FEMINIST THEORY AS LEGAL THEORY

BY JENNY MORGAN*

[*The application of feminist theories to the structure of law has become a subject of increasing controversy. The author discusses the current American debate between the proponents of equal treatment by the law, and those who believe that women have different and special needs. The article examines attempts at deconstruction of the public/private distinction within law. Both threads of analysis are taken up in an examination of the potential impact of feminism on Australian legal education.*]

INTRODUCTION

This article sets out to indicate the centrality of the feminist legal project to law, legal scholarship and legal education in America. While the focus is American, the implications I draw from the material are, I believe, central to Australian legal education. Though the scope of American legal feminism is very broad, this article focuses on only two of the major theoretical debates in American feminist legal scholarship, and on some more practical applications of that theory.

The two theoretical areas addressed are firstly, the sameness/difference debate — are women the same as or different from men, or is this the wrong question; and secondly, the exploration by feminist legal scholars of the distinction, or lack thereof, between the so-called public and private dimensions of life. The reason I focus on these two areas is, in part, due to their prominent place in (American) feminist legal writing: there is a whole field of feminist legal scholarship with which many Australians may be unfamiliar and this article aims to introduce some of this work. Secondly, the two areas examined here are also part of the Australian legal tradition. Should we be unabashedly aiming for 'equal treatment' for women and men or should we be trying to envisage a new system? We are all familiar with the distinction between public and private law and are also familiar with the liberal distinction between the public (regulated by law) and the private (unregulated)[1] but we need to think how these distinctions may be oppressive to women and the role of the law in creating them.

I briefly describe the work of psychologist Carol Gilligan, perhaps the most influential non-legal writer on the American feminist legal project. Her work has influenced both these debates, though particularly the former. It suggests profound questions about women's 'difference' and has been used by legal scholars to suggest ways in which the law and legal education can respond to this

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[1] This particular formulation of the distinction between public and private as one distinguishing between that which is regulated by law and that which is unregulated comes from O'Donovan, K., *Sexual Divisions in Law* (1985).

perceived difference. Her work has also influenced another important area of feminist legal work, touched on briefly in this paper, the feminist critique of liberal rights formulations. I also describe the work of feminists in more 'black letter' legal areas such as contracts and remedies. The article concludes by addressing the implications for Australian legal education that may be drawn from this material and other feminist legal endeavours.

SAMENESS / DIFFERENCE DEBATE

Though perhaps not the most crucial debate in feminist legal scholarship, the sameness/difference controversy has probably absorbed the most energy.[2] Of course the reason for the centrality of the debate in America is in part because of the equality provisions in the American constitution.[3] Nevertheless, the debate is still worth describing to an Australian audience for gender equality, if not constitutionally central, is politically central.

The basic issue is whether women are the same as or different from men. Or in a more narrow or practical sense, should we be encouraging the legal system to accord women equal treatment (the underlying premise being that women are the same as men) or special treatment (where the underlying premise is that women are different from men)? The sameness/difference debate is played out at both a theoretical and practical level (which is hardly surprising, for feminist legal scholars would refuse to see that theory and practice have to be, or indeed can be, separated).

The debate has mostly occurred in the context of maternity leave provisions. Only four states in the U.S. have special maternity leave laws.[4] These have been challenged as being in violation of Federal anti-discrimination laws (Title VII and the Pregnancy Discrimination Act) on the grounds that they treat pregnant women better than non-pregnant workers who are unable to work for other reasons.[5] Such challenges have been supported by 'equal treatment' feminists who argue that 'pregnancy can or should be visualized as one human experience which in many contexts, most notably the workplace, creates needs and problems similar to those arising from causes other than pregnancy, and which can be handled adequately on the same basis as other physical conditions of employees'.[6]

[2] *E.g.* Wolgast, E., *Equality and the Rights of Women* (1980); Scales, A., 'Towards a New Feminist Jurisprudence' (1980) 56 *Indiana Law Journal* 375; Freedman, A., 'Sex Equality, Sex Difference and the Supreme Court' (1983) 92 *Yale Law Journal* 913; Krieger, L.J., and Cooney, P.N., 'The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality' (1983) 13 *Golden Gate University Law Review* 513; Law, S., 'Rethinking Sex and the Constitution' (1984) 132 *University of Pennsylvania Law Review* 955; Williams, W.W., 'Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate' (1984) 13 *New York University Review of Law and Social Change* 325; Finley, L.M., 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate' (1986) 86 *Columbia Law Review* 1118; Scales, A., 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373.

[3] The 14th Amendment to the American Constitution provides 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws'.

[4] Finley, *op. cit.* n. 2, 1128 n. 49.

[5] The most recent challenge was *California Federal Savings and Loan Association v. Guerra* 55 *US Law Week* 4077 (1987). For a brief explanation of Title VII and the Pregnancy Discrimination Act, see *infra* n. 19.

[6] Williams, *op. cit.* n. 2, 326.

