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Beyond Universality

Martha Minow†

This is a moment for heralding “feminist jurisprudence.” Recently a reporter from the New York Times called me and several others to get material for a story on this subject. She said she thinks it is a news story: Something of note is happening as feminist work appears in law.¹ Several law reviews are holding symposia and publishing articles that call themselves feminist.² Even the American Association of Law Schools has included feminist jurisprudence in formal events.³ This Legal Forum symposium demonstrates the current enthusiasm for feminism in law.

While I am delighted to participate, I confess I don’t know what “feminism in law” means. “Feminism” is itself an ambiguous term. Outside of academic institutions, feminism tends to conjure up images of street demonstrations by women. Some non-feminists assume that feminism means opposition to the nuclear family and to traditional traits of femininity. Others think it refers to an effort to impose ideas of maternal care-taking as a philosophy for governing society, and associate those ideas with being forced to do things allegedly “for one’s own good” but actually in derogation of personal freedom. Although such outsider views of feminism may be important to some evaluations, here I will focus on meanings of feminism chosen by those who call themselves feminists. But to concentrate on the definitions advanced by feminists hardly resolves the question of what feminism is. Some feminists identify themselves as those who espouse women’s uniqueness.4 Others reject the gender-based distinctions used historically to characterize

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¹ The newspaper printed the story on its law page. See Tamar Lewin, Feminist Scholars Spurring a Rethinking of Law, NY Times B9 (Sept 30, 1988).


³ See Symposium: Women in Legal Education—Pedagogy, Law, Theory, and Practice, 38 J Legal Educ 1 (1988). Feminism was included as one of the “emerging trends” in legal scholarship (see AALS Program, 1986) and was the focus for the AALS Jurisprudence Section Panel in January, 1988 (see AALS Program, 1988).

men and women. Still others resist any comparison between men and women as a basis for defining feminism, and at the same time reject claims that all women have much in common. For each of these feminists, including me, feminism is about taking all women seriously, which requires eliciting the differences and conflicts among women.

I will treat "feminism" as efforts to take all women seriously by challenging the patterns of hierarchical power that have at times excluded or degraded all, or some, women. Attention to such patterns of power, many feminists would argue, properly leads feminists to examine patterns of exclusion and degradation along lines of race, class, disability, age—other traits used by some to confine or devalue others. I join such feminists in seeking an inclusive meaning of the term, a meaning that simultaneously retains its reference to particular, historically-situated, political movements during this century and the last one, in which people worked to enlarge women's rights and opportunities.

But now, what does feminism "in law" mean? I suggest, here too, an inclusive definition: Let us refer to feminist work in litigation, legislation, legal teaching, and legal theories to advance rights and opportunities for women. From this perspective, feminism in law means advocacy to end restrictive treatment of all women. In the very process of reaching this definition, I may be inviting criticism that feminism is narrow and is unresponsive to many of the central concerns of law. This attack treats feminism as a marginal enterprise, or claims it is not distinctive as a way of thinking or doing law, but instead mirrors other similar advocacy efforts. Or a critic could charge that feminism is inconsistent and incoherent, and thus not an important contribution to legal thought or work.

Such criticisms would not worry me. Indeed, I worry instead about their absence. To be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism. For feminist legal scholarship, this has not happened—yet. Unlike scholarly reviews in literature, history, and other academic fields, law review articles demonstrate persistent inattention to feminist scholarship by all but those who subscribe to it.

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*See, for example, Peter Shaw, Feminist Literary Criticism, The American Scholar 495 (Autumn 1988); Alice Jardine and Paul Smith, eds, Men in Feminism (Meuthen, 1987).

larly, although feminists craft arguments in courts and legislatures, seldom are their own terms used in rebuttal. I have not seen, as yet, a serious effort by nonfeminist scholars to criticize feminist developments in legal scholarship, practice, and teaching. The largely silent response may represent a form of significant criticism. Inattention itself does communicate a message of relative disinterest or complacent disregard. For this very reason, the silence disturbs me. I think feminism deserves better; it deserves the minimum degree of respect that is registered by serious criticism.

Judge Richard Posner’s contribution to this symposium offers an implicit critique of what many of us have called feminist jurisprudence because he rejects many of the arguments and positions advanced by feminists while he asserts his own alternative “conservative feminism.” I predict that more direct criticism is on its way, if only because it affords a potential growth industry in scholarship and rich material for tenure articles for those who want to demonstrate their membership in the club of the already-tenured. But I foresee such criticism for other reasons as well. Feminist work challenges what has gone on before. In both its radical call for change and its extensive reach, feminism invites response. Feminists urge alteration of law school course materials and teach-


* Thus, many responses to the anti-pornography campaign simply reassert the First Amendment framework that the campaign sought to challenge when it characterized pornography as a problem of subordination and inequality. See, for example, Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 Yale L & Policy Rev 130 (1984). Judge Frank Easterbrook, writing for the Court of Appeals for the Seventh Circuit, accepted the defendants’ characterization of the challenged restriction on pornography as an effort to guard against the subordination of women but found this effort too damaging to First Amendment freedoms. *American Booksellers Ass’n v Hudnut*, 771 F2d 323 (7th Cir 1985). Feminist opponents to the regulation of pornography, in contrast, share the concern with subordination but evaluate the impact of pornography differently, and they argue that the depiction of sexuality can be liberating for women. See Amicus Curiae Brief of the Feminist Anti-Censorship Taskforce, et al, *American Booksellers Ass’n v Hudnut*, reprinted in 21 U Mich J L Ref 69 (1987-88) (“FACT Brief”).

