Introduction to Feminist Legal Theory

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INTRODUCTION

A. THE CONTOURS OF FEMINIST LEGAL THEORY

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

Feminist legal theory responds to a basic insight about life and law. It proceeds from the assumption that gender is important in our everyday lives and recognizes that being a man or a woman is a central feature of our lives, whether we are pleased or distressed by the thought of gender difference. Feminist legal theory takes this approach into the study of law by examining how gender has mattered to the development of the law and how men and women are differently affected by the power in law. This concentrated focus on gender and the law is particularly appropriate at this point in our history when matters of sex and law are perpetually in the headlines. There is no better orientation to hot legal topics such as sexual harassment, domestic violence, and pay equity than taking a course on feminist legal theory.

As a field of law attuned to perspective and the influence of experience on our understanding of events, feminist legal theory also addresses important questions related to the construction of personal identity. In my fifteen years of teaching feminist legal theory and related courses to law students and graduate students from other disciplines, I have found that women are disproportionately attracted to these offerings. Perhaps this is because the courses pay close attention to women's experiences and do not pretend that the victim's, defendant's, or judge's gender is always irrelevant to the outcome of a legal dispute. Few courses in the law school curriculum have a similar capacity to excite, illuminate, and enrage. For some students, the course changes their lives.

The subject matter that forms the central core of feminist legal theory is the exploration of women's subordination through the law. In this context, the use of the term "subordination" by feminist writers is meant to convey the systemic nature of women's inequality. Many of the feminist scholars whose writings are discussed in this book have concluded that gender bias constitutes a pervasive feature of our law, rather than merely representing isolated instances of abuse of law. In a variety of contexts, feminist scholars have dissected legal doctrines and the language of court opinions and statutes to find hidden mechanisms of discrimination and uncover the implicit hierarchies that are contained within a body of law. This book will be an eye-opener for readers who thought that sex discrimination could have only one meaning, namely, the explicit different (or disparate) treatment of men and women under the law. In this book, I go beyond discussing problems of disparate treatment to explore bias that takes the form of gender stereotyping, devaluation of women and their activities, and the use of biased prototypes that distort women's injuries and experiences.

The theme of social change figures prominently in this introduction to feminist legal theory. For the most part, feminist legal scholars tend to be advocates of change and, particularly in the past three decades, have proposed large and small reforms of the law and the legal system in the name of gender equality. We have reached a stage at which we can reflect on the larger meanings of some of these changes. By tracing how feminists have agitated for recognition of new legal causes of action, extension of legal rights, and greater enforcement of existing laws, this book gives readers a foundation for evaluating the potential for feminism to transform the law. In some cases we will see

that change does not always mean progress, as feminist scholars demonstrate how basic gender hierarchies can survive attempts at reform and how patterns of inequality are reproduced in different and updated forms. A good deal of feminist theory grapples with choice of strategies and with pragmatic calculations about coming up with the best change for a particular moment.

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

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

I also hope that the book will be useful as an introduction to feminist legal theory for practitioners and judges who have never had the opportunity to take such a course, but who nevertheless confront difficult issues of gender and social inequality in their work. Particularly for lawyers who graduated from law school before the mid-1980s, the very idea of feminist legal theory may be both intriguing and perplexing. I wish to satisfy a bit of their curiosity and to allow them an entry point into the vast feminist legal literature that too rarely finds its way

outside academia. Finally, I hope the book will be of value for researchers and students in women's studies and related fields. In the world of feminist theory, legal scholars have been very active and are beginning to gain considerable attention outside law schools. This book helps such interdisciplinary scholars to understand how feminist themes play out in the legal context and to locate sources and writers in their particular areas of interest.

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

This book is also designed to provide context. The prominent themes in feminist legal theory, such as the interplay between equality and difference and the hidden bias in objectivity, offer a backdrop for understanding the significance of leading cases and legislative action relating to women and gender. As most law students have discovered early in their careers, the holding of an individual case rarely tells us what the case is really about, without a theoretical framework to make sense of the law in context. In this book, I have also endeavored to place the various brands or schools of feminist legal thought in historical context, focusing on some of the crucial political and cultural developments that have marked the last three decades. My narrative of the developments of feminist legal theory, for example, ties the schol-

arship to debates over the Equal Rights Amendment (ERA) and affirmative action, and to conflicts and changes within the feminist movement.

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

It should come as no surprise that in a new and fluid field such as feminist legal theory, there is no clear boundary setting it off from other intellectual movements that have flourished in law in the last generation. For quite some time, moreover, both academics and activists have taken an intense interest in exploring the intersection of different forms of discrimination and oppression—in seeing, for example, how racism and sexism operate in similar and dissimilar ways, and how even feminist-inspired legislation or rulings can overlook the importance of sexual orientation. For these reasons, a considerable portion of this book explores the points of connection or links between feminist theory and allied discourses in the law, particularly critical race theory and gay and lesbian legal studies. These connections illuminate feminist legal theory because they allow us to see how analogous themes emerge in these other intellectual movements, broadening our more general understanding of the social and cognitive forces behind inequality. Identifying the connections between feminism and allied schools of thought also underscores that feminist legal theory, like all other fields, is constantly shifting and redefining itself.

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

B. ORGANIZATION OF THIS BOOK

This book introduces feminist legal theory through two paths. After a brief description of five of the basic methods or "moves" of feminist analysis, I analyze the development of feminist legal theory chronologically. In chapters 2 through 5, I examine the three major stages of feminist legal theory that have emerged since 1971, when the United States Supreme Court first invalidated a gender-based law in *Reed v. Reed*.[1] The stages roughly correspond to the last three decades: the *Equality Stage* of the 1970s; the *Difference Stage* of the 1980s; and the *Diversity Stage* of the 1990s.

