Review Essay - Feminist Jurisprudence

Christina Whitman
*University of Michigan, cwhitman@umich.edu*

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CHRISTINA BROOKS WHITMAN


In the 1970s feminist legal theory furthered feminist legal practice. Feminist lawyers saw themselves as advocates of "women's rights," interested in winning legal victories in particular cases. Because their attention was focused on reform through legislation or litigation, the theory they developed was deliberately, if uncritically, grounded in what would be persuasive to those who held power in government institutions. They built directly upon the precedent made in race cases, precedent which assumed that the appropriate goal for social change was equality and defined equality as the similar treatment of similarly situated individuals. The key to the early legal victories of the second wave was the assertion that women and men are similarly situated for all legally relevant purposes.

In the last decade, however, feminist jurisprudence has become less interested in arguing to judges. Instead, its attention has turned to the critique of law itself as a construct of patriarchy. As a practical matter this shift was provoked by the apparent deficiencies of the ostensibly neutral, formal equality strategy in cases involving problems, like pregnancy, that judges thought reflected bedrock biological differences between women and men. Legal scholars, influenced by feminist critical theory in other disciplines, began to ask whether the standard methods of legal analysis necessarily distort what is at stake for women. In a move that parallels the feminist criticism of science, these scholars challenge the assumption that law establishes a neutral procedural framework that provides a fair hearing for all points of view.

One significant body of work within this critical movement argues that sex is not an issue that can be made to disappear through gender-neutral methods of analysis. This scholarship builds on the insights of Catharine MacKinnon, the only feminist legal theorist to come up with a unifying theory independent from legal precedent and the only one whose work has had a wide readership beyond the profession. MacKinnon challenges the assumption that answers are to be found by comparing women to men. She argues that discrimination against women is based on dominance, rather than distinction, and that the key to understanding male dominance lies in the social construction of sexuality from a male perspective. The social meaning of sex as pleasurable for both sexes when men dominate and women submit justifies gender hierarchy. Women are seen as naturally subordinate in this most basic of biological activities and, by extension, naturally subordinate as
political beings. Sex between women and men, which MacKinnon sees as coerced in fact but socially described as consensual, becomes for her the central subject of jurisprudential inquiry because it explains why sex inequality can be seen by law as the consequence of free individual choice.

Examples of the way in which MacKinnon's work has influenced legal scholarship can be found in the legal reform work of Susan Estrich, the deconstructive work of Frances Olsen, and the more ambivalent, personally exploratory work of Robin West. Estrich fits within the tradition of the 1970s in that she argues for specific changes in legal rules, but when she writes about rape her central theme is the way in which criminal law has constructed sexual coercion as consent. Estrich also departs from earlier strategies for legal reform in her explicit rejection of objectivity and abstraction. She begins her discussions with a description of her own rape, and she goes beyond legal doctrinal analysis to the wider context of the reporting, investigation, prosecution, and disposition of rape cases. Unlike MacKinnon, Estrich is willing to adopt the language of consent. She would have the law find lack of consent when a woman has expressly refused to engage in intercourse ("No means no") or when her consent was coerced by threats or misrepresentation. This would leave unpunished those rapes in which consent or silence was coerced by more subtle means, but it would go beyond what is currently possible in the prosecution of rape by non-strangers. Because Estrich is primarily interested in legal change, she has written her basic argument in two forms to two audiences, neither of which is the larger feminist community. Her work on rape initially appeared as a lengthy law review article addressed to lawyers and was subsequently repackaged as a book, Real Rape, addressed to a lay audience. Although the article adopts the standard law-review format in that it consists of an extended discussion of cases and legislation, Estrich uses these materials to create a powerful narrative of the exclusion of the woman victim's perspective. Her theme throughout is that consent and coercion are defined from a male point of view. Criminal law has required, for example, that force be resisted in the way that men would respond to male aggression. And the due process concern that a defendant not be unfairly punished is exaggerated inappropriately by the male fear that women will cry rape. Although the book is addressed to a lay audience, it is in some ways less exciting than the article. The
argument is more tightly written, focused on the problem of date rape, and Estrich carefully avoids the explicit feminism and anger that permeates the article. Real Rape is designed to persuade legislators to make changes that will facilitate the prosecution of date rape without requiring that they accept Estrich's more fundamental challenges to the way in which male perspectives are embedded in the criminal justice system.