* Compare Ralph Ellison, *Invisible Man* (Random House, 1952) (describing invisibility as the experience of deepest degradation, as a black man experiences his invisibility to whites).

* Some may refrain from responding to feminist legal scholarship out of fear of being called “sexist.” This fear may be quite misguided, although it may also point to the paucity of models for scholarly dialogue besides adversarial combat. Scholarly disagreements could explore commonalities as well as disagreements, and strengths as well as weaknesses in opposing viewpoints. In that spirit, this article attempts to take seriously the criticisms that could be leveled against feminist legal work while also challenging the assumption that either the criticisms or the defenses against them should define the scope of debate.

ing methods, revision of legal doctrines, and reevaluation of basic
categories and modes of legal knowledge and action. Feminist ar-
guments are appearing in more and more places, even within these
halls. The response from women law students and lawyers is often
welcoming and at least attentive. Growing numbers of women in
legal practice and in law teaching are struggling to come to terms
with their positions in often hostile and antagonistic environments,
and many, myself included, turn to feminism only after finding
prevailing legal theories and practices inadequate and, at times,
debasing. And just as men in other fields have found feminist work
challenging and deserving attention, men in law are beginning to
read and teach feminist work. The sheer adversariness of the legal
profession guarantees that in the midst of all this interest in femi-
nism, criticism is on its way.

Just in case the critics remain uninterested, or tongue-tied, let
me give them some help. When the criticism comes, I think it will
gravitate to the three points I have already mentioned: (1) femi-
nism in law is unresponsive to central issues of legal doctrine and
jurisprudence; (2) feminism offers no distinctive legal doctrines or
legal theories; and (3) feminism is inconsistent and incoherent.

I will elaborate upon these criticisms, and respond to them.
My chief hope is to advance the kind of dialogue that I think femi-
nist work invites. In doing so, I shall strive to maintain the com-
mitment to take the perspective of others that informs much femi-
nist theoretical work. My responses to the criticisms I anticipate,
however, may fall subject to a new round of the same critiques.
You may think that some of my responses fail to address the chal-
lenges, or that they do so in ways that show nothing distinctive, or
that exemplify—even revel in—inconsistency. Do not think this is
undeliberate. If you do not understand or absorb my responses,
this may be a sign of the distance between the assumptions you
hold and those that underlie this article. My assumptions constrain
what I see, as do yours. Yet, even if we only glimpse how we mis-
derstand one another, we can recognize the significance of our
own partiality. This recognition, I argue, would itself reflect and
further efforts to take feminism seriously.

I. Is Feminism Unresponsive to Central Issues of Law and
Jurisprudence?

A critic might say that feminism is a curiosity, but a marginal
movement in law and legal scholarship. It might lead a teacher of
criminal law to add new materials for a day’s session on rape; it
may animate and divide a constitutional law class during discus-
sions of abortion and pornography. It may contribute to marginal and optional courses like sex discrimination and family law. But whatever it may mean, feminism, according to this critic, is about women, not everyone; feminism has little to do with central legal themes such as economic efficiency, democratic legitimacy, or the choices between rules and discretion, deterrence and punishment, and procedural formality and substantive fairness.

In this same vein, a young member of the faculty may include in a jurisprudence class some articles on "feminist jurisprudence" to serve as a contrast to law and economics, legal process, and critical legal studies. More likely, the teacher will assign excerpts from Carol Gilligan's *In A Different Voice* on the theory that the feminist legal work is largely an application of this book on moral and psychological development. After all, the teacher will maintain, feminist legal scholars have not offered any explicit, much less systematic, contributions to the area of jurisprudence. Jurisprudential questions address the central issues in law. These questions traditionally include: What should be the relationship between law and morals; what should be the role of the state in a free society; what justifications and restraints are there to guide judicial discretion and to address the counter-majoritarian difficulty; what is the relative priority of the right and the good; and what scheme for redistributive justice adequately accounts for the tension between desert and need? Taking all women seriously, with attention to the hierarchical patterns of power that have excluded or degraded them, may be interesting, but it is at best an area for application of one or another jurisprudential insight and does not constitute a method of inquiry or new set of principles.

In law practice, feminism may obtain attention when a male judge orders a female attorney to use her husband's name when she appears in court, or when a state-wide commission reports on the negative treatment of women in the judicial system. In these brief moments of publicity, the critic will observe, feminist perspectives address only the discrete question of the treatment of women by men in complex systems of courts, bureaucracies, and

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legal rules. In this context, feminists may point out a need for minor adjustments—exemplified by the recent adoption to the federal procedural rules of degendered language amendments that left the entire substance of the rules unchanged. Feminism may remind people to be polite, mannerly, and attentive to the special sensitivities of women, but it hardly represents a significant alternative to the methods, analyses, and institutions of law, or so a critic might charge.

If this is the criticism, here is an initial response: The marginality of feminism as a body of theory and practice reveals the problem that we as feminists identify and work to change. Feminists seek to change the historic use of power as a mechanism to exclude, marginalize, or degrade women, and simultaneously to treat the very exclusion and marginalization it has brought about as a natural or objective judgment about what is true and valuable.

This response to the marginality criticism is actually two-fold. First, feminists challenge this use of power both by relating legal debates to the specific experiences of women and by expanding upon the very debates critics consider to be central. Second, not only do feminists address central issues in law, but they also challenge the very process by which certain issues are defined as central. By looking at the specific ways in which women are marginalized, feminism provides a critique of the process by which new problems are analyzed, assessed, and judged through old ways of looking at problems. At the same time, feminism questions whether issues which do not fit in the old categories should become marginal concerns.

