



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 27

Number 1 *Reweaving the Seamless Web:  
Interdisciplinary Perspectives on the Law*

Article 10

---

11-1-1993

## Feminism and Disciplinarity: The Curl of the Petals

Carol Sanger

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 Loy. L.A. L. Rev. 225 (1993).  
Available at: <https://digitalcommons.lmu.edu/llr/vol27/iss1/10>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# FEMINISM AND DISCIPLINARITY: THE CURL OF THE PETALS

*Carol Sanger\**

## I. INTRODUCTION

In this Symposium, feminism has been invited to take a place alongside such well-established disciplines as history, philosophy, and economics in a consolidated exploration of interdisciplinary approaches to law. While sincerely extended—the feminist entry is not the only one that women are writing—and generously unbounded as to scope, so that one might choose from an embarrassment of rich complexities within feminist legal scholarship, the invitation raises what for many is a prior question: Is feminism a discipline at all? There are, after all, no Departments of Feminism, no universally prescribed first year curricula, no Ph.D.'s. Some would argue that feminism has yet to succeed in “the traditional strategies by which disciplines stake out their territories and theoretical paradigms mark their difference: by claiming a particular domain of objects, by developing a unique set of methodological practices, and by carrying forward a founding tradition and lexicon.”<sup>1</sup>

Others might further argue that feminism fails as a discipline not because of what it isn't, but because of what it is: something more political than academic, a movement rather than a branch of knowledge, a project rather than a field of study. An accompanying claim might be that feminism is too emotional and so lacks the rigor and detachment of a discipline. Like Alice among the daisies and roses in Wonderland's Garden of Live Flowers, something about feminism does not look quite right to those already firmly rooted. As the Tiger-Lily remarked about Alice: “‘If only her petals curled up a little more, she'd be all right.’”<sup>2</sup>

A few of the skeptical “some” and many of the “others” just mentioned are our colleagues and they not only *might* make such observations about feminism's place in the disciplinary garden, they *do* make

---

\* Professor of Law, Santa Clara University Law School; B.A., 1970, Wellesley College; J.D., 1976, University of Michigan. I am grateful to Jeremy Waldron, Elizabeth Potter, and Amy Kastely for their comments on earlier drafts and to Mitzie L. Dobson for her fine editing.

1. CARY NELSON ET AL., *Cultural Studies: An Introduction*, in CULTURAL STUDIES 1, 1 (1992).

2. LEWIS CARROLL, THROUGH THE LOOKING-GLASS 29 (St. Martin's Press 1977) (1871).

them, over lunch and over files at appointments and curriculum meetings. The exact discourse of disciplinarity is not always in play in such discussions; the problem of sorting out what feminism is and what law professors are supposed to do with it is often framed instead around the concept of "seriousness." Disciplinarity and seriousness are, of course, related. The status of discipline is understood in our business as a marker of enduring academic importance and legitimacy, an indication of what is to be taken "seriously."

As the feminist delegate to this interdisciplinary Symposium, I have therefore taken as my initial task consideration of the issue implicit in the invitation: feminism's credentials as a discipline. I explore the contours and curl of feminism's petals in the context of the traditional criteria used to bestow disciplinary status on a subject, thus qualifying it for subsequent interdisciplinary adventures. My aim, however, is less to come up with an imperial thumbs up or thumbs down on feminism as a discipline than to think hard about the definition, authority, and functions of disciplinarity in relation to feminism.

Admittedly, this project presents a dilemma of sorts. Discussing whether a particular subject counts as a discipline has long been a way of keeping start-up disciplines such as feminism—or evolution or political science—on queue, at the margins, or outside the academy all together. Women's Studies' faculty members have long understood that "when we are asked, 'Is Women's Studies an academic discipline?' we are being asked by the unconvinced: 'What are you doing at the university?'"<sup>3</sup> Certainly within the last twenty years or so, feminism has gained university admission, at least at the undergraduate level. "Struggling against tokenism, the 'add women and stir' approach, co-option and marginalization, feminists have managed to establish a space within educational institutions from which to document, analyze and theorize the position of women in society."<sup>4</sup> Thus, the question now is less one of feminism's exclusion than of its legitimacy, or in bell hooks's phrase, the progress of the trek from "margin to center."<sup>5</sup>

---

3. Gloria Bowles, *Is Women's Studies an Academic Discipline?*, in THEORIES OF WOMEN'S STUDIES 32, 38 (Gloria Bowles & Renate Duelli Klein eds., 1983).

4. SARAH FRANKLIN ET AL., *Introduction 1: Feminism and Cultural Studies: Pasts, Presents, Futures*, in OFF-CENTRE: FEMINISM AND CULTURAL STUDIES 1, 2 (1991) (discussing progress of and relation between feminist and cultural studies in Britain). For an excellent history of the women's studies movement, see Marilyn J. Boxer, *For and About Women: The Theory and Practice of Women's Studies in the United States*, in RECONSTRUCTING THE ACADEMY: WOMEN'S EDUCATION AND WOMEN'S STUDIES 69 (Elizabeth Minnich et al. eds., 1988) [hereinafter RECONSTRUCTING THE ACADEMY].

5. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

How then should feminist scholars move out from this beachhead? The first approach would be to continue efforts to develop courses, graduate programs, scholarly traditions, journals, methodologies, vocabularies, and conferences—the familiar indicia of a discipline—without worrying about whether feminism itself is already a discipline. To a certain extent this is happening already, as clusters of scholars throughout the academic world press on with an enterprise that is at times haphazard, opportunistic, and contested from within, but that proceeds with or without properly certified disciplinary credentials. The result may be a kind of academic adverse possession whereby one day everyone will look up and say: “Of course feminism is a discipline; it’s been one for ages.”

The other approach would be to think that it is important *now* to establish that feminism is a discipline before proceeding one course or one appointment further. Under this view, which shapes much of the formal resistance to feminism, there is to be no possession at all, however open and notorious the effort. This approach involves explicit submission to the gate-keeping structure of disciplinarity that by many accounts is the very job of feminism to charge.

Whichever approach prevails, my focus on feminism as a discipline is not to be taken as an unqualified endorsement of disciplinarity as a prerequisite for proper feminist inclusion within law schools. In the first place, disciplinarity itself has now come under critical scrutiny. As David Shumway and Ellen Messer-Davidow explain:

The various connotations of “discipline” have until recently been entirely positive; to call a branch of knowledge a discipline was to imply that it was rigorous and legitimate. The name did not reveal that knowledge was produced by regulating or controlling knowledge-producers, nor that the training of disciples produced the general acceptance of disciplinary methods and truths.<sup>6</sup>

Indeed, much of the hard work and accomplishment of feminist academics has been challenging the traditional rules and practices of knowledge production by insisting on the inclusion of women—as subjects to be studied, as the investigators of the studies—throughout the university curriculum.<sup>7</sup>

---

6. David R. Shumway & Ellen Messer-Davidow, *Disciplinarity: An Introduction*, 12 *POETICS TODAY* 201, 202 (1991).

7. Margaret Anderson provides a more thorough conception of what “including women” means:

[T]he complex process of redefining knowledge by making women’s experiences a primary subject for knowledge, conceptualizing women as active agent in the creation of knowledge, including women’s perspectives on knowledge, looking at gender

Moreover, we might decide that the very attributes that distance feminism from traditional disciplines enhance, not diminish, its value within the academic garden. A lack of roots, for example, enables feminism, like Alice, to bring back news and perspectives from beyond the well-manicured hedges. Feminism too has long been aware of the limits of disciplinarity: "From the beginning, planners feared that departmental status for women's studies might narrow its focus and limit its impact by reproducing the male model of fragmented knowledge and bureaucratized isolation."<sup>8</sup> Indeed, aware of the restrictions inherent in the category, not all fields of inquiry even aspire to disciplinary status. Cultural studies, for example, "[are] not merely inter-disciplinary; [they are] . . . actively and aggressively anti-disciplinary—a characteristic that more or less ensures a permanently uncomfortable relation to academic disciplines."<sup>9</sup>

My claim here is that whether discipline or not, feminism as a subject is as an inevitable and inherent part of modern law school curricula as procedure, ethics, or justice. Ultimately, we may decide that feminism is a genuine discipline and so include it within the interdisciplinary scheme suggested by this Symposium, part of law's turn to concepts, methodologies, and practices from other formal fields of knowledge.<sup>10</sup> Alternatively, we may decide to include feminist concerns simply because they define subjects worthy of our attention, whether accompanied by the full retinue of disciplinarity or not.

I proceed with this inquiry in three stages. The first is simply(!) to define feminism or, at least, to address the complications surrounding the definition of a project that is at once academic and activist.<sup>11</sup> Defining terms—"feminist," "gender," and "feminist criticism"—is particularly important in a context of persuasion, because feminists tend "to forget the extent to which our own years of work on these issues [has] given us an encoded, almost shorthand, system of linguistic reference with which

---

as fundamental to the articulation of knowledge in Western thought, and seeing women's and men's experiences in relation to the sex/gender system.

Margaret L. Anderson, *Changing the Curriculum in Higher Education*, in RECONSTRUCTING THE ACADEMY, *supra* note 4, at 38.

8. Boxer, *supra* note 4, at 96. For the view that Women's Studies should aggressively aim for disciplinary status, see Sandra Coyner, *Women's Studies as an Academic Discipline: Why and How to Do It*, in THEORIES OF WOMEN'S STUDIES, *supra* note 3, at 46 (suggesting that feminism may be in pre-paradigmatic Kuhnian stage).

9. NELSON ET AL., *supra* note 1, at 1-2.

10. See Martha Minow, *Law Turning Outward*, 73 TELOS 79 (1987).

11. See *infra* part II.

we [are] at ease but which [newcomers to the discourse can] neither translate nor speak."<sup>12</sup>

I then turn to the exploration of feminism as a formal discipline, paying particular attention to the problem of feminism's identification with the political.<sup>13</sup> I draw here from a developing critical literature on disciplines—a literature which humbly acknowledges that interdisciplinarity itself is not yet a discipline<sup>14</sup>—and from debates within other disciplines about what to do about and how to come to grips with feminism. I include in this discussion the rationale and practices of academic resistance to feminism, especially in law schools. Such resistance stems in part from what appears to be a deep uncertainty, practiced at both institutional and individual levels, about whether feminism is a true discipline, an interesting (or horrifying) fad, or just a muddle.

The third part of this Essay moves from consideration of feminism as formal discipline to the practice of feminism in the study of law.<sup>15</sup> My point of departure is an observation by K.K. Ruthven about the intervention of feminism in the study of English literature:

It was never suggested to male teachers who completed their formal education before the late 1960s that feminism might even be remotely relevant to the teaching of English. The result was that when feminist criticism finally presented itself to men already in the profession it was construed as merely supplemental to what needed to be known. What was called (misleadingly) the "feminist perspective" was imagined to be something which trendies would take up and troglodites [sic] put down, and which the rest of us might mention from time to

---

12. Susan H. Aiken et al., *Trying Transformations: Curriculum Integration and the Problem of Resistance*, in RECONSTRUCTING THE ACADEMY, *supra* note 4, at 104, 109.

13. See *infra* part III.

14. Ellen Messer-Davidow explains that recent critical interest in disciplinarity and the organization and production of academic knowledge is:

now of interest to critics across the intellectual/ideological spectrum . . . has been piqued by a self-reflective turn on the part of many academics about what they and their colleagues do and also by an instrumentalist turn on the part of those outside the academy (predominantly conservatives) who dislike what academics do.

Ellen Messer-Davidow, Book Review, 17 SIGNS: J. WOMEN CULTURE & SOC'Y 676, 677 (1992) (reviewing TONY BECHER, *ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES* (1989); MATTEI DOGAN & ROBERT PAHRE, *CREATIVE MARGINALITY: INNOVATION AT THE INTERSECTIONS OF THE SOCIAL SCIENCES* (1990); FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT (Sneja Gunew ed., 1990); JULIE T. KLEIN, *INTERDISCIPLINARITY: HISTORY, THEORY, AND PRACTICE* (1990); ELIZABETH K. MINNICH, *TRANSFORMING KNOWLEDGE* (1990)).