These chronological chapters provide an overview of the major themes in feminist scholarship and the debates which have inspired the growth and refinement of feminist legal theory. In them, I describe the various schools of feminist legal thought, identifying the prominent features of liberal, radical, cultural, and postmodern feminist writings. These initial chapters also contain explanations of many of the key terms and theoretical concepts used in recent feminist scholarship. I place concepts such as "women's agency," "gender essentialism," and "multiple perspectives" into the chronological development of feminist legal theory and show how this new vocabulary expands the core of feminist theory to include more diverse groups of women. I also summarize the arguments of opponents of feminist legal theory in order to locate the basic points of disagreement between feminists and their most visible critics.

The first path ends with a chapter discussing trends outside feminist legal theory. To place feminist legal theory in context, Chapter 6 discusses two significant allied intellectual movements—critical race theory and gay and lesbian studies—that sometimes converge with feminist legal theory to produce a broader body of critical scholarship.

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

[1] 404 U.S. 71 (1971).

of specific areas, and they concentrate on applied, as opposed to theoretical, feminist scholarship.

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

In Chapter 8, some of the vast literature on women's sexual exploitation and women's sexuality is canvassed. The chapter covers writings about rape, sexual harassment, and domestic violence. It also explores the phenomenon known as "heterosexism," the cultural preference given to male/female sexual relationships and the corresponding denigration of same-sex relationships, especially same-sex marriage.

Feminist analysis of motherhood and reproduction is the subject of Chapter 9. The chapter looks at the scholarship on such contentious topics as welfare reform, abortion, and single motherhood.

The final chapter offers a retrospective on the growth of feminist legal theory and speculates on the future.

Each of the chronological and substantive chapters has a dual objective: first, to describe the contours of feminist scholarship; second, to assess its impact on the law, whether in reshaping legal doctrine, generating new causes of action or providing direction for the passage of legislation. The feminist influence on legal doctrine is sometimes clearly visible, through, for example, a court's citation of feminist articles or the endorsement in litigation of positions advocated by women's organizations. At other times, the influence of feminism is inseparable from other intellectual and cultural trends. This book concentrates on major themes in feminist legal theory and related discourses, making connections to the practice and interpretation of law in the most prominent cases.

CHAPTER 1

Thinking Like a Feminist

Most legal writers or practitioners who identify themselves as feminists are critical of the status quo.[1] The root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination. Whatever their differences, feminists tend to start with the assumption that the law's treatment of women has not been fair or equal and that change is desirable. This stance separates feminists from researchers who study gender and law with the implicit assumption that the law has not produced or reproduced systematic gender inequity. This nonfeminist gender-oriented scholarship often simply describes gender differences or traces the impact of law on subgroups of men and women. Feminist legal scholarship is more oppositional; it assumes there is a problem and is suspicious of current arrangements, whether they take the form of different standards for men and women or purportedly neutral, uniform standards that nevertheless work to women's disadvantage.

[1] *See* Linda Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute, 25 Tulsa L.J. 775, 777-79 (1990). A smaller group of scholars who regard themselves as feminists do not share this view about the inequity of the status quo. Their "feminism" derives more from a professed commitment to equality of the sexes and a focus on women in their research. Included in such a group would be conservative critics of feminists such as Phyllis Schlafly, as well as more mainstream scholars who occasionally turn their attention to women and the law. *See* Gary Lawson, Feminist Legal Theories, 18 Harv. J.L. & Pub. Pol'y 325, 326-30 (1995). In this book, I focus primarily on feminist scholars who see a need for substantial changes in law and in the larger culture.

Unlike most other courses in the curriculum, feminist legal theory often requires an initial defense. The debate centers on the word "feminism," a hotly contested term with multiple meanings. For the most part, legal subjects tend to be described using neutral categories, unmodified by any particular viewpoint or methodological orientation. Feminist legal theory, however, is distinguished by its explicit reliance on feminism as the guiding force behind its inquiry into law. It owes its existence to the second wave of the women's movement, which began in the late 1960s. Although other legal subjects also have a history and are tied to particular cultural developments—for example, courses on the law of cyberspace, or about new reproductive technologies—feminist legal theory stands out because of its unapologetic connection to a specific political movement and its clear focus on women.

Criticism of the law from a feminist standpoint is a major undertaking. Feminist critiques can take many forms; they can consist of thick descriptions, causal analyses, or advocacy of reform. Clare Dalton's definition of feminism as it relates to the study of law lists some of the possible directions that feminist critiques may take:

> Feminism is . . . the range of committed inquiry and activity dedicated first, to *describing* women's subordination—exploring its nature and extent; dedicated second, to asking both *how*—through what mechanisms, and *why*—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third, to change.[2]

Dalton's definition captures the different emphases of feminist legal writing, even on a single topic. For example, the feminist literature on domestic violence illustrates the three main components of Dalton's definition. First, feminists have sought to describe the *nature* and *extent* of domestic violence. They have not only gathered statistics about the prevalence of domestic violence but have sought a deeper understanding through narratives of battered women and firsthand accounts of those who have worked in women's shelters. The picture of domestic violence generated by these stories contrasts sharply with the conventional wisdom that regards fights between husband and wives as normal and maintains that families should be left alone to work out

[2] Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women's L.J. 1, 2 (1988-89) (emphasis added).

their disputes. The feminist narratives reveal a dynamic of domestic violence, a pattern of abuse, which includes not only punching, shoving and other forms of physical violence, but a complex of actions that one commentator calls a "regime of private tyranny."[3] The thick descriptions contained in feminist writings show how batterers often isolate their wives or partners, cut off support from family or friends, and secure submission by destroying a woman's confidence. The new feminist images are useful not only to persuade legislatures and courts to amend laws regarding domestic violence, but to change the cultural understanding of the phenomenon itself.