Let's take each response in turn. Feminism is not marginal because feminists do advance a range of views about concerns treated as central in law. If taken seriously and included within law school courses, scholarly debates, and law practice, feminists have direct contributions to make to classic legal issues. The perspectives of feminist writers all derive from attention to the experiences of women and other traditionally excluded or relatively powerless groups. Moving from this starting point, feminists offer new insights into such issues as the choices between rules and discretion, as in Frances Olsen's work on the expansion of state power in the movement from a maternal preference rule to a best interests of the child standard permitting discretion in child custody determinations.18 Robin West has shown how feminist and male scholar-

ship share conundrums—and she has thereby shed new light on both kinds of work. Feminists have also introduced victims’ perspectives to debates about deterrence and punishment conceptions, and arguments about the relevance of social and economic circumstances to the evaluation of criminal culpability. Judith Resnik, Carrie Menkel-Meadow, and Lisa Lerman have each contributed striking viewpoints about the proper relationships between procedural formality and substantive fairness. Christine Littleton and Wendy Williams both teach us about ways to revise assumptions about neutrality that are buried within the law. The apparent marginality of feminist work is a function of other people’s decisions to exclude it, not anything intrinsic to the work itself. If feminist work were taken seriously, it could not be understood as marginal.

This first response is unsatisfactory, however, if it puts feminist work in a supplicant role, seeking approval by others. Nor is it satisfactory if it seems to call for a kind of affirmative action for feminist work. In its own terms, this first response requires that we

16 West, 55 U Chi L Rev 1 (cited in note 4) (showing commonalities between mainstream and critical legal scholarship by men, and divergence among feminists along lines that also divide some male scholars).
judge feminist legal work on the same basis that we judge all other work, no more and no less critically. Introducing an affirmative action program raises questions about what standards would be appropriate and implies a quota, listing the number of feminist articles that should be assigned in a classroom or the number of women lawyers a law firm should hire. I have no interest in involving myself with these problems, and they miss my point. My point is simply that any charge of marginality reflects ignorance of the work itself, since much of feminist work does respond directly to dominant themes and dilemmas in law. A feminist interest in creating a basis for legal recovery to individuals damaged by the production and distribution of pornography, for example, may, after a superficial examination, seem remote from central themes of constitutional law and may also seem an obvious assault on basic First Amendment freedoms. Yet, a closer look can reveal how the feminist challenge to pornography depends upon and advances a conception of liberty and a conception of equality, central themes in American constitutional law.\footnote{See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv CR-CL L Rev 1 (1985); Cass Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589.} Marginality, then, is a construction placed on the work, not something inherent in it.

The second response to the charge that feminism is unresponsive to central issues of legal doctrine and hence is a marginal movement emphasizes how feminism itself provides a critique of what has made it marginal, and this critique points toward remaking all of law.\footnote{This may, in some respects, seem inconsistent with the first response. For a general discussion explaining and defending inconsistency in feminist arguments, see pp 134-38.} The charge of marginality presumes that what has been treated as central should be so treated, and what has been called mainstream justifiably sets the norm that defines alternatives as marginal. Feminist work challenges this assumption, and in so doing, engages what we know and how we judge as problems for debate, not merely building blocks in law.

The debate feminists seek to inspire may go neglected or misunderstood, however, if the feminist challenge is construed, unthinkingly, in terms of the mainstream categories and questions that themselves are subject to feminist challenge. As an example, considering and assessing feminist arguments within the frameworks of libertarianism, utilitarianism or any other pre-existing "ism" risks imposing these prior frameworks on feminist thought and results in a misunderstanding of the feminist chal-
LENGE to all such frameworks. Similarly, treating feminism simply as the equity side of a division between equity and law tames and confines feminism within a predefined scheme. To ward off or correct such misunderstandings, let me explain this point more fully by turning to the issue of knowledge.

How we orient ourselves depends on what we think we already know. That is why Columbus called the people he encountered on this continent “Indians.” Although I readily acknowledge that we cannot sort through our perceptions without reference to some categories we have already learned, complacency about these categories may close us off from insights—and may leave us quite mistaken about what we see. Feminist work challenges familiar reference points for knowledge. Familiar reference points may be very familiar because they stem from dominant ways of knowing, ways that make other perspectives less familiar, even less able to be expressed.

It may be familiar, for example, to think about free exercise of religion in terms of the kinds of worship and ritual associated with Christianity. It is possible, then, to extend the reference points to a less dominant, but still assimilable, religion, such as Judaism, and find the counterpart elements of religious exercise. We may ask of Judaism, as we ask of Christianity, what is the day of Sabbath rest, what are the holidays that deserve freedom from the demands of work, who is the religious leader in the community, and so forth. Yet, other religions may less easily graft onto this model of the familiar religion. There may be no day of rest; there may be a sense of hours of the day rather than distinctive days during which religious observance demands setting aside gainful work; there may be no “leader” in a recognizably hierarchical form. Clinging to its own familiar reference points, a Supreme Court may fail to recognize as religious a Native American tribe’s belief that a particular spot, and its remoteness from competing, humanly-made activities, is central to religious observance.