15. See *infra* part IV.

time if it seemed relevant to the interpretation of a particular text.<sup>16</sup>

These remarks, which describe law schools as easily as English departments, raise the question of how law professors who feel similarly stuck between the "trendies" and the "trogloodytes" might go about incorporating feminism into their everyday work. This part of the Essay offers a practical response to such concerns by presenting applications of law and feminism taken from a first-year contracts course.

Of course, trendies and troglodytes should also take note, for as alliteratively alluring as those two categories may be, neither can be sustained. Feminism is not a fad, not a trend; like rock and roll, it is here to stay. As for the troglodytes, academia is no Jurassic Park where species that died out because the whole world changed are now kept alive to scare younger generations. Those whose legal training preceded or omitted feminism as a concept crucial to the study and practice of law may survive, but they will survive only so long as feminism remains a marginal or passing phenomenon, an option many think can be safely waited out.<sup>17</sup> They will be unable to sustain these attitudes when feminist concerns and scholarship are incorporated into law school curricula—not just as supplemental handouts in courses taught here and there by junior professors, but as a subject bound between red, blue, and brown covers throughout the curriculum. The commitment to this undertaking is not simply a feminist project, but one that demands our collective effort.

## II. FEMINISM DEFINED

Before evaluating feminism as a discipline and "law and feminism" as a pedagogical practice, I want to consider what we mean by "feminism."<sup>18</sup> The term itself has become laden with controversy, deeply politicized, and generally confusing.<sup>19</sup> I therefore decline the self-identi-

---

16. K.K. RUTHVEN, *FEMINIST LITERARY STUDIES: AN INTRODUCTION* 7 (Canto ed., 1990).

17. Consider appointments committees that hesitate to hire "feminists" out of concern that they will have nothing to teach when the fashion fades.

18. For the origins of the term "feminism" and its gradual substitution in the United States for "women's movement" in the early 1900s, see NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987).

19. An example of such confusion: In reading the daily *New York Times*, I was recently greeted by a full page blow-up of a conventionally gorgeous model in a bikini accompanied by the bold caption: "Am I feminist?" Her answer? "Yes. . . . My magazine [*Cosmopolitan*] says equality and achievement are crucial for women but you don't have to stop loving men while you get there." N.Y. TIMES, June 29, 1993, at C20 (advertisement).

A different approach, its definitional pessimism aside, is Rebecca West's sound observation that "[p]eople call me a feminist whenever I express sentiments that differentiate me from

fied postmodern approach of some scholars that definition itself is inappropriate:

In light of the many projects, aspirations, and theories that can be denominated "feminist," it makes little sense to advance a definition of feminism. Like all notions, "feminism" has a grammar for its usage; this grammar, however, is contested. Hence it seems silly to draw lines when no one [line, I assume] is entirely reasonable. Better simply to notice and appreciate the multiplicity of meanings inherent in the term.<sup>20</sup>

Without question, the term "feminist" entails an inherent multiplicity of meanings. Part of the project of both feminist theorizing and feminist praxis is to differentiate among women.<sup>21</sup> Many adjectives modify "feminism"—cultural, radical, French, postmodern, Africana-American, first wave, second wave, Chicana, lesbian, Marxist, and conservative. Each signifies a distinct perspective, a developing literature, and differentiated, sometimes conflicting goals.<sup>22</sup> Moreover, these differences play out within the feminism of each discipline.<sup>23</sup> Thus, for readers who may not appreciate the multiplicities of meanings or who may conclude that multiplicities and conflicts necessarily disqualify feminism from consideration as a unified discipline, drawing even very thick lines around a core meaning—and drawing them even in pencil—is not silly at all. Any

a doormat or a prostitute." A WOMAN'S PLACE: QUOTATIONS ABOUT WOMEN 225 (Anne Stibbs ed., 1992).

20. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 256 n.8 (1992).

21. At times, even to utter "essentialism" has been to risk immediate sentencing by the Red Queen.

22. This kind of diversity is not unique to feminism. Sandra Coyner observes:

Psychology, for example, embraces not only experimental and clinical approaches, but also Freudians and behaviorists. Economists includes Marxists, supply-siders, and several orientations in between. These different trends within the disciplines are not complementary; they do not "add up" to form a consistent or somehow more complete picture. They compete with each other as alternate explanations of the same phenomena; they too are "distinctive" systems of knowledge.

Coyner, *supra* note 8, at 48.

23. In literary criticism, for example, Annette Kolodny explains that:

[T]hose who share the term "feminist" nonetheless practice a diversity of critical strategies, leading, in some cases, to quite different readings, requir[ing] us to acknowledge among ourselves that sister critics, "having chosen to tell a different story, may in their interpretation identify different aspects of the meanings conveyed by the same passage."

Annette Kolodny, *Dancing Through the Mine-field: Some Observations on the Theory, Practice, and Politics of a Feminist Literary Criticism*, in MEN'S STUDIES MODIFIED: THE IMPACT OF FEMINISM ON THE ACADEMIC DISCIPLINE 23, 38 (Dale Spender ed., 1981) [hereinafter MEN'S STUDIES MODIFIED] (quoting M.H. Abrams, *The Deconstructive Angel*, in CRITICAL INQUIRY 3 (1977)).



broad movement—whether feminism, socialism, or conservatism—will have a degree of sectarianism that impedes efforts to pin down too tight a definition. Indeed, recognizing differences among women—without the compulsion to reconcile such differences—is part of the pleasure and challenge of feminism, not its downfall. Moreover, disagreement is not disarray. As political theorist Susan Okin points out, feminist theories “disagree with one another on many counts, arguing with both predecessors and contemporaries on all but the most basic issue—our conviction that women are human beings in no way inferior to men, who warrant equal consideration with men in any political or moral theory.”<sup>24</sup>

What matters here is less the perfect definition of “feminist” than the distinction between feminists themselves and the teaching of feminism. The former is a category of commitment; the latter an obligation of the profession. It may still be possible in some law schools for a first-year student to be taught only by nonfeminist professors. But it would seem impossible, irresponsible, and anti-intellectual for those same students not to be exposed to concepts and applications of feminism during their first year of legal study.

Just as I am not a professional historian, I could not teach first-year contracts without sustained attention to the history of contract doctrine, which itself derives from “regular history”; Richard Danzig’s article on the relation between the Industrial Revolution and the foreseeability limitation on damages comes quickly to mind.<sup>25</sup> Indeed, directing classroom attention to social, political, and intellectual histories has become increasingly necessary with students accustomed to “living in the now.” Similarly, I am not a trained economist—I have not even attended law and economics summer camp—yet it would be unthinkable to teach contracts without attention to theories of rational choice and wealth maximization as well as to critiques of those theories.<sup>26</sup> By the same token, one does not have to be a feminist—or even a woman—to value feminist insights and to include them in the teaching of law.

This being the case, what then do we understand “feminism” to mean? Let us consider a definition proposed by Judge Richard Posner, a master of interdisciplinarity:

---

24. SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* 61 (1989).

25. Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

26. It is, of course, much easier to incorporate law and economics than feminism; most contracts casebooks now include a textual introduction to the former in addition to specific cases. In contrast, feminist concerns are rarely included as a regular subject in standard casebooks. I say more about this in part III.

Properly understood, feminism as a branch of learning is the study of women in society, with emphasis on the effects on them of social practices and public policies, with due regard for what women themselves (often long ignored) have said or say, with sincere concern for women's welfare, and with a heavy dose of skepticism about theories of a theocratic or otherwise dogmatic cast that teach that women are predestined to be subordinate to men.<sup>27</sup>

While catching elements of the enterprise, Judge Posner's definition remains unsatisfactory. Feminism even as a branch of learning is something more than the study of women in society, improved as that study may be by methodologies at last attentive to women's experiences and by skepticism toward theories of natural gender subordination. That is, feminism is something more than description, however thick, and something more than concern, however sincere.

The "something more" I want to suggest, the "more" that distinguishes feminism from the purely academic, is the insistence that women in society *must* be studied. Feminism is not just the name of a set of concerns and interests but the vehicle for the demand that those concerns and interests be taken seriously. The idea is not that the inclusion of women is merely some sort of optional curriculum enricher but rather that "womenless" history, english, law, and so on are fundamentally inadequate as the disciplines they represent themselves to be. As Elizabeth K. Minnich has explained:

[I]t is clear that knowledge that is claimed to be objective and inclusive yet reflects and perpetuates societal discrimination and prejudices fails even on its own terms. Knowledge that was created and has been passed on within a culture that, until very recently indeed, excluded the majority of humankind from the activities, positions, and thinking that were considered most important can hardly be disinterested and politically neutral, as it claimed to be.<sup>28</sup>

One mechanism by which "the majority of humankind" gets some attention is through feminist criticism. I use the phrase to refer to the aspect of feminist practice that insists on the centrality of gender—in simplest terms, the social meanings attached to one's biological sex—as a category of analysis.<sup>29</sup> Some have described feminist criticism as a scan-

---

27. Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515, 515 (1993).

28. ELIZABETH K. MINNICH, *TRANSFORMING KNOWLEDGE* 34 (1990).

29. Minnich provides a more thorough explication of "gender":

ning device of sorts, operating like an X-ray or ultrasound "in the service of a new knowledge which is constructed by rendering visible the hitherto invisible component of 'gender.'"<sup>30</sup>

Law professors of an already interdisciplinary bent may be familiar with the idea of gender's relevatory power through Susan Glaspell's short story, *A Jury of Her Peers*.<sup>31</sup> In this story a farm wife is arrested for the murder of her husband. During the search of the house for evidence, murder clues and motives abound, invisible to the male sheriff and county attorney and screamingly apparent to their wives. But as with the evidence, the wives too are invisible to their husbands and so are not asked for their observations. The official search party leaves clueless. The story suggests that what we are able to see is often not a matter of what is before us, but of the particular qualities of the lens we choose for the examination.

The commitment to uncovering the significance of gender is not always driven by feminist concerns. It may also derive from a sense of integrity internal to the discipline itself. Consider a recent debate among British historians regarding the revision of the national history curriculum for school children. Historian Raphael Samuels, altogether silent on feminism, posed the question: Why does the Battle of Trafalgar hold such an exalted spot in the teaching of English history while the Married Women's Property Act gets barely a mention?<sup>32</sup> Objecting to the existing curricular hierarchy, Samuels explains that:

The Battle of Trafalgar was no kind of turning point in the Napoleonic wars, indeed French historians (admittedly a chauvinistic lot) barely mention it. . . . Were it not for the heroic circumstances of Nelson's death and perhaps (a subject worth more inquiry) the nineteenth-century romanticization of war, it is possible that we would know no more of it than we do the battle of Copenhagen or the landing at Tenerife.<sup>33</sup>

---

Gender, in its broadest sense, is the term feminists use to evoke the conceptual and experiential, individual and systemic, historical and contemporary, cross-cultural and culture-specific, physical and spiritual and political construction of what it means to live in a world that has created them not human, but always woman or man (a division that is not a dualism but a hierarchical monism).

*Id.* at 136.

30. RUTHVEN, *supra* note 16, at 24.

31. Susan Glaspell, *A Jury of Her Peers*, in *THE BEST AMERICAN SHORT STORIES* 371 (Edward J. O'Brien ed., 1916); Annette Kolodny, *A Map for Rereading: Or, Gender and the Interpretation of Literary Texts*, 11 *NEW LITERARY HIST.* 451 (1980) (analyzing "the insignificance of [Glaspell's] kitchen things").

32. Raphael Samuels, *Heroes Below the Hooves of History*, *THE INDEPENDENT*, Aug. 31, 1989, at 23. I thank John Comaroff for introducing me to this material.

33. *Id.*

In contrast, Samuels notes:

The Married Women's Property Act, though it gets no more than a footnote in Haydn's *Dictionary of Dates*, is a landmark in the history of women's rights and arguably in the idea of companionate marriage. . . . So far as the civil law was concerned, women—at any rate married women—were for the greater part of this country's existence rightless, not only in relation to goods and chattels but . . . in relation to custody of their children.<sup>34</sup>

He concludes that: “[i]f the ‘free-born Englishman’ is to be the eponymous hero of ‘our island story,’ something needs to be said about how the other half of the nation lived, even though they were, legally and politically speaking, invisible.”<sup>35</sup>

What I have called feminist criticism, Samuels identifies as the looking for “heroes below the hooves of history,” not all of whom are women.<sup>36</sup> To be sure, had women been in high enough places to have had heroic deaths, a few might have become the stuff of traditional history. But the deaths of nineteenth-century women were rarely noble—in a monumental sense—and were instead commonplace, often resulting from childbirth or pregnancy.