Second, feminist scholarship has explored *how* and *why* domestic violence continues to be a major contributor to women's subordinate status. For example, inaction by the police and prosecutors was early identified as one mechanism that allows domestic violence to thrive. Feminists argued that the criminal laws against assault and battery are simply not enforced in the domestic context and that the concept of "family privacy" has been used to justify nonintervention. Some feminist scholarship sought out the deeper structural and psychological supports for domestic violence. Women's economic dependence on men was cited as a major impediment to women's freedom, while the term "learned helplessness" was used to describe the devastating psychological impact that years of violence can have on victims. Because many women value intimate relationships and may still love a violent man, feminist scholars explained that a woman need not be a masochist to hesitate to leave an abusive relationship.[4]

Finally, in their writings and political activism, feminists have advocated *changes* in the legal system and the broader society to decrease the incidence of domestic violence and help victims of abuse. Mandatory arrest laws, special provisions for protective orders, and recovery of tort damages from abusive partners all represent reforms in formal legal doctrine inspired by the feminist advocacy. Feminists also argued for the creation of supportive institutional structures, including women's shelters and the provision of domestic violence advocates who help a victim find her way through a labyrinthian legal bureaucracy. Most recently, there has been an attempt to have domestic violence

[3] Jane Maslow Cohen, Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?, 57 U. Pitt. L. Rev. 757 (1996).

[4] *See* Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23.

treated as unethical conduct that signifies a person's lack of qualifications for positions of public trust or honor.

Dalton's description of the range of feminist inquiries is expansive in that it includes both highly theoretical and practical work, personal narrative and quantitative research. The contemporary emphasis on feminist "theory" does not mean that only abstract scholarship is valued. In fact, more than other schools of thought, feminist theories are apt to emphasize the importance of concrete changes in society and to stress the interaction between theory and practice. Theory tends to be valued not for its own sake, but for its capacity to give meaning to women's experience and to allow women to articulate their experiences more fully.

A. FIVE OPENING MOVES

A good place to begin the study of feminist legal theory is to reflect on what it might mean to "think like a feminist"—to approach legal issues from a feminist stance or perspective. Law students are familiar with what has often been described as the goal of the first year of law school: getting students to "think like a lawyer." This initiation into the discipline offers few answers but emphasizes the kind of questions to which lawyers pay the most attention. Early on, law professors tell their students that mastering the specific content of the courses is not as important as learning the techniques of the lawyer: in particular, exposure to the case method, attention to factual details, separating the relevant from the irrelevant, and tracing out the logical implications of rules or principles. In a similar vein, there are some recurring techniques and insights that can help initiate students in the study of feminist scholarship. Although there is no uniform methodology or approach, feminist scholars often deploy a few recurring "moves" in their analyses, moves that help to place women at the center rather than the margins of the study of law. The following five moves are intended to give some sense of the scope and preoccupations of the critical study of law as it is engaged in by feminists. Throughout this book, we will see how these moves appear and reappear in both theoretical and applied feminist scholarship.

1. Women's Experience

A recurring theme in much feminist scholarship is the importance of women's experience. This emphasis can be traced to the consciousness-raising groups of the late 1960s and early 1970s, where women were encouraged to express their subjective responses to everyday life and discovered that their personal problems also had a political dimension. As a methodology, validation of personal experience has much to offer marginal groups who lack the power to have their understanding of the world accepted as the way things are. Consciousness-raising, for example, simultaneously exposed the depth of women's oppression and the systematic nature of male domination. Women began to name their grievances and reinterpret reality in a critical fashion.

Patricia Cain's definition of feminist legal scholarship centers on this grounding in women's experience.

> Feminist legal scholarship seeks to analyze the law's effect on women as a class . . . [T]he analysis is formed by a distinctly feminist point of view, a point of view that is shaped by an understanding of women's life experiences. This understanding can come either from living life as a woman and developing critical consciousness about that experience or from listening carefully to the stories of female experience that come from others . . . [L]egal scholarship is not feminist unless it is grounded in women's experience.[5]

The emphasis on women's experience is especially useful to identify exclusions in the law, particularly injuries that have not been recognized by courts or legislatures or have been minimized because women's experience is not adequately expressed in the law. When used in combination with political activism, this methodology can sometimes lead to recognition of new legal causes of action.

The story of the recognition of sexual harassment is perhaps the best example of the grassroots development of a legal claim grounded in women's experience. Although sex discrimination in employment had been outlawed as early as 1964, it was not until the mid-1970s that sexual harassment was given a name and challenged as a form of sex discrimination in employment, equivalent to unequal pay or discrimi-

[5] Patricia A. Cain, Feminist Legal Scholarship, 77 Iowa L. Rev. 19, 20 (1991).

natory job assignments based on sex. In her influential book on the subject,[6] Catharine MacKinnon recalls that the term "sexual harassment" was first used in 1975 by a women's advocacy organization in connection with the case of Carmita Wood. Wood was an administrative assistant at Cornell University who finally quit her job after being subjected to a pattern of lewd sexual behavior by her supervisor.

Today we would describe Wood's response to her harassment as a "constructive discharge," meaning that the intolerable working conditions left Wood no real choice but to quit. At that time, however, harassing conduct tended to be dismissed as harmless flirtations. A transformation in the cultural meaning of such conduct occurred when women workers began to express their negative responses to touching, jokes, propositions and other sexualized conduct at work and explain why they felt powerless to complain. Starting with women's experience, from women's perspective, feminists were able to cast sexual behavior in a different light: to argue that what was pleasurable or inconsequential from the harasser's viewpoint was disturbing and serious when seen from the eyes of the target.