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24 See George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal about the Mind (University of Chicago Press, 1987); William James, On a Certain Blindness in Human Beings, in Talks to Teachers on Psychology: And to Students on Some of Life’s Ideals 229 (Henry Holt, 1913). See also Thomas Kuhn, The Structure of Scientific Revolutions (University of Chicago Press, 1970).
26 See Lyng v Northwest Indian Cemetery Protective Ass’n, 108 SCt 1319 (1988). The current debate over what counts as a “burden” on free exercise of religion demonstrates the
Analogously, it may seem familiar to compare women to men in addressing questions of sex discrimination. Is it gender-based discrimination to deny insurance coverage for pregnancy and childbirth expenses? A Supreme Court could answer no, assuming it uses an analysis that takes a man as the norm and finds some women, i.e., non-pregnant ones, able to be like the man. Given this division of the world into pregnant and non-pregnant persons, and given the recognition that both women and men fit within the non-pregnant category, the Court could conclude that pregnant and child-bearing women do not present a specifically gender-based characteristic worthy of legal protection. When Congress specifically rejected this conclusion and amended Title VII to treat employment distinctions drawn with reference to pregnancy as impermissible gender discrimination, the prevalence of a male reference point of view persisted. Programs affording pregnancy and maternity leave therefore were prone to challenge as violations of the ban against gender discrimination, since they treated women differently—in this case, better—than men.

In a somewhat tortured opinion, the Supreme Court did conclude that this challenge would undermine the purpose of the Title VII amendment, and that the reference point here should no longer be men who are presumed to lack major child-care responsibilities. Instead, the Court reasoned, the reference point for the purposes of analyzing alleged discrimination should be any worker's need to combine work and family responsibilities. In this way, the Court challenged familiar assumptions that treat men's experiences as the norm and adopted feminist arguments advanced by Christine Littleton, Judith Resnik, and Wendy Williams. The point here is not to enshrine some view of a woman's ex-
perience as the reference point, but instead to reconsider the assumed reference point after including previously excluded versions of women's needs and interests. If pursued, this demand to include excluded perspectives means a continual challenge to familiar resting points. A next step here, for example, would query the assumption that the accommodation of work and family life concerns only parental duties to children. Doesn't this leave out the responsibilities adult children may have to their ailing parents, or to other close associates in need?\textsuperscript{33}

Seemingly stable categories for sorting through experiences become subject to questions in light of feminist work.\textsuperscript{34} Feminist legal work mirrors the drama staged by feminist work in many fields: The revelation of the excluded offers a challenge to remake what we thought we knew.\textsuperscript{35} When brought to bear on law, feminist questions concern not merely the treatment of women compared to men in various settings, but they also address more profound questions such as what should count as a harm for the purposes of tort law?\textsuperscript{36} Why does the harm have to entail physical injury, or a harm that a white adult man could experience?\textsuperscript{37} Why does the cause relevant to plaintiff recovery have to be traceable to another person, as opposed to a social pattern or practice? Why can't harm include the depiction of a particular group in mass media and privately produced images?\textsuperscript{38} Some feminist challenges have already promoted alternative theories of harm and legal protections sufficiently to alter public debate. For example, whatever one concludes about the advisable legal treatment of pornography, we know, after reading the work of Catharine MacKinnon and Andrea Dworkin, that it cannot be characterized only as free speech; it must also be catalogued as a kind of injury. The categories for making sense of the world are not natural and free from human


\textsuperscript{34} See generally Marsha P. Hanen, \textit{Feminism, Objectivity, and Legal Truth} in Lorraine Code, Sheila Mullett and Christine Overall, eds, \textit{Feminist Perspectives: Philosophical Essays on Method and Morals} 29 (University of Toronto Press, 1988).

\textsuperscript{35} See Barbara Johnson, \textit{A World of Difference} (Johns Hopkins University Press, 1987).

\textsuperscript{36} See Leslie Bender, \textit{A Lawyer's Primer on Feminist Theory and Tort}, 38 J Legal Educ 3 (1988); Lucinda Finley, \textit{Feminism and Torts} (unpublished manuscript).


choice. Feminist analysis introduces alternative frameworks for sorting out perceptions of the world, and in this way, challenges the very reference points that in the past have defined what is central and what is marginal.

An example can illuminate how feminist analysis remakes categories for understanding experiences, and in so doing, responds to central concerns of law while redefining them. Many people have debated policies surrounding what has been called, “surrogate motherhood,” a decision by a woman to enter into a contractual arrangement with a man (and often his wife) to conceive and bear a child and then turn the child over to the couple in exchange for a defined amount of compensation. What should happen if the woman who conceives and bears the child changes her mind and wants to keep the infant? Some have maintained that “the feminist position” demands a grant of power to this woman in recognition of the intimacy of the child-bearing experience and the limits of her ability to know ahead of time what she will feel about surrendering the child. Others have argued that “the feminist position” requires respect for the contract in order to secure equal regard to the autonomy and self-determination of women to match the law’s regard to men’s autonomy and self-determination. Creating an exception to contract enforcement here, some maintain, reintroduces notions of women’s vulnerabilities and disabilities that law historically cited in denying women the power to enter into contracts.