If, as feminist critics, we focus the lens of gender on just this aspect of women's experience—death—complex worlds unfold to which the traditional disciplines have begun to attend anew.<sup>37</sup> And if we narrow the scope still further, and look at women's deaths through lenses ground and polished by feminist *legal* scholars, whole areas of law are implicated and transformed. In evidence, for example, Leslie Reagan's work on the dying declarations of women who suffered illegal abortions reveals how state evidence codes were used to enforce criminal abortion statutes.<sup>38</sup> Studies in criminal law now consider the differences in defenses available to men who kill their women partners in contrast to women who kill men. The medicalization of childbirth, the corresponding regulation of midwifery, the valuation of a woman's life in terms of compensatory

---

34. *Id.*

35. *Id.*

36. *Id.*

37. See JUDITH W. LEAVITT, *BROUGHT TO BED: CHILDBEARING IN AMERICA, 1750 TO 1950* (1986); IRVINE LOUDON, *DEATH IN CHILDBIRTH* (1993); SALLY McMILLEN, *MOTHERHOOD IN THE OLD SOUTH: PREGNANCY, CHILDBIRTH AND INFANT REARING* (1990); MARGARET SANDELOWSKI, *PAIN, PLEASURE, AND AMERICAN CHILDBIRTH* (1984); RICHARD WERTZ & DOROTHY WERTZ, *LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA* (1977).

38. Leslie J. Reagan, “*About to Meet Her Maker*”: *Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, 77 *J. AM. HIST.* 1240 (1991).

damages, and the rules of curtesy compared with dower are all areas where law increases our understanding of why and how women die and what the culture chooses to make of their deaths. My object here is not to outline a new intradisciplinary seminar on Death, Gender, and Law. I want simply to show, using Samuels's example of Lord Nelson's death as a starting point, how gender as a category of legal analysis reveals new ways of thinking about subjects we thought we understood quite well already.

The practice of feminist criticism returns us to the second and more political aspect of the "something more" in feminism: a commitment to doing something about the status of women. I do not mean that Women with Chalk are out to convert students, though of course students may choose to become feminists after learning about feminism, just as they may become historians or mathematicians, even feminist historians and mathematicians, after engagement with those subjects. Rather, for feminist academics, the personal is not only the political but the professional as well.

Sometimes educating women is itself activism of immediate and dramatic consequence. Amartya Sen's work on female infanticide, for example, suggests that in certain provinces of India, the more schooling girls receive, the less likely they are to be killed during their childhoods.<sup>39</sup> While feminist academics make few claims to saving lives in such a crucial, literal sense, we nonetheless understand writing, teaching, hiring, and tenuring as political acts, however puny that kind of activism may sometimes feel.<sup>40</sup> Florence Howe clarifies this position:

In the broadest sense of [the] word, teaching is a political act: some person is choosing, for whatever reasons, to teach a set of values, ideas, assumptions, and pieces of information, and in so doing, to omit other values, ideas, assumptions, and pieces of information. If all those choices form a pattern excluding half the human race, that is a political act one can hardly help no-

---

39. Amartya Sen, *More than 100 Million Women are Missing*, N.Y. REV. OF BOOKS, Dec. 20, 1990, at 61.

40. Regina Austin suggests that this kind of academic contribution does not have to feel all that insignificant. In setting out a research agenda for other minority women legal scholars, Austin states:

We should also find inspiration in the modes of resistance black women mount, individually and collectively, on a daily basis in response to discrimination and exploitation. . . . As scholars, we in turn can aid their political mobilization with lucid analyses that offer broad and cogent perspectives of the structural constraints that produce their subordination and the material openings that must be exploited if further freedom is to be achieved.

Regina Austin, *Sapphire Unbound!*, 1989 WIS. L. REV. 539, 543-44.

ting. To omit women entirely makes one kind of political statement; to include women as a target for humor makes another. To include women with seriousness and vision, and with some attention to the perspective of women as a hitherto subordinate group is simply another kind of political act. Education is the kind of political act that controls destinies, gives some persons hope for a particular kind of future, and deprives others even of ordinary expectations for work and achievement.<sup>41</sup>

Deciding which women to include in one's teaching and scholarship is also political. Consider Regina Austin's question, "When was the last time you had a student who wanted to write a paper on a topic having to do with the legal problems of minority women, and you had precious little to offer in the way of legal articles or commentary that might be on point?"<sup>42</sup> Austin's answer was to write critically about a young black woman whose problem was being fired, legally, for being a single mother, and to urge other minority women scholars to locate their scholarship in "the concrete material and legal conditions of black women."<sup>43</sup>

With all this in mind—if not quite sorted out—we might then settle on a definition of feminism suggested by Clare Dalton:

Feminism is then 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.<sup>44</sup>

### III. THE REQUISITES OF DISCIPLINARITY

We return now to the elements of disciplinarity: those "traditional strategies by which disciplines stake out their territories . . . by claiming a domain of objects, by developing a unique set of methodological practices, and by carrying forward a founding tradition and lexicon."<sup>45</sup> In slightly different terms, "discipline" has come to signify "the tools, methods, procedures, exempla, concepts, and theories that account coherently

---

41. FLORENCE HOWE, MYTHS OF COEDUCATION 282-83 (1984).

42. Austin, *supra* note 40, at 541.

43. *Id.* at 545 (analyzing *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987)).

44. Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 2 (1988).

45. NELSON ET AL., *supra* note 1, at 1.

for a set of objects or subjects."<sup>46</sup> Combining these approximations of disciplinarity, how does feminism fare? What is the domain or set of objects or subjects of feminism? Are there distinctive feminist methodologies, theories, vocabularies, and traditions?

### A. Domain

With regard to the subject of domain or turf, Professors Shumway and Messer-Davidow suggest that feminist inquiry has constituted and redefined itself around a *series* of objects:

women as a subjugated sex class and patriarchy as the system of male dominance; gender (the social character of women and men) denaturalized and detached from sex (the biological traits of women and men); sex-gender systems that organize various cultures; and interactive identities and oppressions, including those of race, class, sexuality, ethnicity, nationality and gender.<sup>47</sup>

These topics surely constitute a qualifying domain or constitutive set of objects, as a review of feminist scholarship throughout the disciplines reveals.

This elaboration of topics is remarkable when we consider that when feminists first approached the disciplines, few women could be found either on the pages of texts or in offices with windows. Looking just at law, and without detailing the entire dismal record—wife assumed within husband's legal identity, private/public sphere distinction, exclusion from civic participation, sex-based discrimination, and so on—women have counted for little. Indeed, legal doctrine itself secured women's subordination. The same institutionalized invisibility can be said for anthropology (the study of man), medicine (most research done on males), philosophy (What is man? What does he know?), theology (God the father, but few goddesses), architecture (structures by men, interior decoration by women), geography (the man-made environment), and so on.

But feminist scholars are a dedicated bunch and none of the disciplines look quite as they did twenty years ago. Women are now increasingly present within the core conceptualizations of the disciplines.<sup>48</sup>

---

46. JULIE T. KLEIN, *INTERDISCIPLINARITY: HISTORY, THEORY AND PRACTICE* 104 (1990).

47. Shumway & Messer-Davidow, *supra* note 6, at 215.

48. See *THE KNOWLEDGE EXPLOSION: GENERATIONS OF FEMINIST SCHOLARSHIP* (Cheris Kramarae & Dale Spender eds., 1992) [hereinafter *THE KNOWLEDGE EXPLOSION*]; ELLEN C. DUBOIS ET AL., *FEMINIST SCHOLARSHIP: KINDLING IN THE GROVES OF*

Feminist geographers have introduced the idea that "space is gendered; that is, the design and use of space—like all other cultural constructs—is determined in part by ideological assumptions about gender roles and relations (for example, the related spatial dichotomies of public and private, work and home, city and suburb)."<sup>49</sup> Women in physical education now teach and participate in real sports with real budgets and fans.<sup>50</sup> Psychologists are now rethinking certain "truths" concerning women: Maybe mothers are not the cause of *all* of their children's problems;<sup>51</sup> maybe women are not more likely than men to be mentally ill.<sup>52</sup>

A crucial question for disciplinarity—as well as a strategic question for feminist scholars themselves—has been whether these subjects are better studied within existing departmental structures or thematically bunched into women's studies programs. At some schools the pervasive or integrative method was preferred in order to secure feminism's place within every discipline. In other schools advocates favored free-standing women's studies programs and departments as the means of securing status, funds, and longevity.<sup>53</sup> But whether integrated or independent, debate over the institutional location of feminism's highest and best use cannot sensibly serve as a general eviction notice upon the subject matter as a whole.

### B. Methodologies

If feminism possesses a coherent subject matter, what about distinguishing methods and practices? The practice of feminist criticism—re-

ACADEME (1985); FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT (Sneja Gunew ed., 1990); THE IMPACT OF FEMINIST RESEARCH IN THE ACADEMY (Christie Farnham ed., 1987); MEN'S STUDIES MODIFIED, *supra* note 23; RECONSTRUCTING THE ACADEMY, *supra* note 4; SEX AND SCIENTIFIC INQUIRY (Sandra Harding & Jean F. O'Barr eds., 1987).

49. Joni Seager, *Women Deserve Spatial Consideration*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 213, 217.

50. Carole A. Oglesby & Christine M. Shelton, *Exercise and Sports Studies: Toward a Fit, Informed, and Joyful Embodiment of Feminism*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 181.

51. Mary R. Walsh, *Psychology and Feminism*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 291; see Paul Caplan & Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 AM. J. ORTHOPSYCHIATRY 345 (1985).

52. See the debate between Walter R. Gove and Marilyn Johnson about whether women have higher rates of mental illness. Walter R. Gove, *Mental Illness and Psychiatric Treatment Among Women*, in THE PSYCHOLOGY OF WOMEN 102 (Mary R. Walsh ed., 1987); Marilyn Johnson, *Mental Illness and Psychiatric Treatment Among Women: A Response*, in THE PSYCHOLOGY OF WOMEN, *supra*, at 119.

53. In many cases, feminism's institutional form was a matter of happenstance. See Boxer, *supra* note 4, at 96 (explaining that women's studies programs often "developed along the lines of least resistance: courses here and there, according to faculty interest and administrative openness; committees composed of whoever was interested and able to participate").



vealing gender as a category of analysis—serves as a starting point. Of course, feminist criticism defines a goal, and not the methodologies for achieving it. Thus an initial question for feminist scholars has been *how* to make gender visible. The issue is immediately problematic in that women have long been discredited as candidates for making very much of anything visible, and their approaches to understanding long discounted as sensible ways to learn anything serious.

The basis of such discrediting has been the traditional reverence for objectivity as an epistemic baseline combined with the fact—objectively obtained—that women could not reason.<sup>54</sup> As philosopher Lorraine Code has explained, the identification of women's knowledge with the hopelessly subjective has been based on

women's purported incapacity to rise above the practical, sensuous, and emotional preoccupations of everyday life. Hence women are judged unfit for the abstract life of pure reason in which true knowers must engage. So a set of dichotomies continuous with the subjective/objective dichotomy is invoked: theory/practice, reason/emotion, universal/particular, mind/body, abstract/concrete.<sup>55</sup>

And we all know on which side of the slash women fall.

Thus an initial task of academic feminism has been to redefine what knowledge is and what counts as knowing. I want to emphasize two important points about this project of revision. First, the idea here is not that men have gotten it backwards and that all knowledge is really subjective—though certainly at various stages in certain feminist critiques that claim has been made. The better argument is that there is and always has been a subjective quality to knowledge, necessarily situated in the circumstances of whoever determines what counts as knowledge. The point has gone unnoticed only because men's subjectivity has defined the "objective."<sup>56</sup> This explains, for example, why the pronoun "he" was understood by those in control to *include* rather than to *obliterate* "she."

---

54. The nineteenth-century thermodynamic explanation for this predicament was that women's reproductive organs used the energy that might otherwise have gone into thinking. See CYNTHIA E. RUSSETT, *SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD* 104 (1989).