Cain's description of the "feminist point of view" emphasizes women's experience because she believes this source of knowledge should inform feminist scholarship. Like most feminist scholars, however, Cain does not believe that only those persons who experience discrimination or oppression firsthand can ever hope to understand it. In Cain's account, women and men who have not personally experienced sex discrimination can nevertheless gain an understanding of it by listening closely to the stories of others and avoiding the temptation to conclude that the speaker is not intelligent enough or perceptive enough to get it right. Although this definition does not preclude men from doing feminist scholarship, in fact, most feminist legal scholars are women, and many incorporate personal stories in their work.

2. *Implicit Male Bias*

The focus on women's experience often leads to the question of how that experience could have been suppressed or ignored, especially

[6] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 250 n.13 (1979).

since women constitute a numerical majority of the population and no longer labor under the formal legal disabilities that kept them from exercising their rights as citizens in the past. Many feminists address this dilemma by seeking to uncover male bias in rules, standards, and concepts that appear neutral or objective on their face. Rules designed to fit male needs, male social biographies, or male life experiences have been described as "androcentric" or "phallocentric."[7] Implicit male bias can be revealed by examining the real life impact of laws on women as a class, paying particular attention to how even noncontroversial legal concepts and standards tend to disadvantage women. In this usage, bias refers not simply to practices deliberately intended to hurt women, but also to practices which have an unintended negative impact or effect. This technique of tracing out the gender implications of a social practice or rule is sometimes referred to as asking "the woman question" because it places women at the center of the inquiry, even when the rule or practice in question appears to have little to do with gender.[8]

An example of implicit male bias can be found in the standard definitions of full-time and part-time work. It is commonly accepted that the standard work week is 40 hours and that anyone who works less than 35 hours per week is appropriately classified as a part-time worker. In today's workplace, most part-time workers are at a serious disadvantage relative to full-timers: they usually receive no pro rata fringe benefits, many types of jobs are closed to them, and they may even be paid at a base rate lower than full-time workers doing the same job. The great majority of part-time workers are also women. In contrast to more mainstream studies of the workplace, a feminist analysis of the part-time workforce questions the neutrality of the 40-hour standard in part because its effect is disadvantageous to women workers as a class.[9] The standard of 40 hours, it seems, is not a magic number but reflects the average amount of time that *men* work. The standard for everyone is thus premised on the norm for only part of the working

[7] A particularly lucid and comprehensive description of androcentric standards in the law and in the larger society is given by Sandra Lipsitz Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* 39-79, 183-91 (1993).

[8] *See* Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837-49 (1990).

[9] I analyze this example in Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. Rev. 709, 713 (1986).

population. The 40-hour standard may look objective, because it is applied alike to male and female workers. What is hidden, however, is that under the standard, men's experience is privileged, and far more women than men are adversely affected by the definition of full-time work.

The implicit male bias in the part-time work standard is not surprising if we consider that the standard is man-made. It originated when there were many fewer women in the labor force and only a tiny percentage of women occupied management positions. This kind of systematic structuring of institutions to reflect the viewpoint and position of those in power is most often invisible. In fact, male-centered standards derive their force from being uncritically accepted as universal in nature. Challenging them is particularly difficult once they have gained legitimacy as an "objective" way of categorizing people and organizing people's activities and work.

The feminist critique of objectivity and androcentrism in the law can be seen in almost all substantive contexts. A forceful version of the critique comes from Catharine MacKinnon, who claims that implicit male bias pervades every facet of modern life:

> [V]irtually every quality that distinguishes men from women is . . . compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulership—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.[10]

Feminist scholarship responding to implicit male bias in the law is sometimes *deconstructive*, that is, it shows at what particular points the standards are male-centered and how they fail to take account of the situation of women. It can also be *reconstructive*, insofar as it is aimed at developing more inclusive standards that fairly represent the diverse interests of all those affected by the law.[11]

[10] Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in *Feminism Unmodified: Discourses of Life and Law* 36 (1987) (footnotes omitted).

[11] *See* Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 58-72 (1988).

3. *Double Binds and Dilemmas of Difference*

In contrast to the popular media, which often depict women as having already attained equality with men, feminist scholarship is far more skeptical about what passes for progress. After more than two decades of sustained feminist criticism of law, feminists are troubled by the resiliency of sexism in society and have not been able to forge a consensus about how to approach or solve many of the critical problems women face. One reason there is so much debate among feminists about strategies for challenging sexism in the law is that, as a subordinated group, women are often confronted with "double binds," or as the philosopher Marilyn Frye puts it, "situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation."[12] Frye sees the double bind as one of the "most characteristic and ubiquitous features of the world as experienced by oppressed people . . ." Being caught in a double bind or "catch-22" means that women constantly face dilemmas in which they are forced to predict which less-than-ideal course of action will prove to be the least hazardous.

The case of Ann Hopkins against Price Waterhouse[13] presents a classic example of a double bind. Hopkins was an ambitious female manager in a large accounting firm who consistently outperformed men on a number of conventional standards, such as generating high-paying clients, working extra-long billable hours, and gaining client approval. She nevertheless was denied a partnership in the firm because the male partners objected to her lack of social graces and her unfeminine style. For their taste, she was too aggressive, abrasive, and macho. The double bind for Hopkins arose because even if she had been able to soften and feminize her appearance and style, she might still not have made partner. The problem is that in male-dominated settings such as elite accounting firms, feminine women are often regarded as lacking the competitiveness, technical competence, and ambition to make the grade. Either course of action was precarious for Hopkins because there is no predetermined script for success for women in such contexts.

[12] Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* 2 (1983).

[13] *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). For a fuller discussion of the case and its implications for feminist theory, *see* Martha Chamallas, Listening to Dr. Fiske: The Easy Case of *Price Waterhouse v. Hopkins*, 15 Vt. L. Rev. 89 (1990).