Frances Olsen writes within the tradition of critical legal studies, which has challenged the consistency and coherence of the rights-based analysis that was used to achieve the early victories of the "women's rights" movement. Olsen's most powerful article may be "Statutory Rape: A Feminist Critique of Rights Analysis," which analyzes Michael M. v. Superior Court of Sonoma County. In that case the Supreme Court upheld a sex-based statutory rape statute against an equal protection challenge. Olsen demonstrates how any approach to the case threatens women: upholding statutory rape law provides security for some women while intruding on the autonomy of others who are not allowed to consent to sex; striking the laws down furthers autonomy at the expense of security when consent is coerced. The trouble, Olsen suggests, is that, under present circumstances, the interests of some women would be best served by stressing autonomy, but other women would be best served by stressing security. Indeed, a particular woman might well be oppressed by both sexual freedom and societal control of her sexuality. She might be subject to coerced sex that does not fit the legal definition of rape and yet be prohibited from other activities on the grounds of her sexual vulnerability. To treat women as autonomous bearers of legal rights ignores MacKinnon's insight into the way consent is coerced. Michael M. provides a case study that demonstrates how legal argument forces advocates to reach premature foreclosure. The answer, according to Olsen, is not to give up on law but to give up on the effort to achieve credibility with judges by articulating principles that purport to decide all cases for all time. Feminist lawyers should make explicitly political choices and challenge those particular rules that have most pernicious effects at any given time.

Olsen's work demonstrates that feminist insights, the introduction of the perspectives of women, can be done in a way that is compatible with and continuous with the best sort of legal analytic reasoning. Lawyers have always dealt with
close textual reading that searches for unsupported assumptions and suppressed inconsistencies. Olsen turns these techniques to self-consciously political purposes in her critique of the arguments made by the Supreme Court, by lawyers, by feminists, and by feminist lawyers. She demonstrates not only that each argument leaves some important interests out but also that a particular position may actually interfere with the ability of the advocate to see what has happened to the real woman in the real case. She points out, for example, that another feminist scholar, who advocates gender-neutral laws, characterizes the rape in *Michael M.* as a "victimless crime" even though the adolescent defendant in that case sought the consent of the victim by slugging her in the face.

Olsen's work builds explicitly on MacKinnon's. Robin West's scholarship is more deeply ambivalent about MacKinnon's contribution, but its very preoccupations demonstrate the way in which issues of sexuality and dominance have become central to feminist jurisprudence. West, like Olsen, has been very prolific. I will discuss only two of her articles here. In "Jurisprudence and Gender," West argues that both liberal rights-based theory and critical legal theory are premised upon a definition of "human being" that is inapplicable to women. Both theories regard humans as fundamentally separate from each other, but women, West claims, are not in fact physically individuated from other people. Women, unlike men, "are in some sense 'connected' to life and to other human beings during at least four recurrent and critical material experiences": pregnancy, heterosexual penetration, menstruation, and breastfeeding. Although West acknowledges that not all women have all these experiences, she argues that most women are forced into them by male power disguised as biological imperative. In this respect she builds on MacKinnon, and, perhaps more than MacKinnon, West appears to assume that these fundamental experiences are the same for all women despite race, class, and even sexual preference. West differs from MacKinnon in that she has a positive as well as a negative view of sexuality: the "potentiality for physical connection with others that uniquely characterizes women's lives has within it the seeds of both intimacy and invasion" (p. 53). MacKinnon accurately describes women's experience, West says, but so do her opponents who describe sex as pleasurable and affirming; each describes one side of the fundamental contradiction inherent in the material condition of women.
West's approach is reassuring to those who feel uncomfortable with MacKinnon's emphasis on sex as inevitably coerced. It provides a less political way to understand the strategic tensions described by Olsen. And it is particularly powerful in describing why a woman's perspective on such issues as rape and abortion may not be captured by legal concepts of autonomy and independence: "The fear of sexual and fetal invasion and intrusion is the fear of being occupied from within, not annihilated from without . . . of having one's own physical and material life taken over by the pressing physical urgency of another, not ended by conflicting interests of another. . ." (p. 41). West claims to provide a means of reconciling "cultural feminists" like Carol Gilligan and "radical feminists" like Catharine MacKinnon. But much of the apparent force of her approach is attributable to the reductive way in which she describes the positions of others, and the reconciliation she claims to achieve may be simply schizophrenic. That possibility becomes apparent in a second, more personal, and very thought-provoking article ponderously titled "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory."