Some of the feminist support for the equal treatment line has essentially pragmatic or tactical origins. Equal treatment advocates could suggest that it is difficult for women to argue that they want to be treated like men in some contexts, for example, in access to jobs seen as traditionally male, yet in other contexts to argue for special treatment, treatment that is better than that of men.[7] The equal treatment protagonists also argue that to single out pregnancy for special treatment perpetuates the view that pregnancy is solely women's responsibility,[8] and that it leaves the door open for arguments that have historically redounded to the detriment of women: that women have a 'special sphere' of activity at which they are particularly good and within which they should be confined.[9] They suggest that singling out pregnancy denies the humanity common to all people[10] and divides workers.[11] It may also, according to equal treatment advocates, mean that new structural barriers to women's employment are created: special pregnancy leave makes women more expensive to employ than men.[12]

Special treatment supporters, on the other hand, argue that pregnancy *is* unique and requires particular laws which are different from those for general sickness and disability leave.[13] Some of the attraction of this view lies in the very inadequate nature of sick leave provisions in America generally: if pregnant women are forced to rely on general disability provisions, the amount of leave allowed will be inadequate for their needs and thus they will, effectively, be back in the old position of losing their jobs because of pregnancy.[14] Special treatment advocates do not deny that other workers have disability leave needs too, but they are willing to work in a piecemeal fashion, starting with pregnant women, towards improving the position for all workers.[15] Special treatment proponents are also concerned that the equal treatment model accepts men as the norm: pregnancy leave is no longer special if you think of women workers as 'normal'.[16]

To an Australian, it may seem somewhat surprising that such a debate could occupy so much energy. After all, if we accept the equal treatment line, should Australian feminists organize to get rid of maternity leave provisions? Perhaps if

7 Williams, W., 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' (1982) 7 *Women's Rights Law Reporter* 175, 196 argues that a doctrinal approach which allows special treatment of pregnancy that is for the benefit of women also allows special treatment that works to women's detriment. She states 'If we can't have it both ways, we need to think carefully about which way we want it'.

8 Finley, *op. cit.* n. 2, 1146 and Williams, *op. cit.* n. 2, 351-5, 377.

9 See Williams, *op. cit.* n. 2, 358.

10 Williams, *op. cit.* n. 2, 326.

11 Williams, *op. cit.* n. 2, 371; Williams, *op. cit.* n. 7, 196.

12 Williams, *op. cit.* n. 2, 367; Williams, *op. cit.* n. 7, 196.

13 See, in particular, Scales (1981), *op. cit.* n. 2.

14 Finley, *op. cit.* 1147-8. Krieger and Cooney present a version of this argument by asserting that the equal treatment/special treatment debate about maternity leave laws should not be argued only at an abstract level, but account should also be taken of the material conditions of women's lives. See Krieger and Cooney, *op. cit.* n. 2, 569. Williams, an equal treatment advocate, maintains that the equal treatment approach can accommodate this argument: if a practice has the effect of creating a disparate impact on women, it should be found discriminatory under Title VII. Williams, *op. cit.* n. 2, 365-6, 378.

15 Krieger and Cooney, *op. cit.* n. 2, 570-2.

16 See Finley, *op. cit.* n. 2, 1147-8; Scales (1981), *op. cit.* n. 2, 427-35. And see Williams' refutation of this argument *op. cit.* n. 2, 366-8.

we go back a little further to the reason for the inclusion of pregnancy under American sex discrimination legislation, the concentration of energy seems less absurd. The Pregnancy Discrimination Act was enacted in response to the Supreme Court decisions in *Geduldig v. Aiello*[17] and *General Electric Company v. Gilbert*.[18] *Geduldig* was a challenge to the exclusion of pregnancy from a disability insurance program, the argument being that this amounted to discrimination on the grounds of sex, *i.e.* a failure to accord equal protection of the laws. The Supreme Court concluded that this was not sex discrimination, rather merely a distinction between pregnant and non-pregnant persons or, as Scales has described it 'that no discrimination exists if pregnant women and pregnant men are treated the same'.[19] The debate is reminiscent of a split within liberalism between equality of outcome or result and equality of treatment.[20] But it is also illustrative of a more profound debate within American (legal) feminism: that is, the whole issue of women's 'difference'.

That debate has been fuelled, perhaps particularly within legal circles, by the work of developmental psychologist Carol Gilligan.[21] Gilligan looked at much of Kohlberg's work[22] on moral development and noted that all his empirical work had been done on male children. Based on her own and other's work on female moral development, she suggested that Kohlberg had inadequately represented human development by only studying male development.

The attraction of Gilligan's work for legal thinkers comes particularly from her conceptions of rights and relationships as revealed in her account of Jake and Amy's responses to the Heinz dilemma.

The Heinz dilemma was developed by Kohlberg to measure moral develop-

17 417 U.S. 484 (1974).

18 429 U.S. 125 (1976). This was a challenge under Title VII, rather than the Constitution, to the exclusion of pregnancy in an employment disability plan.

19 Scales (1986), *op. cit.* n. 2, 1399. By way of clarification, Title VII of the Civil Rights Act 1964 (42 U.S.C. 2000(e) and following) is the Federal law concerned with discrimination in employment. 42 U.S.C. 2000e-2(a)(1) provides that it is an unlawful employment practice for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin'. In 1978, the Civil Rights Act was amended via the Pregnancy Discrimination Act which added the following definition to the (brief) definition section: 42 U.S.C. 2000e (k) 'The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .'. Whilst this amendment may have got over the initial problem in *Gilbert, i.e.* it established that discrimination on the ground of pregnancy was discrimination on the ground of sex, it does not resolve, however, the issue of 'special treatment' for pregnant women.

