral. This is the logical place for feminist analysis to begin—as an explicit challenge to the notion of bias, as contrasted with the concepts of perspective and position. Feminist legal theory can demonstrate that what *is* is *not* neutral. What *is* is as "biased" as that which challenges it, and what *is* is certainly no more "correct" than that which challenges it, and there can be no refuge in the status quo. Law has developed over time in the context of theories and institutions which are controlled by men and reflect their concerns. Historically, law has been a "public" arena and its focus has been on public concerns. Traditionally, women belonged to the "private" recesses of society, in families, in relationships controlled and defined by men, in silence.

A second characteristic of much of feminist work is that it uses a methodology that critically evaluates not only outcomes but the fundamental concepts, values and assumptions embedded in legal thought (MacKinnon, 1982, pp. 239–40). Results or outcomes in cases decided under existing legal doctrines are not irrelevant to this inquiry, but criticizing them is only a starting point. Too many legal scholars end their

inquiry with a critique of results and recommendations for "tinkering"-type reforms without considering how the very conceptual structure of legal thought condemns such reforms to merely replicating injustices (Fineman, 1986). When, as is so often the case, the basic tenets of legal ideology are at odds with women's gendered lives, reforms based on those same tenets will do little more than the original rules to validate and accommodate women's experiences.

From this perspective, feminism is a political theory concerned with issues of power. It challenges the conceptual bases of the status quo by assessing the ways that power controls the production of values and standards against which specific results and rules are measured. Law represents both a discourse and a process of power. Norms created by and enshrined in law are manifestations of power relationships. These norms are coercively applied and justified in part by the perception that they are "neutral" and "objective." An appreciation of this fact has led many feminist scholars to focus on the legislative and political processes in the construction of law rather than on what judges are doing. It has also led many feminists to concentrate on social and cultural perceptions and manifestations of law and legality at least as much as on formal legal doctrinal developments.

Implicit in the assertion that feminism must be a politically rather than a legally focused method or theory is a belief about law and social change that assumes the relative powerlessness of law to transform society as compared to other ideological institutions of social constitution within our culture. Law can reflect social change, even facilitate it, but can seldom if ever initiate it. No matter what the formal legal articulation, implementation of legal rules will track and reflect the dominant conceptualizations and conclusions of the majority culture. Thus, while law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change.

A third characteristic of much of feminist legal methodology is that the vision it propounds or employs seeks to present alternatives to the existing order. This may be, of course, a natural outgrowth of other characteristics of feminist legal thought, particularly when it is critical and political. I place it as separate, however, because an independent goal of much of feminist work is to present oppositional values. It is often at its core radically nonassimilationist, resistant to mere inclusion in dominant social institutions as the solution to the problems in women's gendered lives. In fact, the larger social value of feminist methodology may lie in its ability to make explicit oppositional stances vis-à-vis the existing culture. The objective of feminism has to be to transform society, and it can do so only by persistently challenging dominant values and defiantly not assimilating into the status quo. The point of making wom-

en's experiences and perspective a central factor in developing social theory is to change "things," not to merely change women's perspective or their position vis-à-vis existing power relationships. To many feminist scholars, therefore, assimilation is failure, while opposition is essential for a feminist methodology applied to law.

One other characteristic of much of feminist legal theory is that it is evolutionary in nature. It does not represent doctrine carved in stone or even printed in statute books. Feminist methodology at its best represents a contribution to a series of ongoing debates and discussions which take as a given that "truth" changes over time as circumstances change and that gains and losses, along with wisdom recorded, are not immutable but part of an evolving story. Feminist legal theory referencing women's lives, then, must define and undertake the "tasks of the moment." As the tasks of the future cannot yet be defined, any particular piece of feminist legal scholarship is only a step in the long journey feminist legal scholars have begun.

Within feminist legal thought and, indeed, within the articles included in this collection, there is explicit contest and criticism as well as implicit disagreement about the wisdom of pragmatic uses of law, the effectiveness of law as an instrument of social change and, most broadly, the importance of law as a focus for feminist study. Some feminist scholarship reveals antagonist, even violent disagreement with other feminist works. Disagreements aside, however, it seems clear to me that feminist legal theory has lessons for all of society, not just for women or legal scholars. Ultimately, it is the members of our audience that will judge the effectiveness of our individual and collective voices.

Conclusion

Feminist concerns are, and must continue to be, the subject of discourses located outside of law. Law as a dominant rhetorical system has established concepts that limit and contain feminist criticisms. Feminist theory must develop free of the restraints imposed by legalized concepts of equality and neutrality or it will be defined by them. Law is too crude an instrument to be employed for the development of theory that is anchored in an appreciation of differences in the social and symbolic position of women and men in our culture. Law can be and should be the *object* of feminist inquiry, but to position law and law reform as the *objective* of such theorizing is to risk having incompletely developed feminist innovations distorted and appropriated by the historically institutionalized and inextractable dictates of the "Law."

The scholarship presented here is critical, is political, is part of ongoing debates and is concerned with methods and processes that comprise

law. It is typical of the very best feminist legal scholarship in that it is about law in its broadest form, as a manifestation of power in society, and, for the most part, it recognizes that there is no division between law and power. Many of the articles recognize that law is not only found in courts and cases, in legislatures and statutes, but also in implementing institutions such as the professions of social work and law enforcement. Others reflect the fact that law is found in discourse and language used in everyday life reflecting understandings about "Law." It is evident in the beliefs and assumptions we hold about the world in which we live and in the norms and values we cherish.

I hope that the reader enjoys the excursion to the boundaries of law undertaken in this volume. A few are sure to be disturbed by some of the work presented, others, hopefully, will be inspired. Feminist legal theory has begun to expand the boundaries, redefine the borders of the law.

Madison, 1990

Contents

I

Perspectives from the Personal

Feminists assume that experiences of certain sorts facilitate genuine theoretical insights and that recreation of such experiences are legitimate contributions to legal discourse. Not only can the right "stories" provoke insights into the nature of law, they do so with a richness that eludes traditional presentations by summary or succinct arguments. Just as an appropriate picture may be "worth a thousand words," so too the representations of personal experience can be worth an indefinite number of conventionally relevant abstract-theoretic arguments.

In affirming the connection between the personal and more theoretical discussions, feminist authors acknowledge the relevance of experience, social position, and perspective to the development of theories of law. All scholars approach their subject from some particular point in the social universe and from that perspective; no "unbiased" points of view exist. In feminist scholarship, explication of the position from which the scholarship emanates is a significant part of the methodology.

In Kathleen Lahey's "Reasonable Women and the Law," for example, the author uses descriptions of encounters between women and the law to reveal how the normative notion of "reasonable" behavior functions as a justification for dismissing the voices of persons judged not to conform. This presents a particular dilemma for feminist practitioners of law. On the one hand, women lawyers and judges, as well as clients, must exemplify "reasonableness" in order to be taken seriously. At the same time, women who exemplify the accepted norms of reasonable behavior serve as standards against