"The Difference in Women's Hedonic Lives" is divided into two parts. In the first part, West uses examples from her own life to demonstrate that women's suffering is invisible to men because men lack similar experiences and because women are taught either to deny pain or to regard it as inevitable or pleasurable. The examples West uses are promiscuity, physically abusive relationships, and street harassment. Much of this material is powerfully supportive of MacKinnon's point that sex is socially constructed in ways that are destructive to women. But the second part of West's essay takes MacKinnon to task for silencing women who experience pleasure in sexual submission. West takes The Story of O as illustrative of the way in which giving men power can further women's pleasure. MacKinnon's approach, West argues, leads to a feminism that ignores the "experiential reality" that some women feel pleasure in pain and thus diminishes the "hedonic" content of women's lives. West's article is so consistently interesting and so obviously an effort to speak honestly and directly on matters that are seldom discussed in legal literature that it cannot be easily dismissed. Yet it doesn't form a coherent whole. The author of part 2 seems not to have learned from the author of part 1, and vice versa. If women are taught to lie to men and to themselves about
the existence of pain, as West argues in part 1, how are we to use their experience of pleasure in pain as a basis for feminist theory?

West's attempt to reconcile MacKinnon with the insights of cultural feminism reflects the importance of Carol Gilligan, who has been the other major influence on feminist work challenging the accepted discourse of law. In fact, Gilligan has had an impact on feminist jurisprudence that may be more powerful and more enduring than her impact on any other discipline. Legal feminists came late to the question of difference. The constraints of litigation led them to continue to focus on what women and men have in common at a time when feminists elsewhere were beginning to be preoccupied with difference. Gilligan's *In a Different Voice: Psychological Theory and Women's Development* was published just at the time when legal scholars were looking for an alternative to the gender-neutral jurisprudence of the 1970s. It seemed to provide an explanation for the alienation that many women feel while in law school and legal practice, while suggesting that an alternative jurisprudence could be built around themes of caring, relationships, and responsibility.

Yet Gilligan's "ethic of care" has not proven to be very useful for deciding particular cases or generating legal theory. West's effort to bridge MacKinnon's emphasis on invasion and Gilligan's emphasis on intimacy is provocative but unsuccessful. Another ambitious but ultimately unsatisfying attempt to build from Gilligan is Suzanna Sherry's "Civic Virtue and the Feminine Voice in Constitutional Adjudication." Sherry identifies Gilligan's "different voice" with the tradition of civic republicanism currently enjoying a vogue among constitutional scholars and then argues that the opinions of Justice Sandra Day O'Connor, at least when compared to the opinions of other conservative Justices, exhibit relational thinking in that O'Connor is particularly sensitive to the claims of community. The result is a rather dazzling but very strained exhibition of how unlike can be made to seem (a little bit) alike. In order to make the comparisons work to even a limited extent, Sherry is forced to describe not only civic republicanism, but also O'Connor and Gilligan, in the most abstract and unmodulated terms.

A more successful, because less ambitious, effort to apply Gilligan's insights can be found in the work of Carrie Menkel-Meadow. Menkel-Meadow, who writes about alternative dispute resolution
and the legal profession, focuses not on the substance of law but on the role of women in legal practice. In an article written in 1985 she speculated, on the basis of Gilligan's work, that a significant increase in the numbers of women lawyers might lead to changes in the practice and values of the law. Menkel-Meadow thought women might become "innovators and critics of the profession," creating, for example, a "more cooperative, less war-like" alternative to the "advocacy-adversarial model" of law and a non-hierarchical, participatory structure of law firm organization. More recently, Menkel-Meadow admits that her own research and that of others "seems to indicate that women in law are being assimilated into the traditional culture of the profession rather than bringing . . . innovations" (p. 313). A major strength of Menkel-Meadow's work is her care not to claim too much. She is not insensitive to the dangers of perpetuating stereotypes and takes pains to stress that she is talking about socially created differences between women and men, but she is committed as "an act of faith" to the proposition that women will make a difference. Her work is aspirational, self-described as an agenda for future research and an effort to encourage the development of more caring methods of lawyering. Because it has so little upon which to build, it is also frustratingly vague.