In the short run, Hopkins was able to evade the double bind. She prevailed on her Title VII claim of sex discrimination when the United States Supreme Court ruled that it was unlawful to demand that a woman (but not a man) be feminine and yet still possess the traditional masculine traits associated with partners in large accounting firms. Hopkins's predicament, however, demonstrates the double bind of professional women who are required to conform simultaneously to conflicting stereotypes.

At a broader level, Martha Minow has theorized about the double bind that faces reformers who want to correct for past exclusions by opening institutions to "different" groups of people.[14] The dilemma stems from the fact that most large institutions follow practices and policies saturated with implicit male bias. Simply to follow these "neutral" rules and ignore gender reproduces patterns of exclusion and paradoxically assures that gender will continue to matter in the world. However, to pursue a different strategy and implement an "affirmative action" program that focuses explicitly on gender also may backfire. The danger of taking gender into account is that it will stigmatize the group as different and inferior, and thereby reinforce gender difference. This "dilemma of difference" means that neither ignoring nor highlighting gender will necessarily translate into positive gains for women. Instead, feminists find themselves grappling with how fundamentally to alter the way people think about difference and how to resist the cultural tendency to equate difference with inferiority.

4. *Reproducing Patterns of Male Domination*

A phenomenon related to the double bind and identified by feminist scholars as contributing to the resiliency of sexism is the reproduction—in altered or updated forms—of patterns of male dominance. The theme of some recent feminist scholarship can be described as "the more things change, the more they stay the same." In fields as diverse as employment law and family law, feminists have looked behind claims of progress to uncover important continuities in women's subordinate status. The point often made is that change is

[14] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* 20 (1990).

not inherently progressive and that even substantial shifts in rhetoric and rules may not bring about major improvements in women's lives.

In the realm of employment, for example, feminists have long sought ways to integrate occupations as a way of improving the status and pay of women workers who tend to be concentrated in predominantly "female" jobs. Challenging gender hierarchy in employment has been especially tricky, however, because "gains" in integrating occupations can easily be offset by counter-trends, including the reconfiguration of jobs. Barbara Reskin, a sociologist who specializes in occupational segregation, has questioned the conventional wisdom that great progress has been made in women's employment status.[15] Her empirical research indicates that the apparent trend toward sex integration of occupations is misleading because there is also a trend toward sex segregation of jobs within occupations, with the more elite jobs being held predominantly by men. For example, women's entry into the field of pharmacy has been confined largely to the retail sector, while men work in the more lucrative and more prestigious commercial, research, and academic settings. Reskin's research also shows that what might at first seem to be "integration" of an occupation may actually be the beginning of job shifting, that is, changing a male occupation into a predominantly female occupation, with lower pay and less autonomy. Feminization has occurred in fields that have already started to deteriorate in status.[16] The net result may be that even as women successfully enter formerly male-dominated fields, they remain disadvantaged as workers relative to men.

Reva Siegel's scholarship on domestic violence also emphasizes how the law has managed to continue to immunize this type of abuse of women, despite substantial reforms in formal doctrine.[17] The early legal doctrine of "chastisement" officially gave husbands the right to use a "reasonable" degree of force to compel their wives to submit to their authority. When this right of force was abolished, however, courts developed the doctrine of "family privacy" to justify their refusal to intervene in cases charging domestic violence. The new rhetoric of pri-

[15] Barbara F. Reskin, Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work, 2 Gender & Soc'y 58 (1988).

[16] Barbara F. Reskin & Patricia Roos, *Job Queues, Gender Queues: Explaining Women's Inroads into Male Occupations* 11-15 (1990).

[17] Reva B. Siegel, "The Rule of Love:" Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117 (1996). Siegel is discussed infra at pp. 260-62.

vacy had the effect of continuing the older regime of male prerogative, albeit in gentler, less direct terms. Feminist scholarship such as Siegel's historical study recognizes the possibility that massive changes can occur over time without fundamentally altering basic gender hierarchies. The emphasis is on uncovering how male domination is reproduced and how new rationales and discourses develop to justify the continuing gender disparities.

5. *Unpacking Women's Choice*

In contemporary society, women's inequality presents a paradox. Many who would endorse gender equality as an ideal nevertheless resist the idea that discrimination is the principal cause of women's inequality. Instead, women's subordinate status is often ascribed to women's own choices, and women are held responsible or blamed for their own disadvantages. The old notion that women are not intelligent enough or lack the moral accountability to be leaders in business, politics, or the academy has been replaced by justifications centered on women's choice. This explanation of women's disadvantage is particularly prominent in the discourse on women in the workplace. The conventional wisdom is that because women place more importance on their families, they voluntarily choose to subordinate their career and job aspirations for the sake of their children or their partners. This rationale allows employers to make the paradoxical claim that women actually prefer lower-paying jobs or jobs that offer little opportunity for advancement.

A growing body of feminist scholarship is devoted to unpacking the concept of "choice" and investigating the constraints under which women commonly make choices. The very use of the word "choice" implies that the actor has alternatives, and often suggests that the choice represents the actor's authentic preference. Moreover, in law, responsibility is commonly placed on the person who chooses. An employer, for example, will typically not be responsible for the disparate choices of male and female workers because the sex-linked pattern is thought not to be caused by the employer's own actions. Instead, the law typically presupposes that women's choices derive either from biological imperatives, especially the desire to nurture, or early socialization, which supposedly motivates women to pursue traditionally female activities as adults.

Feminists who resist this emphasis on choice often point to the role that institutional structures and culture play in shaping women's choices. The counter-theory is that choices are not made in a vacuum, and that in making choices, women are influenced by the opportunities presented to them and the dominant cultural attitudes of those with whom they interact. Scholars such as Vicki Shultz explain how certain blue-collar jobs are still regarded as "masculine" and inappropriate for women.[18] This cultural coding of jobs is reinforced by the persistent and often virulent harassment of women who try to break through gender barriers. Absent some affirmative indication by employers that women are welcome and will be supported in nontraditional work—through, for example, a special training and recruitment program for women—it is likely that the percentage of women in such jobs will remain extremely low, that women will "choose" not to enter this line of work or will quit once they realize what they face.