20 Finley, *op. cit.* n. 2, 1144; Olsen, F., 'Statutory Rape: A Critique of Rights Analysis' (1984) 63 *Texas Law Review* 387, 397.

21 Gilligan, C., *In a Different Voice: Psychological Theory and Women's Development* (1982); Gilligan, C., 'In a Different Voice: Women's Conceptions of the Self and of Morality' (1977) 47 *Harvard Educational Review* 481; Gilligan, C., 'Remapping the Moral Domain: New Images of Self in Relationship' in Watt, I. (ed.), *Reconstructing Individualism* (1986); Gilligan, C., 'Remapping Development: The Power of Divergent Data' in Cirillo, L. and Wapner, S. (eds) *Value Presuppositions in Theories of Human Development* (1986). *Cf.* Lyons, N., 'Two Perspectives: On Self, Relationships, and Morality' (1983) 53 *Harvard Educational Review* 125. For applications of Gilligan's work outside the scope of this article see, for example, Karst, K.L., 'Woman's Constitution' [1984] *Duke Law Journal* 447 and Sherry, S., 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543.

22 See Kohlberg, L., *The Philosophy of Moral Development* (1981), cited in Gilligan, C., *In a Different Voice* (1982), *op. cit.* n. 21, 18.

ment. Heinz has to decide whether to steal a drug which is needed to save his wife's life, and which he can't afford to buy. The druggist refuses to lower the price. Jake, the 11 year old boy, when asked if Heinz should steal, recognizes that the dilemma is constructed as a conflict between the values of life and property, decides that life is more important, and concludes that Heinz should steal the drug. He says that if Heinz got caught, the judge should give Heinz a very light sentence. As Gilligan states, Jake '[c]onsidering the moral dilemma to be "sort of like a math problem with humans", . . . sets it up as an equation and proceeds to work out the solution.'[23]

Amy, the 11 year old girl, for on the other hand, is, in Gilligan's words, 'evasive and unsure'.[24] Asked whether Heinz should steal the drug, Amy says 'Well, I don't think so. I think there might be other ways besides stealing it, like if he could borrow the money or make a loan or something but he really shouldn't steal the drug — but his wife shouldn't die either.'[25] Amy goes on to consider not the conflicting values of life and property, but what effect the theft would have on Heinz's relationship with his wife: 'If he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug and it might not be good. So, they should really just talk it out and find some other way to make the money.'[26] Gilligan states: '[Amy] see[s] in the dilemma not a math problem with humans but a narrative of relationships that extends over time . . .'.[27]

On the traditional moral development scale, Jake scores at a higher level than Amy. Gilligan suggests both responses are equally sophisticated, just different. She argues Amy's 'understanding of morality . . . aris[ing] from the recognition of relationship, [and] her belief in communication as the mode of conflict resolution . . . seems far from naive or cognitively immature.'[28] Jake reasons abstractly, taking the problem out of its context, uses a 'logic of fairness' and creates a hierarchy of winners and losers.[29] Amy sees the problem as 'a network of connection, a web of relationships that is sustained by a process of communication. With this shift, the moral problem changes from one of unfair domination, the imposition of property over life, to one of unnecessary exclusion, the failure of the druggist to respond to the wife.'[30] In other words, Jake reasons through a hierarchy or ladder of rights, and Amy through a web of connection.

How have Gilligan's insights affected feminist legal scholarship?[31] To some extent it has probably boosted the special treatment/difference side of the debate. After all, Gilligan's work suggests that women reason differently: as we come to recognise and validate more differences, it is but a short step to argue that the

23 Gilligan, C., *In a Different Voice* (1982) *op. cit.* n. 21, 26.
24 *Ibid.* 28.
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *Ibid.* 30.
29 *Ibid.* 32.
30 *Ibid.*
31 This is perhaps stating the connection too strongly: Gilligan's work is just the most prominent example of a tendency in American feminism to explore, validate and celebrate women's difference which has influenced legal scholarship; furthermore, some of the feminist legal work is merely consistent with, rather than being dependent on, Gilligan's work.

legal system has a role in that recognition and validation.[32] It has assisted broad theoretical analyses of the legal system which criticize the abstract, detached ideal of legal reasoning, and argue for a contextualized, connected legal system. The latter is for some a more accurate description of how the legal system actually works, and for others, an ideal towards which feminist legal workers should be moving.

On a more practical level, it has given a theoretical underlay to some feminists' support of mediation as an alternative method of dispute resolution.[33] Mediation is seen as a form of dispute resolution that places the dispute in its social context, and aims to come up with a resolution of disputes that avoids a zero sum game. At this point, it is probably important to remind ourselves that to suggest that there is only one American legal feminism is to be totally misleading. For instance, to continue the mediation example, there are many feminists (in America, and Australia and England for that matter) who would oppose the use of mediation in many domestic disputes, suggesting that the inequality of bargaining power which exists between men and women makes mediation, with its emphasis on compromise, together with the privacy of mediation proceedings, a dangerous practice for women.[34] Given the historical and continuing subordination of women, it is argued that the procedural protection of a court system, the attempt at equalizing power relationships through legal representation and formality, and indeed, the legal system's emphasis on rights, may be essential in order to achieve justice for women.[35] Fineman has recently drawn attention to the use of mediation in custody disputes. She has argued that the emphasis on mediation has caused, or at least contributed to, the reification of joint custody as an ideal, an outcome which she suggests ignores the interests of divorced mothers. That is, not only must we be concerned about the individual dispute and individual inequalities of bargaining power, but also the broader