Menkel-Meadow does not, except in the most general sense, try to use Gilligan's work to decide substantive questions. Martha Minow's recent book, Making All the Difference: Inclusion, Exclusion, and American Law does exactly that. It is an ambitious effort at synthesis. Minow combines Gilligan's insights with American pragmatism, and other work in philosophy, social science, and literary criticism, to suggest that a wide range of legal questions involving difference ought to be resolved by "attention to relationships—relationships between people, between concepts, and between the observer and the observed." Minow does not limit herself to issues of gender difference but explores the ways in which cases involving race, ethnicity, religious minorities, children, the mentally and physically disabled, and even the separation of governmental powers can be productively resolved by attention to relationships. Her theme is that problems of difference have seemed intractable because difference has been thought to inhere in the "different" individual rather than to be a product of social construction. This mistake has led courts to ask how "special" needs can be
accommodated into essentially unchanging environments rather than to observe how environments create difference by unnecessary failure to be inclusive. Minow argues that we can restructure relationships to include difference. The standard feminist example of this point would be the adoption of workplace structures and practices which assume workers have obligations to dependent family members. Minow generates others: developing hospital procedures that treat every patient as potentially HIV-positive; teaching sign language to the hearing students in a deaf child's class; finding another family to care for a Down's syndrome child whose parents are unable or unwilling to provide emotional support.

Minow does an effective job of explaining how pragmatist and feminist thinking can be used to challenge the "individual rights" analysis that has dominated law. Refreshingly undogmatic, she does not reject rights theory in favor of relational strategies but redefines rights as "communally recognized rituals for securing attention in a continuing struggle over boundaries between people" (p. 383). Despite the strength of her critique, however, Minow does not ultimately succeed in formulating an alternative decisional strategy. She herself sees the problem. It is one shared by many who have tried to articulate a theory of value based on caring: "This all sounds lovely, you may say, but awfully abstract, What actually happens?" (p. 381). Minow's response is to generate a series of actual case studies. They are all individually interesting but difficult to understand as part of a common strategy. Minow's "relational" solutions to particular problems—like, ironically, so many of the solutions generated by economic approaches to law—seem possible only because she makes factual assumptions that facilitate resolution. She assumes, for example, that there are enough resources to treat all hospital patients with extraordinary care. The deaf child appears to be in a class that is taught by a teacher who knows or can easily learn sign language and one in which no other disabled or disruptive students compete for accommodation; this ideal environment will apparently be recreated year after year. In the Down's syndrome example, which is based on actual litigation, the court has before it a family eager to be emotional parents to the child. Every case seems to turn on fortuities. Perhaps all Minow means to say is that the legal system ought to be open to taking advantage of those opportunities to re-
structure relationships that happen to exist. That is an important point but not one that promises a dramatic transformation in how law deals with difference.

The great temptation of legal thinking is the hope that the interests of women, like those of other groups, can be captured in a single narrative, or formula, or three- or four-part test to be applied to all cases. This would give litigators confidence that they are truly representing their clients' interests, and judges would be able to tell themselves that they are acting with appropriate neutrality. Cases, after all, must be decided, so lawyers must reach conclusions and come up with answers. Provisional, contingent solutions seem too political, too likely to be the result of unconscious or conscious bias. Yet feminist scholars, who have undergone their own temptation with unitary, foundational theory, have not been able to describe a theory that benefits some women without hurting others. There are real differences among women, and some of these have been exacerbated by the women's movement and its legal victories, which achieved access to power for some while removing traditional protections for others. As Deborah L. Rhode puts it, "we need theory without Theory."