Neither of these views, I would suggest, is particularly more feminist than the other; both “take women seriously” and both pay some attention to issues of power and degradation. But the more probing inquiry afforded by feminist analysis looks at the context in which such contracts are made. Why does this kind of contract become an attractive option to any woman, and how does this relate to women’s other options, or lack of options, to earn money, especially while raising a family of their own? Why does the contracting couple come to the conclusion that the child they want must be biologically linked to them, or to the man in the couple—and that this contractual arrangement is preferable to adoption of an otherwise unwanted child? These questions reformulate the problem raised by surrogate mother contracts by

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situating those contracts in the deeper social arrangements and attitudes around paid work and parent/child relationships. The reformulation itself does not yield an answer about a particular dispute, nor even about the preferable social arrangements in an ideal society. The reformulation does, however, change the factors that would be relevant to both general and specific discussions about the issue.42

Here is another example of the shift in perspectives enabled by feminist analysis. In Philadelphia, as in many cities, the public school system historically maintained an all-boys high school as the finest high school in the city system.43 Although it had long excluded girls, it is called Central High School—a rather vivid demonstration of how dominant institutions have marginalized females and then treated the results as natural. Philadelphia also created an all-girls school, called Girls' High School, which held a lower position in the competitive educational pecking order in the school system. Indeed, the boys attending Central routinely disparaged the girls at Girls' High as less intelligent than themselves. A lawsuit challenging the exclusion of girls from Central High School ultimately produced an order directing an end to the exclusion of girls.44 This result could have been achieved largely through liberal legal theory: The litigants could simply have argued that on any relevant criterion, the girls and the boys were the same and thus there was no good reason for excluding the girls from Central High School.

Yet, after the integration of Central High, Girls' High remains segregated by sex. No one sought to introduce boys to the school. Indeed, some feminists would argue that there is an important role for single-sex schools for females, given the historical and continuing practices of discrimination against them, even while denying

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42 See also Sheila Mullett, Shifting Perspective: A New Approach to Ethics in Feminist Perspectives 109, 117-18 (cited in note 34) (discussing in vitro fertilization by shifting from utilitarian or contractual questions to an examination of the social arrangements and values that make in vitro fertilization seem a good solution to women's infertility).

43 Information provided by Michelle Fine, University of Pennsylvania School of Education.

44 In Vorchheimer v School Dist of Philadelphia, 430 US 703 (1977) (per curiam), the Supreme Court affirmed a Third Circuit opinion holding that, with the exception of "the science field," the sexually segregated high schools for high achievers were "comparable" and hence did not violate the Equal Protection Clause of the Fourteenth Amendment. See Vorchheimer, 532 F2d 880, 882 (1976). Subsequently, however, a Pennsylvania court struck down the maintenance of single-sex public schools as a violation state constitution's Equal Rights Amendment and, because of the disparate quality of education subsequently proven, of the Equal Protection Clause as well. Newberg v Board of Public Ed, 26 Dec & Cases 682 (1983).
the value of single-sex schools for males at this point in history. The co-educational enrollment at Central High, however, has not eradicated the initial problems concerning gender at that school. People working to implement the judicial remedy at Central High have discovered that nothing in the curriculum, counseling program, or other institutional arrangements at Central was changed when girls were admitted; the girls who got in on the theory that they were like the boys are simply expected now to be like the boys. And now, perhaps fulfilling that vision, it is both boys and girls enrolled at Central who look down upon the girls enrolled at Girls’ High.

A feminist analysis would criticize this development. Assimilating the girls to the model of the boy student at Central High has led to what might even be called sexist attitudes by the Central High girls toward the Girls’ High girls. That sexism, as it turns out, is not due to sex but to gender. To understand this development, we need to reconsider the category of gender and entertain the possibility that it signifies and summarizes social attitudes and roles, rather than biologically different bodies. This understanding requires remaking a basic category we use to know the world. And this understanding permits a different way of judging the judicial remedy and its consequences, a way that probes into the pattern of power preserved by the remedy. It is not enough to alter the numbers of female bodies now studying next to male ones if the exclusion and degradation of females continues at the hands of the biological females who have been invited to assume the gender of the boys at Central High School.

Feminism offers the deeper challenge to the meanings of gender and to the treatment of groups by one another. Feminists pursue these deeper challenges by paying attention to the relationship between knowledge and power. In so doing, feminists join theorists influenced by Hegel, Marx, Freud, Horkheimer, Marcuse, Foucault, Derrida, and Arendt. These European social theorists contribute to continental philosophic traditions that until recently have found little hospitality in this country. But in the very act of shoring up feminist insights by noting their similarity to or harmony with the insights of other contemporary traditions, I invite the second criticism: What makes feminism distinctive?

II. DOES FEMINISM FAIL TO OFFER DISTINCTIVE LEGAL DOCTRINES OR LEGAL THEORIES?

If feminism's contributions to legal theory arise through demonstrating links between categories of knowledge and patterns of power, then feminism begins to look a lot like other emerging trends in legal theory, such as critical legal studies and some forms of law and literature. Similarly, if feminism's contributions to legal practice appear in a sustained challenge to the exclusion or degradation of women effectuated or countenanced by law, then feminism begins to look much like other civil rights efforts waged on behalf of members of racial, ethnic, or religious minorities, or persons with disabilities. And if feminism's contributions to law teaching call for more humane classrooms, modulating or leveling the traditional hierarchical "paper chase" classroom, and increasing the respect for students' own experiences as a basis for knowledge and for criticizing law, then feminism begins to resemble other developments in legal pedagogy, most notably, humanistic, clinical, and critical legal studies. These observations, then, raise the question: Does feminism in law offer anything distinctive?

The answer to this question is both yes and no. The major source of distinctiveness for feminism's contributions to law comes from the insistence on incorporating women's insights and concerns. Since traditional legal doctrines, theories, and teaching methods did not consult or even take account of women, this feminist injunction calls for new content and new methods arising from consultations with women. The wellspring of women's lived experiences provides a rich resource, and the very emphasis on checking legal theories, rules, and practices in light of actual experiences itself presents an opportunity for innovation and reform.