32 One example of such a move or tendency is provided in Ann Scales' work. In her 1986 article she comments on her earlier (1981) work: 'my stance had the . . . basic flaw — an obsession with what differences between men and women the law could, in the abstract, take into account. Pregnancy and breastfeeding, I thought, had to be accounted for if the law were to take a sufficiently broad view of equality: Equality requires that a woman not be forced to choose between children and career, just as a man need not make that choice. I endorse my former view thus far. I then believed also that *only* pregnancy and breastfeeding could be taken into account, because those were the only two "objectively" determinable differences between the sexes. The law, I believed, needed to steer completely clear of the "subjective" phenomenon of stereotyping. I now see that limitation as unnecessarily reticent and guaranteed to achieve nothing, as many such liberal assumptions are.' Scales (1986), *op. cit.* n. 2, 1381 n. 46.

33 Menkel-Meadow, C., 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *U.C.L.A. Law Review* 754, 763 n. 28; Menkel-Meadow, C., 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' [1987] *Berkeley Women's Law Journal* 39, 51-3.

34 Bottomley, A., 'Resolving family disputes: a critical view' in Freeman, M.D.A. (ed.) *State, Law and the Family* 293-303; Bottomley, A., 'What is happening to family law? A feminist critique of conciliation' in Brophy, J. and Smart, C. (eds) *Women-in-Law: Explorations in Law, Family and Sexuality* (1985), 162-87; Schwarzkoff, J. and Morgan, J., *Community Justice Centres: A Report on the N.S.W. Pilot Project, 1979-1981* (1982), 174; Stallone, D.R., 'Decriminalization of Violence in the Home: Mediation in Wife Battering Cases' (1984) 2 *Law and Inequality* 493; Lerman, L.G., 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) 7 *Harvard Women's Law Journal* 57; Germane, C., Johnson, M., and Lemon, N., 'Mandatory Custody Mediation and Joint Custody Orders In California: The Danger for Victims of Domestic Violence' (1985) 1 *Berkeley Women's Law Journal* 175.

35 See, in particular, Bottomley in Brophy and Smart, *op. cit.* n. 34, 184-5.

effect of mediation on women as a group, through a change in the substantive law from sole to joint custody.[36]

Some legal feminists have rejected, or are at least highly sceptical of, Gilligan's work.[37] Catharine MacKinnon, a leading feminist legal scholar in America, has joined other feminists in criticizing Gilligan's failure to articulate a causal mechanism for women's 'different voice'; that is, the expression of a web of connection rather than a hierarchy of rights.[38] MacKinnon criticizes both sides of the equal treatment/special treatment debate, arguing that they both accept men as their norm, and that the question for feminists is not whether a practice treats women the same as or differently from men, but whether the practice subordinates women.[39] And she hesitates to embrace Gilligan's thesis, for she sees women's 'different voice' as arising out of women's oppression. To celebrate this voice, she asserts, is to play into stereotyped visions of femininity which will continue to oppress women.[40] MacKinnon states

> I do not think that the way women reason morally is morality in a different voice. I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some . . . When you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced . . . All I am saying is that the damage of sexism is real, and reifying it into differences is an insult to our possibilities.[41]

My own view of this is that both Gilligan and MacKinnon are correct. Gilligan's work is very moving, and resonates very clearly with the dissatisfaction of many women lawyers and law students with legal education and the legal system more generally. At the same time, MacKinnon is, I believe, sensible in hesitating to embrace a framework that can, as it stands, support biological determinism, and the view that women are inherently different and therefore less capable. She is probably correct that women's different voice (if there is one) does arise from oppression, but the values that Gilligan has identified as belonging to women, those of care and connection, rather than an abstract notion of rights, have a lot to offer law and legal education. I will return to this theme at the end of this article.

THE PUBLIC / PRIVATE DISTINCTION AND THE CRITIQUE OF RIGHTS

Feminist legal scholars have taken the feminist slogan 'The Personal is Political' seriously and explored how the dichotomy between the public and the private has been constructed and supported by the legal system, to the detriment

36 Fineman, M., 'Dominant Discourse: The Professional Appropriation of Child Custody Decision-Making', Institute for Legal Studies, Working Paper Series 2, University of Wisconsin-Madison Law School, also published as 'Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking' (1988) 101 *Harvard Law Review 727*.

37 See also Kerber, Greeno and Maccoby, Luria, Stack and Gilligan, 'On *In a Different Voice:* An Interdisciplinary Forum' (1986) 11 *Signs: Journal of Women in Culture and Society* 304.

38 'Feminist Discourse, Moral Values and the Law — A Conversation' (1985) 34 *Buffalo Law Review* 11, 74, hereinafter cited as 'Conversation'.

39 *Ibid.* 20-4; MacKinnon, C.A., *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 4-5, 101-41; MacKinnon, C.A., 'Difference and Dominance: On Sex Discrimination' in *Feminism Unmodified: Discourses on Life and Law* (1987) 32-45.

40 'Conversation' *op. cit.* n. 38, 74-5.