This account of why women are unrepresented in blue-collar work places less emphasis on women's motivations and orientations before they enter the workplace and more emphasis on experiences women have as adult workers. This shift in emphasis complicates the notion of choice, making it a function of present opportunities and contexts as well as preexisting preferences. The shift also means that forces outside the psyche of the individual woman—employer policies, legal programs, employee training—help shape a woman's decisions and bear some responsibility for the patterns that emerge. The critical stance toward choice liberates feminists to recognize women's *agency*, that is, the capacity for self-direction, without denying or minimizing the distinctive constraints placed on women in a male-dominated society.

B. SUMMARY

The five *moves* described above are theoretical tools that legal feminists have found useful to critique legal doctrines and categories

[18] Vicki Shultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1802 (1990).

in each of the three *stages* of feminist legal theory. As I will define them, the stages reflect broader cultural and political struggles that emerged most prominently in each of the three decades under study, particularly the right of access to formerly male-dominated institutions, the treatment of pregnant women and mothers under the law, and the connection between gender discrimination and discrimination based on race and sexual orientation. During each stage, the five theoretical moves enabled feminists to think more deeply about the basic concepts of equality, difference, and diversity that continue to shape law and legal discourse in this area.

As we discuss the chronological development of the field, the reader will see how these five moves have animated feminist scholarship and activism, regardless of the school of feminist thought most prominent at the moment. For example, the emphasis on women's experience stimulated equality-oriented feminists in the 1970s to work toward integrating male-dominated institutions because they understood that segregation limited women's chances for success in public life. In the 1980s, feminists emphasizing gender domination and gender difference again drew upon women's experience to call attention to the myriad forms of violence directed at women, in the domestic as well as the public sphere. By the 1990s, black and lesbian feminists in particular were able to reflect upon their own experiences with the women's movement to develop an internal critique of the feminist agenda and assumptions of feminist theory.

Similarly, in each historical period, feminists have uncovered implicit male bias in "neutral" rules and struggled with ways around the double bind in a wide range of contexts. They have engaged in a recurring debate over strategies as they find their individual choices limited and recognize that even feminist-inspired legal reform may be overtaken by traditionalist forces and absorbed into new patterns of gender hierarchy.

CHAPTER 2

Three Stages of Feminist Legal Theory

In the past three decades, the field of feminist legal theory has grown so rapidly that it defies neat categorization. The words we use to describe this body of work have changed, as have the boundaries between feminist scholarship and other critical inquiry. However, as an introduction to the field, I have found it most useful to divide feminist legal theory into three stages tracking the three decades of intensive developments: the *Equality Stage* of the 1970s, the *Difference Stage* of the 1980s, and the *Diversity Stage* of the 1990s.[1] I must caution that the stages are oversimplifications, indicating only when certain themes or theoretical orientations emerged or became visible. They may not even represent the predominant feminist influence in the law or legal scholarship at the time. Thus, for example, throughout the periods discussed in this book, equality thinking has dominated in the courts and legislatures, with the newer trends toward difference and diversity having only limited influence beyond academia. Moreover, in each stage, there were individual scholars whose work seemed to fit better in another stage; for instance, even in the 1970s, when most scholarship

[1] These stages very closely resemble Patricia A. Cain's demarcation lines in Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 191, 198-205 (1989-90). In constructing her stages, Cain tracked Clare Dalton's analysis in Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women's L.J. 1 (1987-88). For a periodization and taxonomy of feminist legal theory that also covers developments in North America and Europe, see Carol Smart, Feminist Jurisprudence, in *Law, Crime & Sexuality* 162 (1995).

stressed the similarity between men and women, some feminists emphasized the diversity among women.

It is important to remember that the three stages of feminist legal theory do not exist in nature or history. They are constructions by scholars that enable us to organize and make sense of the diverse and sometimes contradictory arguments of feminist scholarship. Readers familiar with the development of feminist theory in other fields will not find the three stages surprising.[2] The field of feminist legal theory is by no means autonomous; it has absorbed and responded to theoretical developments from feminist writers in women's studies, history, philosophy, economics, sociology, psychology, and literary and cultural studies. Legal feminism has borrowed heavily from these other quarters, sometimes taking years to incorporate themes that interdisciplinary scholars outside the law have already explored.

EQUALITY

The major themes of the Equality Stage are by now so familiar that they are sometimes thought to encompass the only meaning of feminism in law. During this time, the emphasis was on women's similarity to men. This generation of feminists concentrated primarily on dismantling the intricate system of sex-based legal distinctions which had been established purportedly to protect women. Equality theorists argued that protection through the law was harmful to women because it served to restrict women's lives to the home and family. The claim was simply stated and understood: Because women were the same as men in all relevant respects, they deserved access to all public institutions, benefits and opportunities on the same terms as men. The most prominent discourse of the 1970s concerned individual rights, particularly the right of nontraditional women to engage in male-dominated activities. Its central message was that gender should be irrelevant to the distribution of legal benefits and burdens and that persons should be treated as individuals, not as members of a class. Feminists of this era were reluctant to dwell on any differences that might exist between men and women. Because for so long sexual differences had been uncritically accepted as natural, biologically based, and inalterable, feminists were inclined to deny difference and to insist that social change was possible and desirable.

[2] Some of the well-known texts that describe different schools and/or stages in feminist theory are: Alison M. Jagger, *Feminist Politics and Human Nature* (1983); Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (1989); Alison M. Jagger & Paula S. Rothenberg, *Feminist Frameworks* (2d ed. 1984).