Very quickly, however, we reach a problem. Which women would feminists consult? No one subgroup of women can represent

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47 See Schneider, 61 NYU L Rev 589 (cited in note 18).
all women. Several feminist legal scholars have already highlighted the dangers in treating the perspective of white, middle-class, able-bodied women as the sole feminist perspective. More and more feminists have begun to emphasize this point. The danger, I would argue, is the risk of departing from the stringent demands of feminism, rather than a risk inherent in it. Taking all women seriously means recognizing the multiplicity of women’s experiences. Women of color, disabled women, working class women and women on welfare, women rape survivors and women police officers, women with AIDS and women who are physicians, women judges and women criminal defendants all matter, say feminists, and taking them all seriously would dramatically change the construction of the “person” presumed by legal doctrines, legal institutions, and law school classrooms.

Yet, this very multiplicity raises a conundrum: Searching out the variety of women’s perspectives seems to undermine the claim of a distinct feminist contribution. Some feminists may respond that there still are essential female traits, experiences, or capacities that transcend our differences and provide a distinctive foundation for a feminist perspective. Some identify particular issues, such as peace, hunger, and protection of children, as quintessentially women’s concerns. I find these claims unpersuasive. We have plenty of evidence that not all women agree on such issues nor on conceptions of what traits, experiences, or capacities are uniquely and distinctively female. Second-guessing women on such issues not only takes us into the quagmire of debates over whether some people are deluded about their own interests, but also risks undermining the commitment to take all women seriously. Taking all women seriously should mean respecting women’s own conceptions

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50 Women’s active involvement in both major political parties in the United States, and in opposite camps in the abortion, pornography, and maternity leave debates gives some evidence of this.
of themselves and their interests.\textsuperscript{51}

The idea of finding an essence of female identity that could unify women is itself made suspect by recent feminist work. A significant intellectual contribution of feminism is the demonstration that such seemingly empirical conditions as gender identity are fundamentally cultural constructions.\textsuperscript{52} Science and other means for establishing objective facts have themselves become subjects for questioning by feminist critiques rather than neutral means for validating claims. There remains no settled ground for establishing what is essentially female, even if we should want to. Instead, immersion in the historically contingent and culturally constructed meanings of gender and the distinctive perspectives of different groups of women, I believe, offers the avenues of analysis and critique that implement feminist commitments to take all women seriously.

Rather than fold in the face of diversity, and rather than resurrect some singular essence of femaleness, feminists can interrogate the question of distinctiveness itself. Why is it so important for feminism to be distinctive, as that notion has been understood? The preoccupation with distinctiveness shows a preoccupation with pinning things down: with knowing by categorizing and dividing, claiming, naming and blaming, and with tracking ownership of things and ideas. Some would characterize these preoccupations as male. They also fit a description of Western cultural conceptions of knowledge, in contrast to Eastern and African conceptions.\textsuperscript{53} Fascination with tracing distinctive ownership of things and ideas risks distracting feminists from challenging the patterns of thought that historically excluded women and risks forcing us to fight over the few, if any, remaining plots of ground left.

\textsuperscript{51} See Elizabeth V. Spelman, On Treating Persons as Persons, 88 Ethics 150 (1978). Spelman also argues that perceptions by others are relevant and important to taking any person seriously.

\textsuperscript{52} See, for example, Ruth Bleier, Science and Gender: A Critique of Biology and Its Theories on Women (Pergamon Press, 1984); Evelyn Fox Keller, Reflections on Gender and Science (Yale University Press, 1985).

\textsuperscript{53} See, for example, Sandra Harding, The Science Question in Feminism 136-96 (Cornell University Press, 1986) (discussing Eastern and African philosophies that emphasize each person's connections to the whole society or to nature, with consequences for theories of knowledge and of the good). See generally Sandra Harding and Merrill B. Hintikka, eds, Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science (D Reidel Publishing Company, 1983).

\textsuperscript{54} An emphasis on naming distinctive artists, for example, has undervalued "women's work" in needlework and crafts, and neglected those whose social positions made it unlikely their names would become visible. See, for example, Virginia Woolf, A Room of One's Own (Harcourt, Brace & World, 1929) (imagining Shakespeare's sister).
Instead of falling into the trap of defending what makes feminism distinctive, let us note and celebrate what feminism shares with other traditions. This would acknowledge our mutual dependence upon one another in coming to know and to create, not to mention to live. The feminist concern in law for hearing about the lived experiences of all women and renovating legal categories and institutions in light of these experiences invites attention to all who have been excluded. Including the excluded means remaking rules about participation. A commitment to seek out, hear, and redress continued or new exclusions must lead white feminists to consult women of color, able-bodied feminists to talk with disabled women, young feminists to confer with elderly women, and all feminists to seek out women they do not know or understand. This commitment, I believe, also requires that feminists consider the experiences of men as well as women whose concerns have been excluded from attention because of the traits that both share.

In each of its strategies, feminist work bears some analogy to some forms of critical theory, some liberation theories, and some skeptical and pragmatic efforts to join theory and practice. Like the critical theorists of the Frankfurt school, like Hegelians and like American pragmatists, and like some proponents of the scientific method, feminists emphasize practice as a resource for theory and criticize theories removed from the test of concrete experiences. Like many who have challenged formalism in academic work, feminists are skeptical of abstraction for wiping the fingerprints of historical contexts off ideas and concepts that have real weight in the world. Like many 20th century continental male theorists, feminists raise epistemological questions alongside moral and political ones, and question the idea of one truth or one reality that can be discerned and agreed upon by all. Perhaps paradoxically...