41 'Difference and Dominance' *op. cit.* n. 36, 39. *Cf.* Scales (1986), *op. cit.* n. 2, 1381 where she states that 'Gilligan's work . . . could also become the Uncle Tom's Cabin of our century.'

of women. At the most obvious level, this has involved critical analyses of, and action around, the law's failure to intervene in 'the private' and thus its failure to protect women from violence in the home, from marital rape and 'date rape', from incestuous assault as children — all areas of political legal activity by Australian legal feminists in recent years. At the same time, feminist legal scholars have challenged the view that the law does not intervene in the private (and in particular the family), drawing attention to the existing mass of regulation surrounding the family in tax law, criminal law, tort law, *etc.* which both impinges on the family and plays its part in constructing the very notion of family.[42] Some scholars have argued that state intervention in the family cannot be avoided and, indeed, that the whole concept of state intervention is totally incoherent.[43]

Related to this more profound critique of the public/private distinction are attempts to transcend the distinction. Olsen, for example, has argued for a transcendence of the public/private dichotomy, rather than merely an extension of the public legal world into the 'private' familial world or vice versa.[44] Her focus is on the dichotomy between the (private) family and the (public) market, particularly the employment market. She examines efforts to improve the status of women which focus on each of these worlds. She charts attempts to impose family ideology on the market and market ideology on the family, together with attempts to make each live up to its own ideals.

Attempts to make the family more like an ideal family recognise the exploitation of women which has occurred in the private sphere and thus try to make men more benevolent towards women. Here Olsen points to the delegalization movement in family law, a process also evident in Australia, with the increase in court counselling, and mediation. As suggested above, these strategies can hurt women by, for example 'forc[ing] the weaker party to accept a resolution that gives her far less than she would be entitled to in a formal adjudication.'[45]

[42] *E.g.* O'Donovan, K., *Sexual Divisions in Law* (1985); Daly, K.E., 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law and Society Review* 267; Graycar, R. and Shiff, D. (eds), *Life Without Marriage* (1987); Law, S., 'Women, Work, Welfare and the Preservation of Patriarchy' (1983) 131 *University of Pennsylvania Law Review* 1249; Graycar, R., 'Hoovering as a Hobby: The Common Law's Approach to Work in the Home' (1985) 28 *Refractory Girl* 22; Graycar, R., 'Compensation for Loss of Capacity to Work in the Home' (1985) 10 *Sydney Law Review* 528; Land, H., 'The Family Wage' [1980] *Feminist Review* 55; Lahey, K., 'The Tax Unit in Income Tax Theory' in Pask, E.D., Mahoney, K.E., and Brown, C.A. (eds), *Women, the Law and the Economy* (1985); Edwards, M., *The Income Unit in Australian Tax and Social Security Systems* (1984); Grbich, J., 'The Position of Women in Family Dealing: the Australian Case' (1987) 15 *International Journal of the Sociology of Law* 309.

[43] Fran Olsen argues 'that the terms "intervention" and "nonintervention" [in the family] are largely meaningless. The terms do not accurately describe any set of policies, and as general principles, "intervention" and "nonintervention" are indeterminate.' Olsen, F.E., 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835. *Cf.* Minow, M., 'Beyond State Intervention in the Family: For Baby Jane Doe' (1985) 18 *University of Michigan Journal of Law Reform* 933, 934 who, in the context of decisions about treatment of severely handicapped newborns, 'reject[s] the framework of "state intervention" . . . showing that arguments cast in those terms overlook the variety of possible forms and directions of state intervention, and obscure the inevitable role of the state in any possible allocation of power to decide the infant's medical treatment.'

[44] Olsen, F.E., 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497.

[45] *Ibid.* 1542.

Attempts to make the family more like the market focus on equality, a market value, and include Married Women's Property Acts, which imposed juridical equality, an ideal of the market. In fact, this legislation did little to improve women's lives, Olsen argues, because it did not 'force the husband to share his power over the family's wealth' but rather gave rights to separate property. Because women's domestic labour was unpaid and men earned most of the money, the practical effect on women's lives was minimal.[46] She concludes

> Although the reforms promote equality, they also undermine the altruistic bases of the family and thus leave women open to the kind of individualized, particularized domination characteristic of market relations. The reforms have tended to give women equal rights, but they have not democratized the family.[47]

Attempts have also been made to end women's oppression through making the market more like an ideal market, that is, taking its ideal of equality seriously. Initiatives here include anti-discrimination measures, again familiar to an Australian audience, which Olsen suggests are inadequate:

> Anti-discrimination law does not end the actual subordination of women in the market but instead mainly benefits a small percentage of women who adopt 'male' roles . . . It obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognizing such discrimination as a pervasive aspect of our dichotomized system.[48]

Finally, she documents efforts to make the market more like the family or, as Olsen puts it, 'making the market more responsive to the needs of women'.[49] Strategies here are aimed at removing the individualism of the market and Olsen points to protective labour legislation for women which again failed to improve the status of women and indeed, in America, held up the development of decent health and safety protections for all workers and 'effectively degraded . . . [women] by treating the asserted differences as evidence of women's inferiority.'[50]

Olsen argues that both sets of attempts fail because they all accept a dichotomy between the public and the private which fragments people's lives in a way which neither fully reflects lived experience nor transforms that experience to make it whole. Such a transformation is necessary at both a conceptual and practical level. If we can move away from the dichotomous thinking, clearly characteristic of much legal thinking, and characteristic of both the public/private dichotomy and the family/market dichotomy, we may be able to start thinking about strategies that would empower women, recognize the specificity of their lives, ultimately transform both the domestic and public lives of all people, and even make such concepts redundant. She concludes 'Most of the time neither our family lives nor our market lives seem fully satisfactory, yet our dissatisfaction with each leads us to romanticize the other in a vicious cycle . . . Polarizing the family and the market does not increase the possibilities available to individuals and to the human personality.'[51]

46 *Ibid.* 1532.
47 *Ibid.*
48 *Ibid.* 1552.
49 *Ibid.* 1529.
50 *Ibid.* 1556-7. See also Olsen, F.E., 'From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895' (1986) 84 *Michigan Law Review* 1518.
51 *Ibid.* 1566-7.

