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Linking the Visions

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Women's Studies, like law, is deeply interdisciplinary. Its central methodology is simply to ask the feminist question: “What is the significance of this for women?” The answer is inevitably complex because women live varied lives. Any disciplinary tool that helps us understand this complexity is welcomed. Law serves as both a tool of analysis and a subject of interrogation. Asking about women does not lead to simple answers. It complicates the legal project of determining rights and responsibilities

Any lawyer can identify the most obvious achievements of asking “the woman question” of law. One example is the Nineteenth Amendment, a feminist achievement. Another, more recent, is the disappearance of explicitly gender-based job segregation. In other areas asking about the impact of a legal rule on women's lives has revealed aspects of the problem that had been overlooked but seem obvious once described. We have come to understand how critical a woman's control over her reproductive life is to her ability to live on terms of equality with men. We have become skeptical about relying upon the preferences of women to justify confining them to low-paying, low-status positions. We now see coercion in sexual situations that would have been thought to be consensual a generation ago. We no longer look at pornography as merely the exuberant speech of a rebellious male spirit; we notice the woman who is depicted, too, and her silence.

Women's Studies draws on interpretive disciplines that uncover gender bias in doctrines and descriptions that previously seemed neutral. For example, an historical survey of the tort law of emotional injuries reveals its origins in 19th century cases that describe a husband's stake in marriage as material and a wife's as purely emotional. Emotional injury claims were initially more easily recognized when they were brought by women, but they still are disfavored in a way that may be due to their association with “the weaker sex.”

Often, asking about women reveals how limited the tools of law are when addressing deep inequalities. Thoughtful feminism, like thoughtful economics, reveals the unintended consequences of using law to achieve social change. Even when a violation of the law seems clear, it can be difficult to find a remedy that further the interest of all women. Take, for example, the litigation involving state military colleges that led to a U.S. Supreme Court decision in United States v. Virginia. The use of state funds to support institutions of higher education that are completely closed to women made this a clear case of gender discrimination. Most of the Supreme Court agreed, but the justices, and feminists, disagreed on the appropriate solution. Unlike the justices, feminists ask which remedy would best improve the status of women.

The Court ordered the Virginia Military Academy to admit women. The hard question, which feminists debate and the Court left unanswered, is over the terms of that admission. The Court took an equal-access approach, reminiscent of the early 1970's jurisprudence associated with the opinion's author, Justice Ginsburg. It opened the doors of the academies “on behalf of ...women” who could succeed in an environment that rewarded aggressive behavior and upper-body strength. In the absence of a comparable state institution geared to leadership training for women, a state must permit women to enroll in the male academy. This formal equality solution insists only that women be permitted to participate if they can meet male standards. Women who fail to conform to the male model can be excluded.

To other feminists, however, gender discrimination at VMI was not merely a question of exclusionary admissions policies. What troubled them is state support for a deeply stereotypical view of male-female behavior. If the goal of anti-discrimination law is equality of citizenship, this argument goes, institutions based on gender stereotypes should be closed, or the stereotypical behavior should be eliminated in favor of citizen-soldier training that assumes many students will be women.
In a response that has become a refrain throughout feminist jurisprudence, still other feminists responded that closing or redesigning VMI for this reason would itself perpetuate a stereotypical view of women as unsuited for military life. The more radical solution, these women argue, is consistent with the Court's formal approach: Admit women on exactly the same standards as men and subject them to exactly the same requirements. Subject them to adversative education and barracks life. Shave their heads. Make no accommodation. The disappearance of women into bodies made anonymous by uniforms and baldness, and women's success under these conditions, would pose the deepest challenge to our assumptions about gender. From this perspective, law should be used to eliminate not only gender-based lines but the very existence of gender categories.

The first of the feminist solutions would open the public world to more women. The second would make the world safer for unconventional women. Either choice would leave some women vulnerable, yet lawyers, unlike theorists, cannot avoid choosing.