Equality advocates are often associated with the school of thought known as *liberal feminism.* Liberal feminists share a commitment to individual autonomy and choice and insist that these freedoms be afforded to women as well as men. Liberal feminists have sometimes been called "assimilationists" because their arguments tend not to challenge the standards, rules, or structures themselves, but focus instead on equal access within their framework. More so than other feminist orientations, liberal feminism can be translated into legal reform, generally requiring only incremental changes and expansion of current structures to make room for women.

In law schools during most of the 1970s, the term "feminist legal theory" or "feminist jurisprudence" was not yet in use.[3] Feminists were more apt to describe themselves as women's rights advocates, women's liberationists, or egalitarians. These terms seemed to fit better with 1970s equality themes than did the term "feminist" with its more distinctive and oppositional tone. Moreover, in this formative decade, arguments made by feminists to courts and in law reviews were still too new, and oriented toward the practice of law, to be thought of as a legal theory or as jurisprudence. To be sure, the early feminist legal scholars were often influenced by feminist theory from other disciplines, particularly the new women's studies movement. However, it was not until the 1980s that theorizing about the relationship between gender and law became a major project for feminist academics. Course titles then changed from "Sex-Based Discrimination," to "Feminist Legal Theory" and "Gender and the Law."

At that time, feminist legal theorists turned to considering the concept of difference. The enthusiasm for legal reform along equality lines gradually gave way to a realization that this effort would not cure the substantive inequality that beset most women's lives. The 1980s brought to the forefront of discussion the feminization of poverty, the gender gap in politics, the "glass ceiling," and other phenomena, which made it clear that, in many ways that mattered, men and women were different. Like many other social commentators, feminists ques-

DIFFERENCE

[3] The phrase "feminist jurisprudence" purportedly was first used in 1978 at a conference celebrating the 25th anniversary of women graduates of Harvard Law School. *See* Patricia A. Cain, supra note 1, at 193. Some writers prefer the term "feminist legal theory" because it does not carry the quasi-scientific connotations of the term "jurisprudence."

tioned both the idea that gender was irrelevant and the ideal of a gender-blind society.

Feminists theories of the 1980s began to emphasize the various ways that men and women were different. Recognizing gender differences, however, did not mean accepting those differences as inherent or inalterable. Instead, most difference theorists of the 1980s were also social constructionists; that is, they located the source of gender difference in cultural attitudes, ideology, socialization, or organizational structures.

An important project of 1980s feminism involved revising the concept of "equality" to mean something other than "identical treatment" of men and women. Feminists theorized that if men and women did not start from the same position, identical treatment of each group might never produce meaningful equality. In practical terms, this meant that to be treated as equals, women whose lives differed from those of men paradoxically needed to be treated differently. Rather than requiring women to act more like men to achieve equality, feminist theorists argued that the norms themselves should be changed. Questioning implicit male norms in law and society allowed feminists to go beyond assimilation and to set an agenda for legal change premised on women's distinctive needs.

The 1970s equal-rights approach was best suited to handling disputes involving characteristics shared by men and women. However, when biological differences such as pregnancy were involved, the traditional equality principle ("treat likes alike") faltered. Debates among feminists over the best way to confront discrimination against pregnant workers proved to be a catalyst for broader theoretical discussions. The 1980s emphasis on difference also made it possible for feminists to take up such important issues as pregnancy and sexual violence, including rape, sexual harassment, domestic violence, and pornography. These topics had not been fully analyzed by liberal feminists who had concentrated more on economic issues of access.

Feminist legal scholarship in the 1980s was more diverse and less practically oriented than it had been in the prior decade. Although the existence of differences between men and women was a major theme, not all scholars focused on the same manifestations of difference. Some emphasized the difference in power among men and women and speculated on how male domination was accomplished. Dominance theorists developed a critique of liberalism, including liberal feminism. They argued that rather than increasing women's

power, well-established concepts such as privacy, objectivity, and individual rights actually operated to legitimate the status quo. This more radical brand of feminist legal theory called for a major transformation of the law to eradicate the domination of women as a class. A principal project of radical feminism as applied to law described how the legal system had failed to protect women's bodily integrity. The anti-pornography campaign that developed during this period, for example, drew links between portrayals of women as sex objects and the prevalence of sexual violence and sex discrimination.

The influence of cultural (sometimes called "relational") feminism was also felt in the 1980s. More so than other schools of feminist thought, this group of theorists both recognized and celebrated women's differences from men. The starting point for this branch of difference feminism was to articulate the ways women often tended to approach problems, view the world, and construct their identity. Feminists debated how women's "different voice"—with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could find greater expression in law. In contrast to liberal feminism's de-emphasis of the mothering role, cultural feminists sought ways to support maternal and other traditional activities associated with women.

The feminist law curriculum expanded in the 1980s, with new offerings on sexuality, sexual violence, and feminist jurisprudence. The more theoretical feminist critiques also provided a path of entry into the first-year curriculum, challenging traditional courses in criminal law, torts, contracts, and property as inadequate and biased. Similar to the initiative in liberal arts disciplines, feminists in law schools embarked on a dual strategy of creating distinctively feminist offerings and mainstreaming feminism into the standard curriculum.

In the 1990s, feminist preoccupation with comparing the situation of men and women began to be eclipsed by a new focus on diversity among women. Recent critiques of liberal, radical, and cultural feminism have stressed that women are a huge and dramatically diverse group. The hallmark of the scholarship of the Diversity Stage is its attention to differences among women. This shift was impelled by powerful critiques by women of color and lesbians who claimed that they had been left out of the now-classic feminist analyses. While claiming to speak for "women" in general, many feminist writers failed to grasp that their work had little relevance for women who were not white, middle-class, and heterosexual. The 1990s feminist critics of

feminism emphasized the dangers of essentialism—the assumption that there is some essential commonality among all women—whether it be women's oppression by men or women's different voice.