In her recent book, *Justice and Gender*, Rhode, like Minow, emphasizes the broader context in which legal rules are created. But unlike Minow, she addresses only questions involving gender and she reaches for no overarching method of analysis. Instead, Rhode discusses the full range of particular legal problems involving women, placing each one in its historical, social, and economic context before discussing the relevant judicial opinions and current legal arguments. Rhode herself makes very few suggestions for legal change, at least as ultimate solutions. There are aspects of this approach which are extremely frustrating. Rhode is so thorough in explicating the full range of arguments that she seems excessively balanced. Again and again she responds to hard questions with a simple call for more research. But Rhode has created the first true legal treatise on gender, and unlike most legal treatises, hers does not limit itself to doctrine. The book is crammed with information from secondary sources and exhaustive in describing the range of possible legal positions. It is not a comfortable book to read from cover to cover, largely because of its lack of a distinctive point of view, but it is a splendid resource.

Some of the most exciting scholarship now being produced
creates partial narratives. Much of it is innovative in its use of non-legal methods of analysis, and some departs dramatically from traditional approaches to legal inquiry. In one recent article, for example, Vicki Schultz uses statistical methods to analyze the role in Title VII cases of employers' arguments that women are overrepresented in low-paying, low-status jobs because they are not interested in more highly rewarded work. Instead of considering each judicial opinion as an independent, self-contained text, Schultz looks at a data set of fifty-four cases and makes a quantitative analysis of the relationship between argument, evidence, and outcome. She finds that courts are more willing to credit the lack of interest argument when employers show that they have made special efforts to attract women and less likely to credit it when plaintiffs produce individual victims who can offer anecdotal evidence of discrimination. Schultz concludes that courts assume that patterns of sex segregation are attributable either to women's choices or to employer coercion. Judges believe that discrimination exists only where employers refuse to hire those women who enter the work world with the desire to take on nontraditional jobs. They overlook the possibility that women's choices are evolving, formed in part in reaction to structural features of employment that affect women's experience in the workplace. Relying on sociological research which supports this latter interpretation, Schultz proposes a new story which implicates employment practices in women's choices even when employers do not engage in deliberate exclusion or coercion. Because she does not focus on doctrinal argument but on underlying judicial assumptions about the nonlegal world, Schultz does not discuss whether Title VII provides an adequate vehicle for remedies against individual employers when segregation is caused by structural and cultural features of workplace organization. But she makes a powerful case that, if it does not provide such remedies, the statute is not responsive to the most serious and enduring problems of employment discrimination against women.

Schultz's work suggests that no single legal approach is adequate because workplace exclusion operates in different ways for different women. Narratives by Black feminist scholars pose a more fundamental challenge, not only to the perspective of white feminist jurisprudence, but also to its lack of passion. In "Sapphire Bound!" Regina Austin, a writer who has been particularly in-
interested in tactics of resistance, calls for a jurisprudence that would "preach the justness of the direct, participatory, grass-roots opposition Black women undertake" (p. 544). She takes as her text *Chambers v. Omaha Girls Club,* in which a court held that Title VII was not violated when a girls' club, administered primarily by whites for Black teenage girls, fired its arts and crafts instructor, an unmarried Black woman, because she became pregnant. The dismissal was found to be justified because Chambers was a "negative role model" for her students. Austin points out the irony of an employment practice that replicates the very condition the organization claims to address: club administrators hoped to discourage teenage pregnancy because of the economic hardship and social prejudice it entails, but Chambers's pregnancy was not "problematic" in this sense until she was fired. Like Schultz, Austin relies on sociological and cultural studies of the way in which structure affects individual choice. She describes adolescent pregnancy as a response to the material conditions in which many Black teenagers live, and Chambers's adult decision to become a mother as "an alternative social form that one might choose deliberately, rationally, and proudly" (p. 576). Role models, Austin argues, ought to be Sapphires, affirming the perspective of less powerful Black women rather than projecting "an assimilated person that is . . . unthreatening to white people" (p. 574).