55. LORRAINE CODE, *WHAT CAN SHE KNOW?: FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE* 28-29 (1991).

56. Or, as Dale Spender explains:

Most of the knowledge produced in our society has been produced by men; they have usually generated the explanations and the schemata and have then checked with each other and vouched for the accuracy and adequacy of their view of the world. They have created *men's studies* (the academic curriculum), for, by not acknowledg-

Feminists are not out to subvert the hierarchies, to replace logic wholesale with intuition, or to reason with empathy. Rather, they value the subjective and experiential as informing how we conceptualize problems and questions and how we formulate and test answers. As Evelyn Fox Keller explains in the context of feminism and science, feminists seek to escape

the ideology that asserts an opposition between (male) objectivity and (female) subjectivity and denies the possibility of mediation between the two. A first step, therefore, in extending the feminist critique to the foundations of scientific thought is to reconceptualize objectivity as a dialectical process so as to allow for the possibility of distinguishing the objective effort from the objectivist illusion.<sup>57</sup>

The second point is that much of what women have known is not "subjective" in any epistemically disqualifying way, but is in fact good reliable information. Nonetheless, as Lorraine Code makes clear, authoritative status was withheld even from the knowledge women constructed from their own designated areas of experience:

'Gossip', 'old wives' tales', 'women's lore', 'witchcraft' are just some of the labels patriarchal societies attach to women's accumulated knowledge and *wisdom*. Yet the knowledge in question stands up to the most stringent tests that even the objectivists require. It is testable in practice across a wide variety of circumstances. (Think, for example, of midwifery or cookery.) Its theoretical soundness is evident in its practical applications.<sup>58</sup>

The problem in all this for feminist scholars is clear. Both the topic of women and the methodologies employed to study the topic bear the continued burden of longstanding depreciation. The connection between women's invisibility and discredited methodologies is, of course, no accident. The invisible is not invisible by chance; part of the process of hiding information about women has involved discounting the very processes that would reveal it. This puts feminist scholarship in a curious squeeze. What has been long covered is not always subject to sudden

---

ing that they are presenting only the explanations of *men*, they have 'passed off' this knowledge as human knowledge.

DALE SPENDER, *Introduction to MEN'S STUDIES MODIFIED*, *supra* note 23, at 1.

57. Evelyn F. Keller, *Feminism and Science*, in *SEX AND SCIENTIFIC INQUIRY*, *supra* note 48, at 232, 238.

58. CODE, *supra* note 55, at 68 (explaining that examples chosen "from practices commonly classified as trivial, women's work to show that the knowledge derived even out of such denigrated practices is wholly worthy of the name").

exposure and must instead be teased out, approached slyly and indirectly. For example, many ventures in law and literature are attempts to reveal what might, under different traditions of knowing, be obvious and clear but that are instead veiled and obscure.<sup>59</sup> Strategies most likely to reveal women's experience are often less familiar and more suspect. Regina Austin reviews the problem and the obligation of solution in the context of law:

The world with which many legal scholars deal is that found within the four corners of judicial opinions. If the decisions and the rubrics they apply pay no attention to race, sex, and class . . . [I]t is thus imperative that we find a way to portray, almost construct for a legal audience, the contemporary reality of the disparate groups of minority women about whom we write.<sup>60</sup>

How then have feminist scholars proceeded? What are feminist research methods? The specifics vary according to discipline. In journalism, feminist scholars have sought "other ways to interpret texts and images than quantitative content analysis, other forms of interviewing than the predetermined survey, other ways of understanding women's experiences than the laboratory experiment."<sup>61</sup> Feminist biologists are now reassessing the long standing "androcentric assumptions" regarding data description and inferences from data. A feminist contribution to methodology in evolutionary studies, for example, is not uncovering new data, but providing a woman-centered framework as an alternative to the standard "man-the-hunter" story. The aim is not prehistoric politics (woman-gatherers used tools first!), but rather that whatever conclusions are reached about the use and meaning of early tools take framework

59. James White explains:

Reading texts composed by other minds in other worlds can help us see more clearly (what is otherwise nearly invisible) the force and meaning of the habits of mind and language in which we have been brought up, as lawyers and as people, and to which we shall in all likelihood remain unconscious unless led to perceive or imagine other worlds.

James B. White, *What a Lawyer Can Learn from Literature*, 102 HARV. L. REV. 2014, 2023 (1989) (reviewing RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)); see, e.g., CAROL SANGER, *SEPARATING FROM CHILDREN: LEGAL AND LITERARY RESPONSES TO MOTHER-CHILD SEPARATIONS* (forthcoming 1994); Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991).

60. Austin, *supra* note 40, at 547.

61. Lana F. Rakow, *What's a Nice Feminist Like You Doing in Journalism and Mass Communication?*, in *THE KNOWLEDGE EXPLOSION*, *supra* note 48, at 191, 195.

assumptions into account in assigning evidential relevance to data.<sup>62</sup> In law, traditional legal reasoning—deduction, induction, analogy, and so on—has been joined and enriched by what Katherine Bartlett identifies as “feminist legal methods.”<sup>63</sup> These include such practices as consciousness-raising, “asking the woman question”—identifying whether and how any particular rule disadvantages women—and “feminist practical reasoning”—a form of contextualized deliberation that takes into account the material conditions of women’s lives.<sup>64</sup>

What is shared throughout the disciplines is the commitment to valuing the experiences, insights, and logic of women’s lives and women’s reasoning. In addition to traditional forms of analytical reasoning in which we have been schooled, feminist scholars also observe, participate, and ask questions of those under the hooves and outside the texts. We turn to nontraditional accounts and sources, contextualize, collaborate, engage in consciousness-raising.<sup>65</sup>

In her excellent analysis of feminist research across disciplines, Shulamit Reinharz explains how even traditional research methods—interviewing, ethnography, oral history, content analysis, case studies, experimental research, statistical research formats—are transformed by a feminist ethic into feminist methodologies.<sup>66</sup> Thus, while there is nothing new about interviewing as a research technique, there are different manners of interviewing, of formulating the questions, of understanding one’s own responses to the answers, of caring about the interviewee as well as her story, and of attending to the ethical issues raised by interviewing. Reinharz concludes that “by listening to women speak, understanding women’s membership in particular social systems, and establishing the distribution of phenomena accessible only through sensitive interviewing, feminist interview researchers have uncovered previ-

---

62. Helen Longino & Ruth Doell, *Body, Bias, and Behavior: A Comparative Analysis of Reasoning in Two Areas of Biological Science*, in *SEX AND SCIENTIFIC INQUIRY*, *supra* note 48, at 165, 172.

63. Katherine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990).

64. *See generally id.* (exploring consciousness-raising, “the woman question,” and feminist practical reasoning); Heather R. Wisknik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *BERKELEY WOMEN’S L.J.* 64 (1985) (examining developmental nature of feminist legal criticism and its methodological implications).

65. To be sure, feminism has not “invented” all of these. Anthropologist Micaela di Leonardo acknowledges feminism’s “intellectual inheritances”: For example, “[a]ttempts to undermine power differentials between fieldworker and informant stem from liberal, Marxist and especially phenomenological insights concerning power and interaction.” Micaela di Leonardo, *Women, Culture, and Society Revisited: Feminist Anthropology for the 1990s*, in *THE KNOWLEDGE EXPLOSION*, *supra* note 48, at 121.

66. SHULAMIT REINHARZ, *FEMINIST METHODS IN SOCIAL RESEARCH* (1992).

ously neglected or misunderstood worlds of experience"<sup>67</sup> in areas such as rape and "worker happiness," among others.

Reinharz identifies ten general themes that define feminist research:

1. Feminism is a perspective, not a research method.
2. Feminists use a multiplicity of research methods.
3. Feminist research involves an ongoing criticism of nonfeminist scholarship.
4. Feminist research is guided by feminist theory.
5. Feminist research may be transdisciplinary.
6. Feminist research aims to create social change.
7. Feminist research strives to represent human diversity.
8. Feminist research frequently includes the researcher as a person.
9. Feminist research frequently attempts to develop special relations with the people studied (in interactive research).
10. Feminist research frequently defines a special relation with the reader.<sup>68</sup>

Many of these practices, which reveal lives and relationships, problems, and analyses previously undetected, are still regarded as "lore," not in its best sense as valid, detailed explanation of experience, but as some sort of academic divining. Sustained skepticism toward feminist methodologies is especially puzzling in that when employed in other disciplines, such as history, similar methodologies are accepted as part of the enterprise of understanding the past.<sup>69</sup> But when identified as feminist and applied to women's issues, such practices are discounted at a higher rate.

Much of the favoring of certain methodologies over others—usually something quantitative over something qualitative—relates back to the uncritical reverence of the old version of objectivity. The institutional power of disciplinarity reinforces such preferences:

Just as civil regulation established the cognitive exclusiveness of lawyers and physicians in their respective domains, the university enabled disciplinary practitioners to achieve cognitive exclusiveness over their regions of the academic world. These practitioners relied not on licensing but on credentialing; they

---

67. *Id.* at 44.

68. *Id.* at 240.

69. JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 5-10 (1988) (comparing historians to paleontologists—trying to make sense of assembled bones—and to detectives—trying to find bones in first place).

controlled the apparatus for training practitioners and admitting them to their ranks.<sup>70</sup>

Cognitive exclusiveness is secured by controlling not only who is hired, but also what is taught, researched, funded, published, evaluated, and rewarded. "Problem" methodologies are nonstarters all the way down. Consider the comment that many of us have heard in regard to a candidate's feminist scholarship: "It *might* be good, but we have no one and no way to evaluate it."<sup>71</sup>

This is not to say that feminist practices are unproblematic, even among feminists. How, for example, should feminists deal with the authority of "women's experience" when the experience or desires articulated by some women—for motherhood, for pornography, for high heels—are seen by others as the absolute essence of gender subordination? Are these women the subjects of false consciousness? Are they collaborators? Biologically determined? Culturally bound? All white? The answers, and some of the questions, are still being worked out. Apparent contradictions or conflicts have required scholars to look more carefully at the breadth and foundations of various early—sometimes called "first wave"—positions. These include confident but monolithic claims about "women and their problems," the valorization of subjectivity as utterly distinct from the objective and, in law, prematurely staking too much of the feminist claim on equality without sufficiently attending to the demands of difference.

As the evidence comes in, as challenges are issued, feminists continue to refine their observations and conclusions and to think through the implications of feminist theory. Consider two examples concerning reproduction, long understood to be a central cause of women's subordination and so the subject of much feminist attention. The first concerns Nancy Chodorow's psychoanalytic explanation that women are the way they are—connected, maternal—in crucial part because women have been raised by caretakers of the same sex.<sup>72</sup> While many feminists have used and developed Chodorow's ideas, others have found them too located in white, middle-class family patterns to explain why all women

---

70. Shumway & Messer-Davidow, *supra* note 6, at 207.

71. See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

72. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 77 (1978).

still raise most children.<sup>73</sup> This is only to say that Chodorow has presented a theory that other feminists are now challenging. Philosopher Elizabeth Young-Bruehl directs us to a different aspect of Chodorow's work—the implications of its success.<sup>74</sup> That is, if social aims of Chodorow's theory come into being so that men begin to take care of children, that does not end the feminist inquiry:

If shared parenting, one of the most frequently advocated social goals, is seen as the way to break up a social syndrome of the reproduction of mothering (in Nancy Chodorow's phrase) and to bring about the autonomy which too much embeddedness in relationship has kept unavailable to women, then this common caution asks that advocates of shared parenting not neglect processes of the psyche that may very well go on in *any* kind of parenting.<sup>75</sup>

A second era in which feminists must continue to attend to the implications of theory is reproduction. Having spent years trying to secure a right to abort, feminists are now confronting all sorts of women who *want* to have children—aging yuppies, HIV-positive women, teenagers, women who become mothers through contractual obligation.<sup>76</sup> Feminists now argue with one another about the regulation of maternal health during pregnancy, about the uses of reproductive technologies, and about the value of motherhood itself. How should we think about what Marjorie Shultz calls “intentional parenting,”<sup>77</sup> when “surrogate mothers” enroll in the plan?<sup>78</sup> Working out these sorts of difficulties and developments are part of the excitement—challenge, adventure, risk, and complexity—of feminism. Fermat's last theorem tantalized mathematicians for 350 years. That all the proofs are not yet in for the many complex hypotheses offered by feminist theorists is neither surprising and certainly not disqualifying.