The feminist critique of the public/private divide is by no means complete. Neither Olsen nor O'Donovan, an English feminist legal scholar who has engaged in a similar critique of 'Sexual Divisions in Law',[52] presents 'the answer' for transcending the public/private distinction. However, their critique provides ways of analysing the law's impact on women's subordination, ways which transcend doctrinal legal boundaries and reinforce the need for feminists to engage with law to transform the terms of the debate.

CRITIQUE OF RIGHTS

Both the sameness/difference debate and attempts at deconstruction of the public/private distinction, have influenced another feminist legal project, the critique of rights formulations. The feminist critique of rights also connects with the more discursive dissatisfaction of critical legal studies scholars with rights discourse. One of the best examples of feminist legal scholarship in this area is Fran Olsen's discussion of statutory rape laws.[53]

The analysis came out of a Supreme Court challenge to statutory rape laws by a 17 year old boy.[54] The particular statutory rape law challenged was not gender neutral, that is, it was an offence for a man to have sexual intercourse with a woman under 18 years of age, and he argued such a law denied him equal protection because he was being prosecuted and his 16 year old female 'partner' was not. His challenge was rejected by a majority of the Supreme Court, who held that because young women were exposed to the risk of pregnancy, there was no need for them to be additionally exposed to the risk of prosecution.

Olsen refers to feminist objections which describe (gendered) statutory rape laws as 'an unwarranted governmental intrusion into [young women's] . . . lives and an oppressive restriction upon their freedom of action', that is, they interfere with a young woman's 'right to privacy and her right to be as free sexually as her male counterpart'.[55] Furthermore, they treat young women as passive victims and men as aggressors thereby perpetuating a double standard.

Olsen notes that one suggested solution to these feminist objections is to make the laws gender neutral. The problem with this approach is that such a change in the law is not necessarily going to change legal practice. She argues 'it leaves untouched the repressive aspects of statutory rape laws. In our present society, these repressive aspects hurt females more than males'.[56]

Secondly, it could be argued that it is best to remove the state altogether from regulating this activity. However, this would leave women open to exploitation by individual men: 'Nice as it is to be freed from state oppression, domination by private individuals can be equally oppressive. Despite their negative aspects, statutory rape laws can provide some protection for females.'[57] She points out that rights analysis cannot help us decide which reform is best for women — the

52 O'Donovan, *op. cit.* n. 42. See also Finley, *op. cit.* n. 2.
53 Olsen, *op. cit.* n. 20.
54 *Michael M. v. Superior Court* 450 U.S. 464 (1981).
55 Olsen, *op. cit.* n. 20, 404-5.
56 *Ibid.* 411.
57 *Ibid.* 407.

right to privacy will isolate women and expose them to individual exploitation, and the right to equality does not recognize that women are more likely to be sexually exploited than men, or challenge that practice. Instead, we must face the political and moral questions involved away from the context of rights discourse.

Olsen goes on to consider, albeit somewhat speculatively, a strategy that would empower young women, while still providing some protection. She argues that, rather than completely ceasing to have statutory rape as an offence, the young woman should be able to decide whether to bring a prosecution; that is, the young woman's 'characterization of a sexual encounter as voluntary intercourse or as rape would be determinative'.[58] She recognizes that this strategy would expose young women to pressure from their parents, and may play into the stereotype that women make up claims of rape, but it recognizes that young women may be particularly vulnerable, and does something to reduce that vulnerability.

A similar critique of rights discourse has also occurred in the area of abortion, both in England and America. Feminists have pointed out that the rhetoric of 'the right to choose', or in American constitutional rhetoric, 'the right to privacy', presents an image of isolated women, disengages us from debates about how the right to choose should be exercised, and allows the state to justify a failure to support funded abortions for all women.[59] The American critique of the way abortion 'rights' have been constructed links the feminist discomfort with rights discourse to the critique of the public/private distinction: as MacKinnon says '[T]o fail to recognize the meaning of the private in the ideology and reality of women's subordination by seeking protection behind a right *to* that privacy is to cut women off from collective verification and state support in the same act'.[60]

I have tried to indicate two of the central theoretical debates in American legal feminism, and hinted at a number of others. I have not discussed some perhaps more practical American feminist struggles. These include the (fairly successful) struggle to get sexual harassment recognized as a form of sex discrimination[61] and the current attempts to address the issue of pornography.[62] The latter is probably the most controversial issue amongst American feminist legal workers

[58] *Ibid.* 408-9.