Other Black scholars have refused to conform to traditional legal standards of politeness and coherence. Some of the most powerful work is by Patricia Williams, who is more explicitly autobiographical than Austin. Williams's recent essays are written in a fragmented, postmodern style that captures the contradictions of her life as a descendant of slaves and of slaveowners who has graduated from Harvard Law School and now teaches commercial transactions. In "On Being the Object of Property," Williams challenges conventional legal discourse by wrenching legal concepts away from their established meanings and using them evocatively and metaphorically. An illusory contract, for example, becomes not a contract in which consideration fails because it is nonexistent or unavailable but a metaphor for the way in which contract law is used to justify the brutal parting of a mother from her children—Mary Beth Whitehead, a "surrogate" mother, from her baby daughter; Williams's twelve-year-old great-great-grandmother, a slave raped by her owner, from her daughter, Williams's
great-grandmother, Mary. Williams's essay is disturbing because it is open-ended and evolving. It doesn't end with a solution. It doesn't even formulate a problem in a form that a court could answer. Perhaps it therefore isn't "law." But it certainly should speak to lawyers.

Law has a tendency to marginalize, and even exclude, theories that are tentative, ambiguous, provisional. Yet some of the most exciting feminist jurisprudence, as well as some of the most banal, has been explicitly open-ended. Formal rules and structured analyses are the ways in which law protects itself against favoritism and arbitrary decision making. But feminist scholarship has found that the dangers of legal power lie not only in bias and interest but also in the false confidence that bias and interest have been eliminated. Feminist jurisprudence has developed a group of theories that can be used to critique results in particular cases and be a powerful challenge to the rhetorical claims of the law. It has complicated and challenged legal discussion. Its interdisciplinary reach is impressive, although little of it is, perhaps as a consequence, strikingly original.

Yet there is a sense in which much of current feminist jurisprudence seems unmoored, directionless. Perhaps more than anywhere else, the strains of the debate over essentialism have disrupted feminist strategies in the law. The formal equality model that accomplished so much through litigation in the 1970s cannot be reconciled with what feminists have come to know about the dangers of assuming similarity within gender as well as across gender lines. However, no alternative model has emerged that avoids these dangers and successfully appeals to the constitutive principles of our Constitution and laws. Courts are just beginning to accept the full implications of the view that groups, as well as individuals, can be holders of legal rights. The next, and more difficult, stage will be to retain the force of that understanding while making a legal space for more nuanced claims about the way that disadvantage varies within groups.

NOTES

1. In cases such as those challenging the legality under Title VII of policies that prohibit all fertile women from certain high-paying jobs on the ground that working conditions
are harmful to fetuses, International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991), some of these victories have come under attack. Important work is being done by scholars such as Mary Becker, who has demonstrated the powerful similarities between these policies and early-twentieth-century protective legislation held unconstitutional in the 1970s. See Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," University of Chicago Law Review 53 (Fall 1986): 1219-73.  


4. Perhaps because MacKinnon's framework has so dominated the discussion of sexuality in feminist jurisprudence (as both inspiration and focus of attack), there has been very little development of a lesbian perspective. See Patricia A. Cain, "Feminist Jurisprudence: Grounding the Theories," Berkeley Women's Law Journal 4 (January 1989): 191-214.  


7. For example, in Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court held that the exclusion of women from employment as prison guards in all-male maximum security prisons that housed sex offenders did not violate Title VII of the Civil Rights Act because the "unique" vulnerability of women to rape created an increased security risk that justified their exclusion.  

8. Angela Harris, "Race and Essentialism in Feminist Legal Theory," Stanford Law Review 42 (January 1990): 581-616, criticizes both West and MacKinnon as privileging white experience and ignoring Black women. Harris argues that MacKinnon's emphasis on the sexual domination of women by men ignores the way in which social constructions of sexuality (for example, the response to rape) have been used to oppress Black men as well as women. Harris's attack on West goes directly to the core of West's theory. By making gendered experiences primary in the formation of women's sense of self, West overlooks the lives of Black women, for whom "the web of race and gender" cannot be disentangled.  


11. Carrie Menkel-Meadow, "Portia in a Different Voice: Speculation on a Women's
14. For example, Patricia J. Williams, in "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," Harvard Civil Rights-Civil Liberties Law Review 22 (Spring 1987): 401-33, and Kimberle Crenshaw, in "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," Harvard Law Review 101 (April 1988): 1331-87, have argued that some white feminists, and male critical legal scholars, have been too quick to jettison rights-based theory. Legal discourse of rights has, they argue, been a powerful tool for minorities, who do not consider its work complete.