---

73. See generally Judith Lorber et al., *On the Reproduction of Mothering: A Methodological Debate*, 6 SIGNS: J. WOMEN CULTURE & SOC'Y 482 (1981) (stating that move toward psychoanalytic theory regarding mothering is mistake).

74. Elizabeth Young-Bruehl, *The Education of Women as Philosophers*, in RECONSTRUCTING THE ACADEMY, *supra* note 4, at 9.

75. *Id.* at 20.

76. See Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15 (1992).

77. Marjorie M. Shultz, *Reproductive Technologies and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (stating that today, with advances in birth control and artificial insemination, there is more choice as to when (and if) to become parent).

78. *Id.*

What is now clearly “in” are the critical foundations of a feminist canon. Different disciplines are at different stages, if we follow Peggy McIntosh’s description of the five-phase process of transformation.<sup>79</sup> In phase one, the disciplines—history, political science, law, and so on—start out “womanless.”<sup>80</sup> As feminist claims are raised, the next step is scouting out what, if any, famous women can be found in the field.<sup>81</sup> This phase is a mixed blessing in that the famous women are never as famous as the famous men. (Let’s hear it for Myra Bradwell—the first woman officially denied admission to the bar by the United States Supreme Court!)<sup>82</sup> Mathematics and engineering may still be in phase two.<sup>83</sup> Professor McIntosh’s third phase is “woman as problem, anomaly, or absence”;<sup>84</sup> the fourth is the exuberant but often unbalanced “women *as* history.”<sup>85</sup> This all leads up to phase five, where real transformation is accomplished as the discipline is “redefined, reconstructed to include us all.”<sup>86</sup> Law is in, or we must immediately catapult it into, phase five.

In addition to the developments within each particular discipline, scholarship on certain overarching issues further constitutes the discipline of feminism. These include such crosscutting themes as the power of linguistic conventions,<sup>87</sup> theories of patri-

---

79. PEGGY MCINTOSH, INTERACTIVE PHASES OF CURRICULAR RE-VISION: A FEMINIST PERSPECTIVE (Wellesley College Center for Research on Women Working Paper No. 124, 1983).

80. *Id.* at 3, 7.

81. *Id.* at 7-9.

82. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). Scholars are now attending to the lives and circumstances of early women lawyers who *were* admitted to practice. See Barbara A. Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991); Sylvia A. Law, *Crystal Eastman: N.Y.U. Law Graduate*, 66 N.Y.U. L. REV. 1963 (1991).

83. See, e.g., Robyn Arianrhod, *Physics and Mathematics, Reality and Language*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 41; H. Patricia Hynes, *Feminism and Engineering: The Inroads*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 133.

84. MCINTOSH, *supra* note 79, at 9-14.

85. *Id.* at 19-20.

86. *Id.* at 20.

87. See DALE SPENDER, MAN MADE LANGUAGE (1980); BARRIE THORNE ET AL., LANGUAGE, GENDER AND SOCIETY (1983). For a more practical perspective, see CASEY MILLER & KATE SWIFT, THE HANDBOOK OF NONSEXIST WRITING: FOR WRITERS, EDITORS AND SPEAKERS (2d ed. 1988).

The use of “man” to mean “men and women” is for many feminists a crucial mechanism for the conceptual invisibility of women, and Dale Spender argues with great force that this usage did not arise “mysteriously” but is instead a classic example of how “men generated this meaning and checked with each other to establish its ‘logic’ and validity.” SPENDER, *supra* note 56, at 6. Many men, however, still regard the issue of pronouns as a matter of grammar rather than an inherent feature of the gendered construction of knowledge. See, e.g., Phillip Areeda, *Always a Borrower: Law and Other Disciplines*, 1988 DUKE L.J. 1029, 1029 n.2 (“I



archy,<sup>88</sup> conflicts among women on account of difference,<sup>89</sup> and strategies for change based on commonalities from shared aspects of women's lives. These themes are also central to the feminist legal canon now taking solid shape. There are now at least four anthologies of feminist legal scholarship<sup>90</sup> and three new textbooks,<sup>91</sup> although the absence of women and feminist concerns from casebooks not specially devoted to women's issues remains a problem.

### C. Resistance

If feminism has the attributes of at least an incipient discipline, what then are the sources of reluctance/resistance to its integration within the traditional curricula? To put the question more generally, why for all its traditional strengths, is feminism still disliked, mistrusted, and rejected in many quarters as an appropriate subject for scholarly devotion and scholarly reward? There are common, often sensible, objections to any attempt at curriculum reform.<sup>92</sup> Two such common objections are that the subject is not important enough, and even if it is, so are a lot of other subjects. There is simply not room in the curriculum or time in the day to teach it all.

I have already discussed the first, the verdict of insignificance, that previously disqualified half of humanity as participants or topics in the

---

use such words as 'man' or 'he' in their universal, not gender-specific, senses." I would argue that Professor Areeda and others should consider the idea that for many women, the "universal" meaning of masculine pronouns asks too much. Would men be able, even after years of working with a revised grammar, to feel at home within a universal "she"?

88. See DUBOIS ET AL., *supra* note 48, at 86. See generally Cheri Kramarae, *The Condition of Patriarchy*, in THE KNOWLEDGE EXPLOSION, *supra* note 48, at 397 (reviewing feminist discussions on whether concept of patriarchy provides promise or pitfall for understanding history of man's antagonism towards women).

89. See generally CONFLICTS IN FEMINISM (Marianne Hirsch & Evelyn F. Keller eds., 1990) (discussing conflicts among women).

90. AT THE BOUNDARIES OF THE LAW (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); FEMINIST JURISPRUDENCE (Patricia Smith ed., 1992); FEMINIST LEGAL THEORY (D. Kelley Weisberg ed., 1993); FEMINIST LEGAL THEORY: READINGS IN GENDER AND LAW (Katherine T. Bartlett & Rosanne Kennedy eds., 1991).

91. KATHERINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (1993); MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (forthcoming); MARY JOE FRUG, WOMEN AND THE LAW (1992). These materials join the earlier genre of texts on women and law focusing on sex discrimination. See HERMA HILL KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (3d ed. 1988); BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975).

92. See generally Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1 (1992) (discussing efforts to restructure first-year law curriculum).

academic world. With regard to the second objection—why study women “over” racial minorities or poor people or law and economics? The answer is easy. These other areas should be included within the curriculum. They too are embedded, if just surfacing, in much of what we teach. They too do not so much crowd as enhance our traditional courses. There is more likely to be overlap than conflict between any of these newer concerns and the study of feminism. Teaching about women often means teaching about race, class, and rational choice. It is no accident that the plaintiffs in habitability cases are most often poor women or that widows throughout the canon usually win or that women rationally consent to many bad deals. The job of the feminist critique is to ask why this is so. Reconsider Mrs. Williams, the signer of the unconscionable cross-collateral agreement in *Williams v. Walker-Thomas Furniture Co.*<sup>93</sup> Law professors often attend to the fact that she is poor, but does it matter as well that she is African-American (can one even tell from the case alone?) or that she is a woman? Does it matter what race the salesman was? Or that she signed the agreement in her home? Did all customers pay the same original price for the stereo? Might we not be in the new territory of race and gender discrimination in consumer sales suggested by Ian Ayres’s economic analysis of new car sales?<sup>94</sup>

In addition to standard objections to the introduction of any new subject or field, there are certain nonacademic explanations for the particularly hearty strains of resistance that confront feminism. I begin with the observations of British feminist Janet Radcliffe Richards, who explains that feminism is by its very nature quite difficult to get across:

The phenomenon of sexual injustice, of taking it for granted that different kinds of treatment are suitable for men and women as such, is so pervasive, so deeply entrenched and so generally taken for granted that to recognize it for what it is is to have a view of the world which is radically different from that of most people. The feminist sees what is generally invisible, finds significance in what is unremarkable, and questions what is presupposed by other enquiries. And since to the uninitiated this is bound to appear no different from imagining the nonexistent, making a fuss about nothing, and gratuitously instigating disturbances in the foundations of society, perhaps it is not sur-

---

93. 350 F.2d 445 (D.C. Cir. 1965).

94. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiation*, 104 HARV. L. REV. 817 (1991).

prising that there is still not very much public sympathy with feminism.<sup>95</sup>

Deborah Rhode develops this notion further in her discussion of what she has identified as “‘the no-problem’ problem.”<sup>96</sup> This is the phenomenon that “[f]or most Americans, gender inequality is not a serious problem, or it is not their problem.”<sup>97</sup> Rhode explains that adherents of the “no-problem” response to sexual inequality can choose from a variety of supportive cultural beliefs. These include the outright denial of gender disparities, the recognition of disparities but the denial of their injustice, and the acknowledgment by some that sex-based discrimination *may* exist but that it is likely caused by women themselves.<sup>98</sup> Any proof of improvement—a few women hired, a few successes here and there—confirms the original diagnosis of “no-problem.” This complex system of belief and absolution makes feminist activity seem all the more like invention and whining.

A second explanation for feminism’s lack of embrace by the public, colleagues, institutions, and even close relatives, is the matter of its “appearance or attractiveness.” As Janet Radcliffe Richards has bravely pointed out, many people simply “think of the movement as an inherently *unattractive* one. They dislike what they see of both feminists and feminist policies, and the result is not only a disinclination to join with feminists, but even a resistance to listening to what they have to say.”<sup>99</sup> Richards offers several explanations for this: the fact that feminism “suffers from a natural hazard of all reforming movements, of being identified in the public eye with [its] conspicuous extremes”;<sup>100</sup> that feminists have had to be noisy, if not shrill, to be heard at all;<sup>101</sup> and that feminists have at times urged radical solutions—no men, no make-up, no families—as the only cure for gender oppression.<sup>102</sup> John Siliciano offers an academic version of these same traits: “a propensity towards exclusionary jargon, a smugness of conviction, and a tolerance for some true fanatics among the rank and file.”<sup>103</sup> However, Siliciano notes that in this

---

95. JANET RADCLIFFE RICHARDS, *THE SKEPTICAL FEMINIST: A PHILOSOPHICAL ENQUIRY* 321 (1980).

96. Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731 (1991).

97. *Id.* at 1735.

98. *Id.*

99. RICHARDS, *supra* note 95, at 338.

100. *Id.* at 339.

101. *Id.* at 340.

102. *Id.* at 346-47.

103. John A. Siliciano, *Fighting with Angry Women: A Response to Lasson*, 42 *J. LEGAL EDUC.* 461, 461 (1992) (commenting on inadequacies in Kenneth Lasson’s attack on “femi-

regard, "feminism is no different from any of the other emerging schools of thought, like critical legal studies or the law and economics movement, that compete for attention and adherents among legal academics."<sup>104</sup>

Nonetheless, calling something feminist—whether a candidate, someone's scholarship, a proposed program, or an idea—changes whatever debate follows.<sup>105</sup> Even feminists are sometimes reluctant to so identify. After I taught my school's first Feminist Jurisprudence course in 1989, a number of students, enthusiastic about the content of the course, nonetheless requested that its title be changed to something else, something without the word "feminist" in it. They explained that the job market was bad enough without having the "F-word" on their permanent transcripts.<sup>106</sup> A similar skittishness may explain why most Women's Studies Programs, concerned with funding as well as job placement for graduates, are so called—as opposed to Feminist Studies—and why, of the many new law school gender journals,<sup>107</sup> only Yale's has the word "feminism" in the title—they must not have problems getting jobs.<sup>108</sup> Consider also women who preface some modest complaint or well-taken observation with the disclaimer that "I'm not a feminist, but . . . ."

Because it is not my view that feminists are especially obnoxious or any more opinionated than male colleagues committed to some impor-

---

nism" as represented by Lasson's choice of Catherine MacKinnon quotes). See (or better yet, don't see) Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1 (1992). In response to Lasson, MacKinnon contemplates punching him in the nose and suing the journal. Catherine MacKinnon, *Letter to the Editor*, 42 J. LEGAL EDUC. 465 (1992).