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66 Somewhat similar, and somewhat different, arguments appear in West, 55 U Chi L Rev 1 (cited in note 4) (showing divisions among feminist theorists and connections between supposedly adverse male theorists, thus remaking usual assumptions about these theorists).
68 See, for example, John Dewey, The Quest for Certainty: A Study of the Relation of Knowledge and Action (Putnam, 1960).
69 Compare Richard Rorty, Philosophy and the Mirror of Nature (Princeton University Press, 1979) with Harding, The Science Question in Feminism (cited in note 53); Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983); and Scales, 95 Yale L J 1373 (cited in note 20). For a demonstration...
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cally, feminists join some critics of empiricism, at least in its positivist forms, while also adhering to some views of science that all have a focus on phenomena and experience rather than on formal ideas. Thus, along with many contemporary critics of Western science and positivism in social science, feminists explore ways of knowing and writing that claim kinship with literature and that emphasize constructed or chosen meanings rather than external realities. Yet, feminists unite with pragmatists, and some kinds of social scientists in emphasizing the significance of experience as a check and as a resource for knowledge.

In addition, feminist work shares with other approaches the view that conflict, rather than consensus, characterizes human perceptions and values, and depictions of individual and social life that deny conflict are untrustworthy and are likely to suppress viewpoints of some people. Feminist work shares with communitarianism and republicanism a criticism of the conception of the individual self as fundamentally autonomous and bounded. Feminists, along with these others, propose a view of the self as importantly connected with others, constituted through membership in groups and affiliations through relationships of love, care, and duty. Like some social theorists, historians, anthropologists, and writers of fiction, feminists try to highlight what may be contingent and mutable about contemporary experience by drawing contrasts with other human possibilities. Consistent even with law and economics, feminists demand to know the first and second order consequences of legal rules. Furthermore, like many excellent lawyers, feminist theorists try to revise categories of analysis to assure that the categories serve envisioned ends rather than becoming ends in themselves.

By this time, some critics now will ask, if feminism shares so much with numerous different theories, many of which conflict with each other, isn't feminism then inconsistent and incoherent? The surrogate motherhood example explicitly identified competing


60 See Harding and Hintikka, Discovering Reality (cited in note 53).

61 Some feminists emphasize an approach toward problems that pursues accommodation and negotiation rather than win-or-lose confrontations. See, for example, Gilligan, In a Different Voice (cited in note 12). Yet, work of this sort emphasizes the conflict in ways of knowing and solving problems—conflict often along gender lines—that is too often suppressed in accounts that claim uniformity in human experience. See id.

arguments that can be and have been labeled “feminist,” and the very strategy here of claiming feminism’s distinctiveness and then abandoning that claim is obviously inconsistent. What is the value of an approach that would deliberately present such incoherence and inconsistency? This is the third line of criticism I will consider.

III. Is Feminism Inconsistent and Incoherent?

What if, for argument’s sake, I concede that feminism is inconsistent, and yes, often apparently incoherent? I then would ask, compared to what, and why does this matter? A self-identified feminist may switch sides on an issue, such as how important is privacy, depending on the context (although she may also be contrasting privacy for an individual with privacy for a family unit). Alternatively, avowed feminists make opposing claims about pornography, maternity leave, and sexuality. Whatever feminism is, then, it may seem to support inconsistent positions and offer little power, on its own, to resolve debates of importance to its adherents.

Feminists do disagree and a given feminist may join my line of argument on one issue, but switch sides on another. Obvious examples of inconsistency appear in the debates waged among feminists ourselves, internal arguments shared with the public. Contemporary feminists have visibly and vocally differed over whether pornography should give rise to civil sanctions, and whether maternity leave policies should be understood as violating federal bans against sex discrimination. Historically, feminists have debated and disagreed about protective labor legislation, the Equal Rights Amendment, and about the meanings of women’s labor histories in judging the causes of occupational segregation by employers such

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* It could be argued that other prevailing approaches to law are inconsistent and incoherent; scholars associated especially with critical legal studies have advanced such arguments about “liberal legalism” and about “law and economics.” See Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L J 1 (1984). I will not do more here than note that criteria of consistency and coherence are often applied but seldom met. In addition, inconsistent positions often emanate from those who oppose changing the status quo. In commenting on this paper, Cass Sunstein recalled a particular professor who would respond to proposals for change with one of two inconsistent responses: “We’ve already done that,” or, “we’ve never done that before.”


* See generally Finley, 86 Colum L Rev 1118 (cited in note 20) (describing the conflicting views).
as Sears, Roebuck & Company. Some feminists criticize corporate law firms for failing to promote women to partnership while others criticize the law firms themselves for their hierarchical form. Some feminists urge greater respect for the work of mothers and wives while others seek to increase women’s access to paid labor and men’s participation in unpaid child-care.

Each of these fights, however, can be understood as disagreements about tactics within a larger framework of agreement about ends. Given historic exclusions and discriminations against women, and given the limitations of legal and political levers for change, it should not be surprising that many tactical choices involve alternatives, each of which carries potentially negative consequences. Nor should it be surprising that different individuals and groups evaluate the risks and opportunities in such choices differently. These contrasting evaluations give rise to disagreements over tactics.

In short, the contradiction is not in feminists, but in the multiple patterns of separation and degradation that link women’s only sources of power and strength to our exclusion from male power. The exclusion and subordination of women has taken multiple—and inconsistent—forms. Women have been devalued for failing to contribute financially to their families and, when women do bring home a paycheck, they have been criticized for taking men’s jobs. Women have been derided as weak and vulnerable and have also been castigated when individuals depart from this stereotype. It is consistent with the inconsistencies of women’s experiences to respond with criticisms on multiple and contrasting fronts. Despite shifting positions on particular legal arguments, feminists share a long-term vision of a world in which women are not devalued, harmed, or excluded from participation on the basis of their gender or sex. The conflicts reflect the social and historical arrangements that have presented women—and men—with such

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partial and unappealing alternatives.