The anti-essentialist writings of the 1990s start from the premise that the lived (real-life) experiences of women differ depending on such factors as race, class, ethnicity, physical disability, and sexual orientation. Given this complexity, it makes sense to replace the goal of devising one overreaching feminist strategy with the less grand objective of considering legal policies from the perspectives of different groups of women. In the Diversity Stage, feminists have become used to the idea that they are likely to disagree and that coalitions are necessary to produce legal reforms.

The salience accorded to differences other than gender also generated new theories about the interaction of various kinds of oppression in society. Theorists tried to explain how race, class, and gender intersected in multiple ways to create distinctive forms of discrimination for specific subgroups of women. These theories of multiple oppression meant that the traditional focus of anti-discrimination law on discrete, mutually exclusive kinds of discrimination needed to be reexamined. For example, if the situation of African-American women was to be fully addressed, the habit of thinking about "women and minorities" would have to be broken. Such conceptual dichotomies tended to focus attention on white women and black men, subtly erasing black women from the equation. In the Diversity Stage, feminists have aspired to embrace a "both/and" rather than "either/or" mindset, thereby avoiding the temptation to reduce people's experience to only one aspect of personal identity or only one form of oppression.

Treating oppression in discrete boxes, moreover, tended to obscure how different forms of discrimination may be mutually reinforcing. In this period, gay men and lesbians argued for a broader definition of sex discrimination that would cover harassment and discrimination based on sexual orientation. The term "heterosexism" was coined to describe the ideology that privileges heterosexual relationships over same-sex ones, underlining the historically male-dominated character of heterosexual relationships.

Paralleling the move to studying multiple forms of oppression, feminist scholarship in the 1990s became more attuned to the complex nature of personal identity and attempted to present women simultaneously as both victims of oppression and agents of their own destiny. The focus on sexual violence, particularly the account given

by dominance feminists in the 1980s, generated complaints from many quarters that feminism had become fixated on victimization and did not adequately account for women's ability to resist, make choices, and contribute to the cultural meaning attached to gender in society. The "both/and" strategy was again deployed to develop new accounts of women's behavior, showing how women are often forced to make strategic choices within constraining structures. This more nuanced account of women's agency and victimization also highlighted differences among women: Not only is discrimination experienced differently by different groups of women, but women use a variety of coping mechanisms to deal with discrimination, ranging from forthright resistance, to co-optation, to avoidance.

The shift in the 1990s to a theory of multiple oppression led to the blurring of demarcation lines between the various allied intellectual movements. Just as feminists were required to take race into account in constructing their agendas and analyzing problems, scholars from the critical race school could not ignore the role of gender in shaping racism. The law school curriculum reflected this convergence with the introduction of offerings on stereotyping, critical perspectives, and a textbook on power, privilege and the law.

The present period is also marked by particularly trenchant critiques of feminism, coming not only from writers who disagree with most feminist aims but also from self-declared feminists who believe that the direction of feminist scholarship in the last decade has undermined women's quest for equality. Some of the younger feminist critics entered the debate at a time when liberal feminism was under intense scrutiny. They longed for simpler times when the feminist agenda was unitary, focused on equality, and not so clearly linked to politics of race and sexual orientation. One purpose of this book is to provide just enough context and history to the study of feminist legal theory to encourage a new generation of feminists to take a broader and more complex view of the movement and its influence on law.

Before we turn to look more closely at the Equality Stage which began in the 1970s, it is important to note that the narrative of the development and growth of feminist legal theory in the United States presented in this book is but one of many stories that can be told about the connection between feminism and the law. A longer view would start over 150 years ago with the Declaration of Sentiments unveiled at the Seneca Falls Convention in 1848, and would describe how first-wave feminists focused heavily on the legal constraints of their time,

such as laws that prevented married women from enjoying the ordinary rights of citizens to own property and to retain the wages from their labor. Like the feminists who followed them more than a century later, they devoted considerable efforts to agitating for legal reforms, knowing that the legal structure itself was part of a system that endorsed and enforced gender inequality. As with contemporary feminists who have been intensely engaged with (some might even say preoccupied by) legal issues in the last three decades, these earlier generations of women's rights advocates appreciated that they must confront the law if they were to understand and transform women's social and economic status. A formidable challenge that continues into the present has been finding ways to harness the power of law to construct gender equality, rather than to perpetuate patterns of gender subordination.

CHAPTER 3

The Equality Stage (1970s)

Feminist legal theory is a relatively new field. Usually, scholars date its inception to the early 1970s, when women's rights advocates first mounted an organized legal campaign against sex discrimination in the courts. As is true of most social or political movements, however, the groundwork for this burst of energy in the early 1970s had been laid in an earlier era. Statutes mandating equal pay for equal work and prohibiting sex discrimination in employment had been passed by the mid-1960s, and every state had a commission on the status of women. Most importantly, by 1970, a sizeable number of women were studying law (approximately 10 percent of the total number of law students) and the percentage of licensed practitioners who were female was finally growing after years of languishing at approximately 2 percent.[1] This was the first time in history that women had a sufficient presence in legal institutions to argue for their own cause. They also had the benefit of legal precedents established in response to the black civil rights movement in the 1960s. Throughout this early period, a basic strategy was to analogize unequal or discriminatory treatment of women to racial discrimination.

[1] In 1970, 2.8 percent of attorneys licensed to practice law were women. This was very close to the figure of 2.5 percent in 1951. By 1980, women's representation in the profession had risen to 8.1 percent. Barbara Curran, *The Lawyer Statistical Report* 10 (American Bar Foundation) (1984).