104. Siliciano, *supra* note 103, at 461.

105. It is worth noting that feminist scholarship research, concerned with identifying, understanding, and changing the subordinated status of women, enters law schools without much fuss when it is not immediately characterized as feminist. Consider two recent examples from economics and linguistics. Gregory Matoesian's conversational analysis of rape trial transcripts shows how linguistic conventions reproduce male dominance through the stylized discourse of interrogation and examination at trial. GREGORY MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* (1993). Ian Ayres's empirical analysis of price differentials in new car sales suggests that black men, black women, and white women pay more for cars than do white men. See Ayres, *supra* note 94, at 819. While both are works of feminist criticism, I suspect that neither author will be accused of ideological motivation.

106. The course is now called "Contemporary Legal Theory" and its changing contents—feminist jurisprudence, law and economics, critical race theory, and so on—are announced yearly in the registration materials.

107. See, for example, *Berkeley Women's Law Journal*, *Columbia Journal of Gender and Law*, *Harvard Women's Law Journal*, *Southern California Review of Law and Women's Studies*, and *Stanford Journal of Law, Gender and Sexual Orientation*.

108. See the *Yale Journal of Law and Feminism*.

tant issue, I want to advance a third explanation for resistance to feminism of even the mildest variety. This is simply that feminism is an explicitly gendered proposition. It is about women. Without paragraphs of citation, we might agree that at least at this stage of human social and political relations, women make men nervous. This results in a combination of social discomfort, intellectual mistrust, and terror. For many people, too much in too many areas of life has been put up for renegotiation. Taking feminism seriously, both as a branch of study and as a social movement, necessarily requires some acceptance of sometimes threatening shifts in the distribution of power and status. In consequence, discussions about curriculum transformation may well provoke anxieties at an emotional level.<sup>109</sup> Alice in the Garden of Live Flowers was explicit on this point: “‘If you don’t hold your tongues, I’ll pick you.’”<sup>110</sup>

This is bad news for feminist scholars in at least two respects. First, it is often hard to recognize or respond to opposition grounded in unarticulated dissatisfactions, what Susan Aiken calls the “subterranean emotional text of this discourse.”<sup>111</sup> Second, to suggest in any academic setting that an emotional subtext is at work is to “risk reconfirming the stereotypical prejudices that have for so long prevented [women] from being taken seriously within an academy which requires ‘objectivity.’”<sup>112</sup> That is, noticing or naming this aspect of resistance reaffirms the charge that women reduce everything to “feelings”—just as everyone suspected all along.

In law schools and within the legal profession—institutions not so very long ago solidly and comfortably male—particular grounds for uneasiness exist. Women continue to show up yearly in larger numbers, both in classes and in court where they are now educated enough to be

---

109. As Susan Aiken and her colleagues discovered in their four-year interdisciplinary integration project at the University of Arizona:

Because feminist scholarship’s insistence on the social construction of gender inequality constitutes an implicit (and sometimes explicit) critique of men, it challenges masculine self-images and involves many men in a curious dilemma. If they assume both their own agency in social processes and the injustice of women’s secondary status, then they must acknowledge complicity in gender imbalance. . . . [R]efusal or failure to initiate changes creates guilt and dissonance between their actions and their self-images as just and thoughtful people. . . . For [those] who see themselves as liberal and sympathetic to women, yet who resist the thoroughgoing transformation implicit in the feminist project, the implications of this conundrum are all the more stinging.

Aiken et al., *supra* note 12, at 111-12.

110. CARROLL, *supra* note 2, at 31.

111. Aiken et al., *supra* note 12, at 113.

112. *Id.*

lawyers, propertied enough to be litigants, dangerous enough to be criminal defendants, and as always, compromised enough to make up the entire courthouse staff. Their physical presence alone may be unsettling, especially when women and women's issues turn up not only in force but in places where authorities were sure they could not possibly be, such as the federal courts. As the Ninth Circuit Gender Bias Task Force recently reported, women have a substantial, if unexpected, presence throughout the federal system by virtue of women's interests in federal benefits, immigration, federal Indian law, bankruptcy, and the Employment Retirement Income Security Act.<sup>113</sup>

We know from Alfred Hitchcock that noticing a previously unnoticed other, especially when she appears in force, can be terrifying: Recall Tippi Hedren in *The Birds*, not so unlike the Ninth Circuit Court of Appeals, suddenly aware that she too is surrounded by rows and rows of birds poised on every line and fence. Unlike Mr. Hitchcock's birds, feminist academics and lawyers do not want to take over the whole town. They do, however, want to change its layout.

And here we shift from ornithology back to disciplinarity, for the discourse of discipline is consistently invoked to discredit feminism's demands for structural change—in curricula, in research, in hiring—on the grounds that feminism is too political for institutional embrace. In law schools—as in the “hard” sciences—the application of feminism to law, with its pretenses to apoliticality, is perceived as particularly worrisome.

What responses are there to the resilient claim that feminism is too political to take up long-term residence in the legal academy? I suggest four. The first is to concede that feminism *is* political, in the sense that its origins and goals reflect a commitment to improving the lives of women.<sup>114</sup> But in this sense, the “political” character of feminism is little different from the political character of law in general—except for feminism's explicit inclusion of women. Open any textbook on jurisprudence and you will find an introductory disquisition on how we all benefit from the rule of law, how a stable legal structure is a great thing for society, and so on. Feminism is political in that it explicitly addresses the task of

---

113. Ninth Circuit Gender Bias Task Force, Preliminary Report of the Ninth Circuit Gender Bias Task Force (July 1992) (Discussion Draft, on file with author).

114. Thus, we must take seriously Annette Kolodny's plea that to study the women who helped make universal enfranchisement a political reality while keeping silent about our activist colleagues who are denied promotion or tenure; to include segments on 'Women in the Labor Movement' in our American Studies or Women's Studies courses while remaining wilfully ignorant of the department secretary fired for her efforts to organize a clerical workers' union . . . is not merely hypocritical; it destroys both the spirit and the meaning of what we are about. Kolodny, *supra* note 23, at 40-41.

redeeming such promises so far as one-half of society is concerned. Traditional law is "apolitical" only to the extent that it denies a problem exists and is uninterested in whether the boasts of general jurisprudence are ever true.

Second, to the extent that the charge of feminism as politics refers not to its general social goals but to the attack on the canon, we should remember that such politicality is hardly a feminist invention hurled upon the otherwise apolitical enterprise of knowledge production. As I have discussed above, work in feminist epistemology across a variety of disciplines has deflated the claim that knowledge has ever been wholly neutral in content or construction. Nonetheless, the claim manages to stay aloft. Feminist scholarship is still labeled as "ideologically motivated";<sup>115</sup> feminist writers with whom one disagrees are still called "radical."<sup>116</sup> In response to such behavior, feminists (and Friends of Feminism) must simply hold firm and remind everyone that "to expose the ideology inherent in 'neutral' scholarship . . . does not necessarily leave scholars with only a mindless relativism that disregards evidence and logic."<sup>117</sup> As Evelyn Fox Keller makes clear, the feminist project is not to

abandon the quintessentially human effort to understand the world in rational terms [but rather] to refine that effort. To do this, we need to add to the familiar methods of rational and empirical inquiry the additional process of critical self-reflection. . . . In this way, we can become conscious of the features of the scientific project that belie its claim to universality.<sup>118</sup>

Third, while feminism as a scholarly movement arose from what was earlier called the "women's liberation movement," feminism is not the only discipline with political origins and political implications. Think, for example, of ecology and economics. Ecology originated in popular environmental activism that necessarily turned to the academy for critical investigation of its suspicions and claims. Its politically based agenda transformed the way that a variety of disciplines—chemistry, zo-

---

115. See Aiken et al., *supra* note 12, at 111 (discussing how in on-going debate on curriculum integration, scholarly authority of women was contested by men labelling their assertions as "ideologically motivated" while "leaving the ideological grounding of their own epistemologies unexplored").

116. Posner, *supra* note 27, at 516. But see Gillian K. Hadfield, *Not the 'Radical' Feminist Critique of 'Sex and Reason'*, 25 CONN. L. REV. 533 (1993).

117. Aiken et al., *supra* note 12, at 111. Aiken noted that "when feminists challenge the very idea of neutrality in scholarship, . . . they may be . . . accused of 'rampant relativism' and of replacing academic standards with ideological frameworks." *Id.* at 121.

118. Keller, *supra* note 57, at 238.

ology, urban studies—were studied and made no bones about the social and political uses to which its findings would be put. Similarly, economics established itself in Enlightenment political controversies about trade policy. Even now—and most certainly in its law and economics incarnation—economics is clearly identified with a particular political orientation. Law schools nonetheless seem quite happy to seek out economists for faculty positions with little objection that the “politics” of law and economics interfere with anyone’s intellectual rigor.

The fourth and final response to the allegation that feminism is just political rant is this: To the extent a feminist claim appears too heated, too emotional, too querulous, too undisciplined, too whatever, the academy is exactly the right place for disputation. The argument has been made with regard to feminist literary criticism:

[T]he only way in which feminist criticism can enter the academies and make its way there is as a new knowledge which entertains its fundamental tenets as hypotheses rather than beliefs, and understands that such hypotheses will receive provisional acceptance only for as long as they are able to withstand attempts to disconfirm them.<sup>119</sup>

Such attempts are a proper response for those to whom feminism makes insufficient sense. Indeed, as John Siliciano has argued, legal scholars dissatisfied with feminism have something close to an “intellectual obligation to challenge the excesses of feminist thought, to test its assumptions and hypotheses, in short, to give it the kind of rigorous assessment that it deserves and that it needs if it is to successfully transplant some version of itself into popular culture and thought.”<sup>120</sup>

So far, however, the scholars most likely to take on the assumptions, hypotheses, and excesses of feminism have been other feminists. The explanation is probably a mixture of men’s uncertainty about the rules of engagement,<sup>121</sup> an unfamiliarity with feminist vocabulary and shorthand, and perhaps some disdain for an upstart enterprise that is, without question, still finding its way. At the same time, feminists with all their varying adjectives have a huge interest in getting things straight; remember that feminism takes its political obligations seriously. That is why femi-

---

119. RUTHVEN, *supra* note 16, at 14.

120. Siliciano, *supra* note 103, at 462.

121. “When it comes to contesting ideas with women, particularly women who bring any degree of passion to the debate, many men tend to lose their bearings.” *Id.* The whole thing would be much easier if feminists and their critics would follow the guidelines suggested by Professor Siliciano: “Show respect. Listen. Look for value. Focus on the specific and the tangible. Talk straight. Avoid polemics and ridicule.” *Id.* at 463.



nist legal scholars are increasingly willing to challenge one another regarding tactics, theories, and goals.

#### IV. LAW AND FEMINISM

How then does one go about doing "law and feminism?" One approach would be to see how feminism fits into the kinds of interdisciplinary activities with which law is already familiar. These include borrowing across disciplines, collaborative problem solving, and the development of new fields from discrete but overlapping disciplines.<sup>122</sup> If we take this list as a guide, feminism's interdisciplinary status seems solidly in place. Law and legal scholarship in general have begun to "borrow" from feminist methodology by attending increasingly to the experiences of the regulated as a basis for evaluating legal regulation and by widening the range of sources from which information is sought. Law also "borrows"—indeed, at times has thrust upon it—feminist scholarship from other disciplines. Sociologist Lenore Weitzman's work on the economic consequences of divorce,<sup>123</sup> economist Victor Fuchs's conclusions about the consequences of child raising on women's employment,<sup>124</sup> and political theorist Susan Okin's analysis of the relation between justice and family life<sup>125</sup> present data and analyses to which law must attend. Feminism has also participated in the development of new legal fields concocted from overlapping disciplines. For example, in the area of dispute resolution, a combination of procedure, justice, and game theory, feminist concerns have served both as catalyst and critique.<sup>126</sup>

Yet while feminism fits easily into these accepted categories of interdisciplinary ventures, I reinstate my initial claim that interdisciplinarity is too limited a conceptualization of the relationship between feminism and law. In the first place, interdisciplinary study is often seen as a kind of academic luxury; we will make the contacts, encourage the cross listings, hire the specialist and develop the materials as time, money, and energy permit.

---

122. See KLEIN, *supra* note 46. These are generally familiar to legal education and legal practice. Borrowing across disciplines is, for example, what expert witnesses are about. Similarly, lawyers now engage increasingly in collaborative problem solving, or what we might think of as interdisciplinarity in action; the composition of hospital ethics committees across fields of training is a familiar example.

123. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

124. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988).

125. OKIN, *supra* note 24.

126. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545 (1991); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39 (1985).

More importantly, the feminist argument with regard to curricular reform and transformation is not staked to the notion of disciplinarity. For whether or not feminism is a separate discipline in a formal academic sense, it represents a set of issues crucial to the integrity of law's own disciplinarity. If we are serious that the study of law has something to do with just rules and fair practices, then the inclusion of feminist concerns within the law school curriculum is assured.

To demonstrate the ease with which feminism can be incorporated into the regular curriculum, I want to engage in some quick "show and tell," using a first-year contracts course as the model.<sup>127</sup> In fairness, I use the word "ease" to refer more to the abundance and applicability of good materials than to professorial comfort. I acknowledge that an element of bravery may be required in taking on anything labeled or perceived as "feminist," for as we have discussed, the word alone is fraught: What is it? Will I get it right? What if I get it wrong?

This kind of pedagogical anxiety is not completely new to law schools, although up to now it has been reserved primarily for those who teach criminal law and must decide what to do about rape. Many criminal law professors simply choose not to teach rape in order to avoid the potential risks of student and professorial uneasiness, hostility, and conflict.<sup>128</sup> Others do not teach it on "principle," unwilling to be pushed around by feminists. In deciding not to include rape in his criminal law class, James Tomkovicz recalled that "[u]nlike the authors of the casebook [who in the latest edition had included materials on rape], I was not going to kowtow to any interest group; I was not going to be blown off course by the winds of a transient movement."<sup>129</sup>

---

127. I put to one side such courses as *Feminist Jurisprudence and Women and the Law*, on the understanding that those who teach those courses will already have in hand materials, pedagogical goals, and so on.

Because I am concerned here with introducing students to feminism as a matter of substantive law, I do not address feminism as a pedagogical practice, though a growing body of literature addresses the differences gender makes in the work of our classrooms. See, e.g., MARY F. BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986).

128. See Nancy S. Erickson & Nadine Taub, *Final Report: Sex Bias in the Teaching of Criminal Law*, 42 RUTGERS L. REV. 309, 340 (1990).

129. James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481, 483 (1992) (concluding that teaching rape was difficult but worth effort and not including rape in future would only be for good reasons).

Tomkovicz reports that he has never been urged to teach rape by a male colleague, and wonders if "the women who have exhorted me to teach rape might be a little less avid in doing so if they could trade places with me and experience the risk first hand." *Id.* at 493 n.36. But surely this is not a matter of gender daring; many family law professors are women and teach

There is, however, some progress. Most standard textbooks now include materials on rape and an increasing number of criminal law professors, including Professor Tomkovicz, are brave enough to use them. Surely in time, rape's inclusion will seem inevitable, if only because, as Susan Estrich observes, "our job is to teach what is significant in our fields [and] [i]n criminal law, rape is significant, and worth our attention."<sup>130</sup> This is not simply because rape concerns women. Rape is also an excellent vehicle for teaching issues of consent, theories of criminality, line-drawing, and so on. According to Estrich, this is why, if syllabus-push comes to syllabus-shove, rape stays in—even at the expense of *Regina v. Dudley & Stephens*<sup>131</sup> and cannibalism:

I can think of no subject of substantive criminal law in greater ferment, no area where the concepts that are at the core of the "general course" come alive so vividly, and none that demonstrates some of the dilemmas of criminalization and just punishment so clearly as the law of rape.<sup>132</sup>

Incorporating feminism into contracts is probably an easier emotional task in that the disadvantages women suffer contractually are usually not physical, putting aside debates about prostitution, pornography, workplace safety, and surrogacy. Thus, incorporating women into contracts is less loaded—the subject of women could come up in almost any substantive area. It is, of course, not necessary that women serve as a focal point in *every* area; the aim here is not the inversion of hierarchies, but rather the sensible, appropriate inclusion of women.

#### A. Teaching Standard Doctrine with Gendered Cases

I begin with the substitution of cases to teach ordinary points of law that discuss or implicitly rely on gender differences for cases that do not. The idea here is that of the academic "twofer." Certain topics involving women, like rape in criminal law, provide *two* pedagogical benefits—conceptual rules and gender critique—for the price of one lesson.

An excellent example of this is the surrogacy case of *Baby M.*<sup>133</sup> Where else can you get discussions of bargaining, breach, consent, consideration, disclosure, duress, illegality, incapacity, public policy, role of

---

marital rape, which presents the same set of problems, especially when students have not been exposed to the subject at all in their first year.

130. Susan Estrich, *Teaching Rape Laws*, 102 YALE L.J. 509, 520 (1992).

131. 14 Q.B.D. 273 (1884).

132. Estrich, *supra* note 130, at 516.

133. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988); see Marjorie M. Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 61-63 (1991).

counsel, specific performance, statutory authority, third-party beneficiaries, and unfairness, all in one compelling case with which students are already familiar?<sup>134</sup> Beyond these doctrinal basics, the case raises more complex issues such as commodification, choice of law—is this contracts or custody?—and limitations on contract itself. Each of these topics can be played out further in the context of gender. Is surrogacy a matter of gender exploitation or of reproductive autonomy? Why are gestational services subject to different regulation than the sale of sperm? And so on. It is worth pointing out, though class discussion will quickly make this clear, that there are no obvious or agreed upon feminist answers to these questions.

While *Baby M.* works very well, I want to introduce a second case, less comprehensive in scope than *Baby M.* but that has its own virtues. The case, *Simeone v. Simeone*,<sup>135</sup> concerning the validity of a prenuptial contract, could be used in sections on duress or in what Professors Farnsworth and Young call “policing the bargain.”<sup>136</sup> The case is appealing in several respects. First, compared to *Baby M.*, it does not take on the complicated world of reproductive choice that, even for the hearty, can be a challenge in class. Second, in *Simeone* the court explicitly connected the status of women in society to the logic of its decision.<sup>137</sup> Whether or not the court is correct may matter less than the fact that the court itself raised the issue.<sup>138</sup> This may be especially helpful for women professors

134. See E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 442 (1988).

135. 581 A.2d 162 (Pa. 1990).

136. FARNSWORTH & YOUNG, *supra* note 134, at 289.

137. *Simeone*, 581 A.2d at 165.

138. *Borelli v. Brousseau* is a second case where the court, or at least the dissent, explicitly locates its decision in the modern status of gender relations. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1993). In *Borelli*, a wealthy husband had a stroke. Because he did not want to be cared for at a private nursing home, his wife agreed that she would quit her job and take care of him at home in exchange for his promise to leave her certain property at his death. *Id.* at 651, 16 Cal. Rptr. 2d at 17-18. The husband died without leaving wife the property. *Id.*, 16 Cal. Rptr. 2d at 18. In deciding that their contract was not supported by consideration, the court upheld “the long standing rule that a spouse is not entitled to compensation for support. . . . Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case.” *Id.* at 654, 16 Cal. Rptr. 2d at 20.

The dissent disputed the majority’s loyalty to the rule, arguing not that spouses are free from the duty to support one another, but that because many wives work, they should not have to perform those services personally. *Id.* at 659-60, 16 Cal. Rptr. 2d at 23-24. To agree to do so, as the wife did here, should constitute satisfactory consideration: “[T]o contend in 1993 that such a contract is without consideration means that if Mrs. Clinton becomes ill President Clinton must drop everything and personally care for her.” *Id.* at 660, 16 Cal. Rptr. 2d at 24.

Both *Borelli* and *Simeone* raise questions of power and contract within marriage. *Borelli* fits nicely into materials on consideration and complements *Simeone* well. In neither case is

who, upon mentioning anything like "the status of women," know to await the upward roll of student eyeballs in the "here-it-comes" or "there-she-goes" mode.

*Simeone* falls into the "You Want Equality, I'll Give You Equality" school of legal thought. The facts are straightforward. In 1975, thirty-nine year old neurosurgeon marries twenty-three year old unemployed nurse.<sup>139</sup> "On the eve of the parties' wedding, [his] attorney presented [her] with a prenuptial agreement to be signed," which she did "without benefit of counsel."<sup>140</sup> The agreement provided that in case of separation or divorce, Mrs. *Simeone* would receive a maximum of \$25,000 in support payments, an amount paid out well within two years after their 1982 separation and before their divorce was tried.<sup>141</sup> *Simeone* presented two standard issues in prenuptial cases: Was there duress and, absent duress, were there policy reasons for policing a prenuptial contract differently than other contracts? The specific issue here was whether the law required full disclosure to the wife of the statutory rights she waived by virtue of the prenuptial agreement when the agreement itself made reasonable provision for her.<sup>142</sup>

The Supreme Court of Pennsylvania decided that full disclosure was *not* required, relying heavily on its assessment of the improved status of women in these feminist times.<sup>143</sup> As the court explained, the earlier requirement of disclosure

rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of the contracts they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. . . . Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements.<sup>144</sup>

The court concluded that "[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which

---

there a clear "feminist" position; both cases demonstrate the complexities of creating legal rules in a context of social inequalities.

139. *Simeone*, 581 A.2d at 163.

140. *Id.*

141. *Id.* at 164.

142. *Id.*

143. *Id.* at 166-67.

144. *Id.* at 165.

they were perceived as having in earlier times have, appropriately been discarded."<sup>145</sup>

*Simeone* is a wonderful case in which to raise issues of fairness in bargaining, heightened as they are by the majority's lodging its decision in social facts about gender status. There is, of course, much to discuss about the quality of the facts. The inferiorities women were *perceived* as having? Women as homemakers *or* breadwinners?<sup>146</sup> No disadvantages in marital agreements?<sup>147</sup> No disadvantages in society?<sup>148</sup> Is this a "no-problem problem" or what?

The dissent in *Simeone* adds to the richness of the case as a teaching device by considering the effect of marital status upon contract.<sup>149</sup> It offers an alternative set of policy reasons why prenuptial contracts *should* be scrutinized, arguing that "the majority has given no weight to . . . the state's paramount interest in . . . the protection of parties to a marriage who may be rendered wards of the state, unable to provide for their own reasonable needs."<sup>150</sup> This suggests a different assessment of women's occupational equality out there in "society in general." All this offers the opportunity to raise a central issue in feminist theory, the sameness/difference debate.<sup>151</sup> Are women and men sufficiently alike in abilities and circumstance so that they should be treated the same, or are there differences of a quality such that different legal rules are appropriate, indeed desirable? Here the debate plays out with regard to the contractual capacities of the engaged. The majority votes show suspicious gusto for sameness. The dissent prefers to err on the side of difference, primarily to spare the state additional expense should women fare badly after all.

The issues raised in *Simeone* could easily parallel similar themes raised in other first-year courses. That is, the pervasive method of feminism can also be a coordinated pervasiveness. By consulting with colleagues in torts and criminal law, the question arises regarding whether special relations between men and women should alter traditional duties. For example, when studying the particular problems of acquaintance rape in criminal law, one could introduce the critique of Beverly Balos

---

145. *Id.* Justice Papadakos concurred with the result but "fear[s] my colleague does not live in the real world." *Id.* at 168 (Papadakos, J., concurring).

146. See ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

147. See OKIN, *supra* note 24, at 134-39 (discussing vulnerability on account of marriage).

148. See FUCHS, *supra* note 124, at 60-64.

149. *Simeone*, 581 A.2d at 168 (McDermott, J., dissenting) ("I am not willing to believe that our society views marriage as a mere contract for hire.").

150. *Id.* at 169-70 (McDermott, J., dissenting).

151. A good start is Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985).

and Mary Lou Fellows, which suggests that current law has the standard for consent to sex between acquaintances—if she knew him, she probably consented—exactly backward.<sup>152</sup> In contrast, Fellows and Balos argue that when a man and a woman meet under social circumstances, a confidential relationship is created so that its breach would make it more, not less, difficult to prove that any subsequent sex was consensual. One could evaluate similar relational notions in torts, selecting from a range of feminist critiques on gendered notions of harm and responsibility.<sup>153</sup>

One final point. As its caption suggests, *Simeone* is a dispute between relatives and so, like other cases of “domestic” promises and contracts, it might be lodged in a course on family law. But if part of feminism’s project is to integrate the study of women genuinely into the law school curriculum, then cases in which women make contracts need to be in contracts too, even if the contracts concern family or procreational matters. As Marjorie Shultz has pointed out, conceptions of gender hierarchies are perpetuated in law schools in part through the “informal curriculum,” the hierarchies of value attached to certain courses, vocabularies, analyses.<sup>154</sup> Thus, Professor Shultz notes:

Contracts as a field of theory and practice purports to be about the market place, the public world, economic interests, and rational self-interested bargaining. By contrast, the family world is deemed to be about the private, the personal, the altruistic, the harmonious, the “squishy,” warm-and-fuzzy side of life.<sup>155</sup>

Yet both courses involve many of the same conceptual issues as the rules surrounding promises and theories of enforcement. Contracts is exactly the right place to implant the idea that women are an intrinsic part of the entire study of law and not just some side bar for girls, lefties, and family practitioners.

