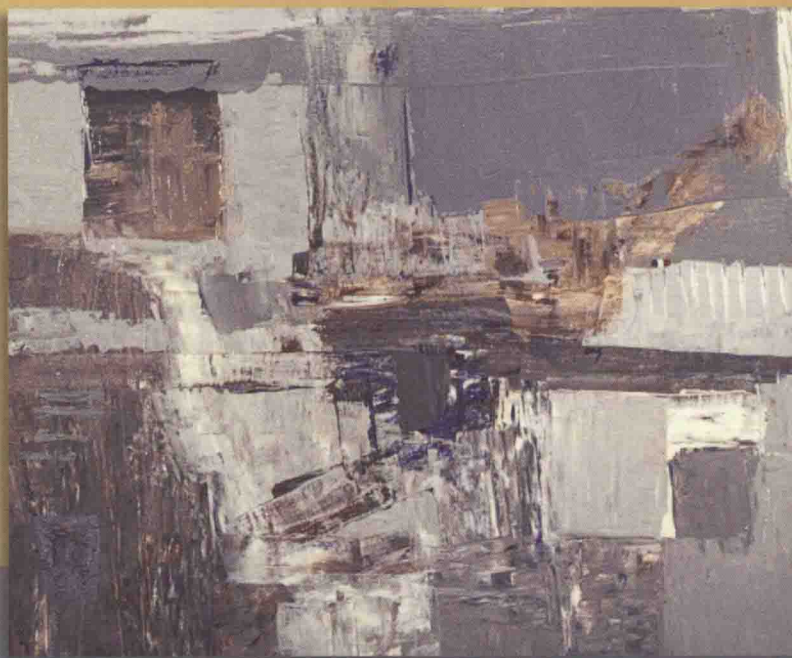


ASPEN STUDENT TREATISE SERIES

# INTRODUCTION TO FEMINIST LEGAL THEORY

THIRD EDITION



*Martha Chamallas*



Wolters Kluwer  
Law & Business

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# Introduction to Feminist Legal Theory

Third Edition

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**Wolters Kluwer**  
Law & Business

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For Peter and Beth

# Preface to the Third Edition

*Introduction to Feminist Legal Theory* is designed principally for students and scholars who have made some commitment to study feminist legal theory, often by signing up for a course by that name or a related course on gender and law. This text functions as a paperback treatise and as a guide to exploring the connections between feminism and law. It examines many of the substantive topics that feminists have written extensively about, discusses major cases in the field, and shows how feminism has influenced the shape of legal categories and doctrines since the 1970s. It should help students understand some of the more difficult and theoretically sophisticated law review articles assigned for their courses. It works well as a companion text to gender and law casebooks or as a principal text for a seminar, assigned along with law review articles, books, or anthologies. My students have also used the text to help them choose paper topics and to study for final exams.

## FEATURES

*This book illuminates the central debates of the contemporary era and explains the basic concepts and vocabulary of feminism in a legal context.* The chronological narrative of the development of feminist legal theory presented in the initial chapters of this book gives readers who are new to the field a sense of its history. The book offers a concise overview of a dynamic field, paying particular attention to how feminist legal theory intersects with other schools of thought, such as critical race theory and LGBT (lesbian, gay, bisexual, and transgender) legal studies. The citations in this book were carefully chosen to allow readers to locate prominent authors and articles commonly regarded as exemplary and important to the overall development of the field. Without attempting to reduce the whole of feminist legal theory to a few basic themes, writers, and narratives, I have tried to provide enough content and context to represent the contours of the field.

*Introduction to Feminist Legal Theory is written to be accessible to readers with no background in feminist theory, including those who are simply curious about the subject.* As a law professor who has offered a cluster of

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related courses — Feminist Legal Theory, Legal Control of Sexual Conduct, and Gender and the Law — I have often been approached by law students, graduate students from other disciplines, faculty colleagues, judges, and practitioners who tell me they are intrigued by my field and sense that feminist legal theory contains something new and potentially valuable for them. Others express a desire to discover the ways in which their lives as women might relate to the study or practice of law, particularly because the law is so often depicted as gender neutral and unconnected to politics and cultural conflicts. At times, male students and colleagues have confided that they wished there were a text that would give them some background and insight into feminist legal theory to expand their knowledge beyond the context of contentious discussions in the classroom and the faculty lounge about date rape, sexual harassment, or reproductive rights.

Introduction to Feminist Legal Theory *is a concise and compact summary of the field*. It can be used to compare legal feminism to other schools of legal thought—for example, law and economics or legal realism—and can enrich fields of study such as women's history, women and politics, or feminist philosophy. I particularly hope that it will be of value to scholars and judges who wish to infuse feminist perspectives into their scholarship and judicial opinions, as well as by lawyers who wish to argue that basic legal concepts such as fairness, justice, and autonomy should take on new meanings.

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As a visiting professor at the Harvard Law School, I owe a debt of gratitude to the students in my feminist legal theory seminar who “tried out” the third edition of this book and to Kristi Jobson and Frank Sabatini for their valuable work as my research assistants.

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Finally, I want to thank Peter Shane — my spouse and colleague — for everything.



# Introduction

## A. The Contours of Feminist Legal Theory

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

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

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

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

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

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

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

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

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

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

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feminist or critical theory and who are not familiar with specialized anti-discrimination law doctrines.

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

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

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

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

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

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

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

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

### B. Organization of This Book

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

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

<sup>1</sup> 404 U.S. 71 (1971).

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

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

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

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

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

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

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

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

## **Introduction**

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



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