There are, however, more profound divergences among feminists which do present divergences within feminism worthy of analysis. Some feminists claim to have access to new correct answers. Others call for a collaborative process through which many people can work to arrive at an answer. Still others emphasize the multiplicity of frameworks that defeats any single answer. These positions represent deep differences about the nature of knowledge and about the desired form of political and legal judgments. Yet, even these deep differences share something important, something that distinguishes these feminist positions from many other kinds of positions. Each of these alternatives present questions of judgment as situated in patterns of power. Thus, some feminists claim to have a correct answer to problems of justice because they have identified a pattern of unequal power or oppression that they believe is wrong and that allows them to select from among competing frameworks for sorting out conflicting versions of reality. Others believe that a process through which people with conflicting views participate as equals in reaching a judgment itself will channel and check the patterns of power that distort perceptions and thus distort judgments. And still others locate competing perceptions of reality in complex patterns of social relationships, and identify in these patterns the difficulties of reaching judgments in any but contextual, contingent ways. The commitment to locate knowledge and judgment within patterns of social practice may take feminists in multiple directions, but it is a unifying commitment nonetheless. Moreover, feminists join in challenging historic exclusions and devaluations of women. This shared commitment underlies apparently contrasting efforts to improve women's positions and opportunities by revaluing traditional feminine traits or by demonstrating that women, too, can achieve traditionally male accomplishments.

To be unified in purpose, however, hardly answers the charges of inconsistency and incoherence, and I do not pretend to have fully answered the charges. But what, exactly, is so important or

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*See, for example, MacKinnon, 8 Signs 635 (cited in note 59); Ruth Colker, Anti-Subordination Above All: Sex, Race and Equal Protection, 61 NYU L Rev 1003 (1986).


valuable about consistency and coherence—and from whose perspective are those values to be judged? By contesting the very categories for analysis and by insisting on the links between knowledge and the social arrangements within which knowledge is produced and used, feminists, at times, challenge even these seemingly neutral measures of intellectual integrity, such as the demand for deductive tidiness. And by urging modes of analysis that pay attention to the varieties of human experience and to the complex interplay between experience and knowledge, feminists dispute the first premises against which consistency and coherence are typically measured.

At issue here is more than a question of merit, cognitive sturdiness, or various scholarly virtues. At issue here are the choices registered deep within a culture about meaning. Will the culture of lawyers, scholars, politicians, and those who approve and reinforce meanings make room for human variety or instead subordinate variety (along with various humans) to a scheme that prefers unity and order? Feminists, along with many others, are interested in notions of law that can constrain oppression. Feminists therefore remain interested in theories of universal rights and abstract moral claims. But if universality, abstraction, and theory itself are defined in a way that undermines the perspectives of some while privileging the perspectives of others, these, too, will become subject to feminist questioning and critique. The pronouncement of consistency as an ideal in our culture has accompanied demands for doctrines that are color blind, gender neutral, and respectful of religious and ethnic difference. Yet, such ideals may themselves serve to hide actual practices of prejudice and subordination. A gender-neutral, color-blind rule establishing a minimum height of 5'8” for employment on the police force has a disproportionately negative impact on women and members of some racial and ethnic minorities, even though the rule does not say so on its face. The aspiration to universality itself may stand in the way of its realization if it seals off from view the bias built into legal norms, public practices, and established institutions.

Rather than pretending to have already achieved universality, and rather than hide behind notions of internal consistency and coherence, feminists urge legal officials to acknowledge their partiality. There is more than one perspective on truth, more than one vantage point necessary to compose knowledge, more than one context relevant to evaluating fairness. This, of course, is a basic insight informing the adversary system, and democracy itself. Feminists suggest that acknowledging the inevitable partiality of
any human judgment will open avenues for fuller consultation, disagreement, and debate. We need more—not less—richly detailed contexts for making sense of what happened when we come to a criminal trial. We need more humility, not less, in evaluating what is just. This stance may be painful for feminists to take right now. It would be more comforting to assert that we know what is right, and we have the new universal scheme that is consistent and coherent and should replace existing legal theories and doctrines. But this would deny the struggles we know are necessary for making meaning from the variety of our experiences.

IV. WHAT'S NEXT

I had three goals for this paper. One was to model, in the absence of genuine dialogue, the kind of serious criticisms of feminism that I hope others will pursue, and in that way, take feminism seriously. Another was to offer a glimpse of the excitement and rich variety in feminist legal work at this moment even in the process of taking the perspective of potential critics of feminism. The third was to help an audience understand why feminists do not aspire to produce a new, coherent theory of law with universal principles and responses to all the standard questions of law and legal theory. We are too busy creating new approaches to teaching, practice, and normative judgments that shift the terms of what has prevailed in the past.

What do I foresee as a future for this emerging set of feminist activities in law? I predict that future lawyers and legal scholars will take feminism seriously. Feminists will continue to generate ideas and practices that reinvent the terms of justice, while also remaking teaching methods and materials, reinvigorating scholarship and litigation, and demonstrating the importance and power of "bumbling through." And when feminist work is taken seriously, some portion of feminist purposes will be achieved.

71 See Resnik, 1989 U Chi Legal F at 6 (cited in note 52).