### *B. Pre-Fab Case Critiques*

A second approach is to entertain at regular intervals feminist critiques of standard cases or themes. When teaching *Lumley v. Wag-*

152. Beverly Balos & Mary Lou Fellows, *Guilty of the Crime of Trust: Non-Stranger Rape*, 75 MINN. L. REV. 599 (1991).

153. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

154. Shultz, *supra* note 133.

155. *Id.* at 56. Yet, as Gillian Hadfield has observed, family metaphors—marriage, parenting—were commonly used in a complex commercial setting by franchisors to describe their “highly intimate and interdependent” relationships with franchisees. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 963-64 (1990).

ner,<sup>156</sup> for example, one can supplement the case with Lea VanderVelde's excellent detective work and analysis.<sup>157</sup> After discovering that all the prominent nineteenth-century American cases in which employees were enjoined from working elsewhere involved women, indeed mostly actresses and opera singers, VanderVelde set out to understand why "on a gender-neutral legal issue like an employee's right to quit, women's cases would so considerably outnumber men's cases in a profession [stage] where women worked alongside men."<sup>158</sup> She locates the answer in the historical meaning of women's fidelity, employment, and autonomy in nineteenth-century legal culture.<sup>159</sup> When addressing cohabitation contracts, one can turn to Clare Dalton's analysis of power and gender in contract law.<sup>160</sup> When considering the doctrine of indefiniteness, the relational aspects of franchise agreements are well explored by Gillian Hadfield.<sup>161</sup> Patricia Williams has threaded *The Alchemy of Race and Rights* with observations about the reach and nature of commercial transactions.<sup>162</sup>

Another useful critique is Sharon Rush's article, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*.<sup>163</sup> Rush compares the societal demands for purity in our college athletes, enforced through NCAA restrictions on player payments as a requirement of eligibility status, with similar expectations about women as mothers, enforced by limitations on pregnancy contracts. Because the article is long, one could omit the sections on motherhood and use just the materials on athletics. This serves several purposes. First, the class itself might draw links between the rationale in the sports cases to other circumstances where contracts or "deals" are understood to taint a particular status. Second, limiting the reading to restrictions on athletes also gives feminism a better name, not that the word has to come up at all in this context. We should keep in mind that feminism is concerned with disadvantage on account of gender. Without question, in most cases this means women. But, as with the early sex discrimination cases which

---

156. 42 Eng. Rep. 687, 693 (1852).

157. Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 777-82 (1992).

158. *Id.* at 777.

159. *Id.* at 777-82.

160. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

161. Hadfield, *supra* note 155, at 965 (describing franchise agreements as "mutual obligations embedded in an intimate interdependence among equals").

162. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

163. Sharon E. Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549 (1989).



vindicated the rights of men,<sup>164</sup> feminist scholarship is also informed by ways in which law constructs men as a social category.

Another resource is Mary Joe Frug's *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*.<sup>165</sup> While the article may be more appropriate for teachers than students, I sometimes assign the introductory explanation in which Frug creates eight fictional law student "types"—the "feminist," the "reader with a chip on his shoulder," the "individualist," and so on—each character drawn with special attention to his or her attitudes about gender.<sup>166</sup> Frug uses these personality vignettes to demonstrate a point central to the feminist critique of objective knowledge: Readers react differently to cases, casebooks, and legal rules, in part because of who each reader is, and where in the social, gender, and political order the reader is located. The eight characters—one can invent replacements if these seem unrepresentative—are also useful in that they can serve as dummies for arguments that class members themselves may be reluctant to make.

An advantage of Frug's article is that it enables first-year students to look at all of their casebooks more critically. They, and we, can decide if Frug's observations regarding editors' selection of particular kinds of women doing particular kinds of things create stereotypic or negative portrayals of women in contrast to the representations of men.<sup>167</sup>

A disadvantage of the Frug article is that it may be hard for first-year students to comprehend a critique before they have grasped what a casebook is at all. There may also be an element of foolhardiness in criticizing too quickly the book for which one has just ordered students to shell out fifty dollars. Little doubt remains, however, that professors should read the piece, and not just to crib the history of Amelia Bloomer to enhance one's teaching of *Parker v. Twentieth Century-Fox Film Corp.*<sup>168</sup>

The materials mentioned in this section are part of an increasing literature on the relationship between gender and contract law. A subsection of the Women in Legal Education Section of the Association of American Law Schools now keeps a bibliography of these materials; op-

---

164. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

165. Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

166. *Id.* at 1070-74.

167. There are also specific feminist critiques of casebooks in the other first-year subjects.

168. See Frug, *supra* note 165, at 1119-20 (discussing *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970)).

erators are standing by to take your call.<sup>169</sup> The aim is that in time such materials will not be supplementary, as law moves closer toward “phase-five” status where knowledge is “redefined, reconstructed to include us all.”<sup>170</sup>

### C. *Multidisciplinary Materials*

There is no reason to limit ventures in “law and . . .” only to pairs. That is, one can teach law and history *and* feminism, or law and feminism *and* economics. Two excellent readings which offer these particular combinations are Michael Grossberg’s chapter on broken engagements, *Broken Promises: Judges and the Law of Courtship*,<sup>171</sup> and Ian Ayres’s article *Fair Driving: Gender and Race Discrimination in Retail Sales Negotiations*.<sup>172</sup> Because readers are more likely to be familiar with the latter, I focus here on Grossberg’s work.

The chapter, an analysis of the rise and fall of the breach-of-promise-to-marry suit, wonderfully connects social and political history with the development of contract doctrine. In discussing why judges early in the century favored the suit, Grossberg introduces readers to the problems of spinsterhood, not as an individual psychological predicament a la the twentieth-century cartoon character Cathy, but as a public matter of great concern. The promise to marry was an agreement “upon which the ‘interest of all civilized countries so essentially depends.’”<sup>173</sup> Damages were initially high because of the serious reputational and financial losses to the young woman who would now remain single forever (and to her family who would now support her forever).<sup>174</sup>

Grossberg discusses seduction, chastity, jury composition, and women’s changing occupational opportunities to show how social, financial, and political considerations all shaped judicial attitudes toward the cause of action. The limited options of women as actors with regard to courtship, to employment, to sex, to property, and to family life—what might be considered the “feminist concerns”—necessarily inform the discussion. *Broken Promises* demonstrates the fluidity of contract doctrine in

169. Or you can write to the Committee on Teaching of Contracts, AALS Section on Women in Legal Education.

170. See *supra* note 86 and accompanying text.

171. MICHAEL GROSSBERG, GOVERNING THE HEARTH 33-64 (1985).

172. Ayres, *supra* note 94.

173. GROSSBERG, *supra* note 171, at 36 (quoting *Wightman v. Coates*, 15 Mass. 2, 3 (1818)).

174. On the economic incentives to marry, see LEE V. CHAMBERS-SCHILLER, “*Hymen’s Recruiting Sargeant*”: *Factors Influencing the Rate of Marriage*, in LIBERTY, A BETTER HUSBAND: SINGLE WOMEN IN AMERICA: THE GENERATIONS OF 1780-1840, at 29 (1984).

relation to changing cultural values. As women became less economically dependent on husbands or fathers because of increased work opportunities, the cause of action fell into increasing disfavor.

Despite initial mass scoffing at the idea that anyone could ever have gone to court for "breaking up," I find students tremendously engaged by *Broken Promises*. In addition to its own rewards, the chapter nicely sets the stage for such cases as *Ricketts v. Scothorn*<sup>175</sup> by contextualizing the importance of economic security for young women. The materials also foreshadow the issues in *Baby M.*,<sup>176</sup> the problems of promise and breach in the creation of intimate relationships.

## V. CONCLUSION

Some readers might still agree with the Tiger Lily that simply nothing can be done about the shape of feminism's petals; she cannot be a flower. Still others might argue that she can, but that the correct species would be trifold, her goal not to flourish among the others but to devour them. Many feminists would argue that the image itself is all wrong: Feminism in academia is less like strolling in a garden than "dancing through a mine-field," in Annette Kolodny's phrase.<sup>177</sup>

My view is that of course feminism belongs in the garden, inhospitable as that location may sometimes be. Indeed, feminism's roots within the disciplinary garden are already quite deep. That is because feminism is less a transplant than a variety rather like the others but for having gone untended for centuries. Women have *always* been there. It seems almost silly now to think in "phase-one" terms: How could there ever have been "womenless" history or literature or law? Yet many of us were trained and educated—frustrated and bewildered—within exactly such constructs.

But *that* garden, once thought to be the very measure of beauty, can no longer grow unchecked. Whether feminism is considered as a separate discipline or an inherent aspect of all of them, the place of women in the world of knowledge is now established. Feminism now demands equal access to sunlight and water—that is, to funding, students, curricular inclusion, and collegial respect. The inquiry has shifted from the shape of feminism's petals to the contours of the garden as a whole. The resulting panic—a fear of pruning—is not surprising, for as Kolodny explains:

---

175. 77 N.W. 365 (Neb. 1898).

176. See *supra* notes 133-34 and accompanying text.

177. Kolodny, *supra* note 23, at 23.

What is really being bewailed in the claims that [feminists] distort texts or threaten the disappearance of the great western literary tradition itself is not so much the disappearance of either text or tradition but instead, the eclipse of that particular *form* of the text, and that particular *shape* of the canon, which previously reified male readers' sense of power and significance in the world.<sup>178</sup>

The legal canon is under similar reconstruction as feminist concerns about the just treatment of women become part of what lawyers are expected to know. In this regard, feminism as a subject is like ethics. Rarely taught with vigor or purpose in pre-Watergate legal education, the question is now how to teach ethics well—a separate course or pervasive integration—rather than whether to teach it at all. The transformation with regard to feminism may be slower than it was with ethics—no scandals have yet emerged to alert state legislatures that the bar needs instruction in feminism, although the 1991 Anita Hill/Clarence Thomas controversy was something of a start. Of course, as law professors, we ought not wait for orders on this matter. The case for including feminism throughout the curriculum is already clear and strong enough.

Things could, of course, be easier. Feminism could use more of the institutional support received by other disciplines linked to law. Teaching feminism, even if one commits to do it only a few times a semester, is hard work. The theories and vocabularies are new to many and, at this stage of the process anyway, gender tensions are still in play. Feminism needs the equivalent of the John M. Olin Fund and the George Mason University Law and Economics Center—or the Fund and Center themselves in a generous interdisciplinary gesture—to set up summer sessions, finance seminars, and fund faculty research in feminism so that its integration into law schools—like that of the integration of economics—becomes more accepted and accessible.

In addition, the integration of women into law might be easier if we keep a collective eye on the purpose of the feminist enterprise. As Janet Radcliffe Richards reminds us, feminism is not concerned with “a group of people it wants to benefit, but with a type of injustice it wants to eliminate.”<sup>179</sup> The goal is not for “inversions of traditional habits . . . as one ruling group replaces another.”<sup>180</sup> Thus, we might ditch the concept of feminists as “femagogues,” in John Le Carre’s clever phrase,<sup>181</sup> and in-

---

178. *Id.* at 29.

179. RICHARDS, *supra* note 95, at 17-18.

180. Young-Bruehl, *supra* note 74, at 20.

181. JOHN LE CARRE, *THE NIGHT MANAGER* 7 (1993).

stead take up Charlotte Perkins Gilman's appealing and undisciplined portrait of the "feminist":

Here she comes, running, out of prison, and off pedestal; chains off, crown off, halo off, just a live woman.<sup>182</sup>

---

182. COTT, *supra* note 18, at 37.