[59] See the discussion of *Roe v. Wade* 410 U.S. 113 (1973) and *Harris v. McRae* 448 U.S. 297 (1980) in MacKinnon, C., 'The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion' (1983) 17 *Radical America* 23 and MacKinnon, C., 'Privacy and Equality: Beyond *Roe v. Wade*' in *Feminism Unmodified* (1987); Kingdom, E., 'Legal Recognition of a Woman's Right to Choose' in Brophy, J. and Smart, C. (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (1985); Brown, 'Reproductive Freedom and the Right to Privacy: A Paradox for Feminists' in Diamond, I. (ed.), *Families, Politics and Public Policy: a Feminist Dialogue on Women and the State* (1983).

At the same time, some American legal feminists, particularly black feminists, have argued rights discourse is useful for women. *E.g.* Williams, P.J., 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401; Schneider, E.M., 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' (1986) 61 *New York University Law Review* 589 and Minow, M., 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 *Yale Law Journal* 1860.

[60] MacKinnon (1983), *op. cit.* n. 59, 33.

[61] MacKinnon (1979) *op. cit.* n. 39; MacKinnon 'Sexual Harassment: Its First Decade in Court' in *Feminism Unmodified*, *op. cit.* n. 39.

[62] *E.g.* MacKinnon, C., 'Not a Moral Issue' (1984) 2 *Yale Law and Policy Review* 321 and Chapters 11-16 in *Feminism Unmodified*, *op. cit.* n. 39.

at the moment. Catharine MacKinnon has drafted legislation, originally passed in two local government areas, which gives women a right to sue for damages for harm directly caused by pornography, and in limited circumstances to get an injunction to prevent further distribution of particularly violent pornography.[63] Such moves have been strongly criticized by other feminists who have concerns about free speech, and those who feel that the approach is inadequate because it fails to address the more pervasive and oppressive images of women in advertising in the general media.[64] The issue of pornography is presently central to American feminism, in a way that is perhaps not quite so true of British, or, for that matter, Australian legal feminism. This is, in part, because American feminists are more likely to be working in a radical feminist framework, a framework which sees sexuality as central to the oppression of women, in the way that Marxists use class as the central analytical category.[65] British feminism is more likely to be a socialist feminism and therefore is more concerned with the dual oppression of gender and class.[66]

BEYOND SEXUALITY AND THE FAMILY

The focus on empowerment of women is common to much feminist legal writing. The controversy over equal and special treatment can be seen as, in part, a debate about tactical questions as to which strategy is likely to be the most empowering to women. Gilligan's work has reinforced an interest in allowing women's voices and experiences to be heard in legal education and the legal profession more generally. And the critique of the public/private dichotomy is providing a way, at the very least, of understanding women's disempowerment by the legal system's insistence on non-regulation of the private. It could be suggested that the two areas I have concentrated on are essentially concerned with 'women's issues' — sexuality and the family — areas which have traditionally been seen as of concern to women legal workers. This is certainly not the limit of the feminist contribution to the legal project. Feminist legal scholarship also has important perspectives to throw onto traditional 'black letter' law.

Two pieces of North American legal scholarship are of particular interest here.[67] In one, Christine Boyle, a Canadian, reviews two books on remedies.[68]

63 Minneapolis Code of Ordinances, Title 7. Ch. 139 and 141, vetoed by the Mayor and Indianapolis Antipornography Ordinance No. 24 and No. 35 (1984); see Spahn, E., 'On Sex and Violence' (1984) 20 *New England Law Review* 629, 630. The Indianapolis ordinance was held unconstitutional in *American Booksellers v. Hudnut* 771 F.2d 323 (7th Cir. 1985), affirmed 106 S. Ct 1664 (1986).

64 *E.g.* Spahn, *op. cit.* n. 63; the Feminist Anti-Censorship Taskforce Amici Curiae Brief in *American Booksellers v. Hudnut* 106 S. Ct 1664 (1986). The arguments are summarized for an Australian audience in Gaze, B., 'Pornography and freedom of speech: An American feminist approach' (1986) 11 *Legal Service Bulletin* 123.

65 See MacKinnon, C., 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 515, 515-6: 'Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away . . . Sexuality is that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their relations create society. As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind.' *Cf.* MacKinnon, 'Desire and Power' in *Feminism Unmodified op. cit.* n. 39.

66 *E.g.* Barrett, M., *Women's Oppression Today: Problems in Marxist Feminist Analysis* (1980); Segal, L., *Is the Future Female?: troubled thoughts on contemporary feminism* (1987).

67 See also Lahey, K., and Salter, S., 'Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism' (1985) 23 *Osgoode Hall Law Journal* 543.

68 Boyle, C., 'Book Review' (1985) 63 *Canadian Bar Review* 427 (reviewing Sharpe, R.J., *Injunctions and Specific Performance* and Waddams, S.M., *The Law of Damages*).

She draws attention to the use of 'he' as the universal pronoun in one, and the one paragraph on family law injunctions, as compared to the 68 paragraphs on injunctions to protect property. She is careful not to suggest that 'family law is a "women's subject"', but does argue 'that people who are concerned about the position of women in our society, would, on this issue-oriented level, look for material on injunctions for the protection of abused wives'.[69] She again draws on Gilligan's work to point to the abstract character of much of the writing and the worship of 'rationality' in one of the texts. She is concerned that Waddams overvalues rationality, a term he does not define. Does it mean unemotional, or making decisions without reference to morality, or something else? The first two are both modes of decision making that a feminist analysis would find deeply troubling. She states, in one of the great quotable quotes of feminist legal scholarship: '"Men and the Law" is tolerable as an area of intellectual activity, but not if it is masquerading as "People and the Law"'.[70]

The other article is by Mary Jo Frug, 'A Feminist Analysis of a Contracts Casebook'.[71] In some senses it is similar to Christine Boyle's piece, but it is more closely argued, detailed and devastating. Frug demonstrates how different readers interact with a casebook, and, in particular, how these various readers' notions of gender affect their absorption of legal principles, their understanding of women (and men), and for women law student readers, how their self-perception as future lawyers is affected.

She engages in a detailed analysis of women's appearances in the casebook. As authors of cases (judges) women are totally absent either because of their historical absence from the legal profession or because none of the judges are ever identified by their sex. Other legal authors such as commentators are always identified as males. As parties in the cases, women appear as housewives, sisters, fashion designers and hairdressers. As a law student audience, women are never addressed: all the commentators quoted refer to men as possible future lawyers. Frug deals with the expected criticism 'but that's how the world is', suggesting it is an 'ironic diversion'.[72] She argues that casebook editors rarely consider the issue of whether they are accurately representing 'the real world' when they select cases. She even concedes that the casebook editors may be able to justify their choice of cases in this or some other way. However, the fact remains that the selection reinforces rather than expands readers' views about gender, and while historically women may have been excluded from the legal profession, the book conveys a disconcerting view of current 'legal culture'. She also discusses the analytical and abstract character of the book and given that we associate these characteristics with males, she contends that this contributes to the maleness of the casebook. She argues that the authors' neutral stance, their failure to discuss the justice of case outcomes, and their failure to discuss developments in legal theory 'discourages readers from developing ethical, social and

[69] *Ibid.* 431.
[70] *Ibid.* 430-1.
[71] Frug, M.J., 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American University Law Review* 1065.
[72] *Ibid.* 1079-80.

moral opinions on legal issues. Insofar as these questions and opinions seem feminine, because they involve attachment, compassion, and emotion, repressing these questions encourages readers to repress the feminine characteristics within themselves'.[73]

It can be seen that both the Boyle and the Frug pieces engage in a critique of the abstraction, rationality and neutrality of the law, and argue for a more contextualized, subjective and connected approach. That is, for another way of making women visible. This critique is probably the most threatening to traditional legal analysis, but also the most radical challenge to the devaluing of the female in law. Catharine MacKinnon has argued 'male dominance is perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. . . . Feminism claims the voice of women's silence . . . the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence.'[74] The work of Boyle and Frug is a concrete attempt to expose how the supposed universality or 'point of viewlessness' of legal discourse excludes women.

WHAT IS THE RELEVANCE OF THIS SCHOLARSHIP TO AUSTRALIAN LEGAL EDUCATION?

I believe that part of the feminist project in law schools is to make women visible. It disturbs me that in 1986 a woman student can come to me in tears saying she had spent 8 weeks in a course on human rights and women had not been mentioned. Were we not human? To my shame, I suggested that perhaps gender neutral language wasn't *that* important. As she said to me, 'if they can't even include women in the language they use, what hope have we got for changing *anything*?' We must examine the cases and, in particular, the hypotheticals used in lectures and tutorials and question what image of women is presented. It is a small but vital point — the reasonable man should be dead and buried by now.[75]

It can be argued that women are not invisible in Australian law courses — after all women's issues are discussed in the teaching of family law and sexual assault. Of course they are, and though many questions remain about the adequacy of our approach to these questions, the reach of feminism into the law is, and must be, much greater. A number of universities, though not very many in Australia, have established 'Women and the Law' courses. These are inclined to cover 'women's issues' — domestic violence, sexual assault and anti-discrimination. As Reg

[73] *Ibid.* 1112.

[74] MacKinnon, C., 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs: Journal of Women in Culture and Society* 635, 638-9.

[75] It is worth remembering here though that a mere change in language will not necessarily lead to a change in conception, and may more effectively hide a masculist discourse. As Lucinda Finley argues, 'the use of neutral language may mask underlying biases in the purportedly objective standard that were more apparent when the gender male was referred to specifically'. Finley, L., 'Laying Down the Master's Tools: A Feminist Revision of Torts', unpublished manuscript, p. 21, forthcoming 1988. *Cf.* Boyle, C., 'Criminal Law and Procedure: Who Needs Tenure?' (1985) 23 *Osgoode Hall Law Journal* 427, 433: 'Simply changing one's language does not necessarily reflect a change in perspective.'

Graycar has argued, the first two must be part of a compulsory criminal law course, whether or not they are also covered in more specialized courses.[76] Mary Jane Mossman, a Canadian feminist legal scholar, has pointed to the problems with the 'women and law' strategy.[77] She suggests that few students will take such a course as an option, and they are likely to be those students who are already alert to the masculist nature of most legal culture; enrolment in such courses may be stigmatizing, 'reinforcing the idea of women as Other' and, finally, they may 'dissipate efforts to create gender equality in the law school as a whole'.[78]

A somewhat more sustained challenge to gender inequality is made through Law and Gender courses such as the one taught at La Trobe University and the one recently established at the University of New South Wales. Such courses generally take a more global view of the role of law in creating gender inequality. Thus, they tend to take a more theoretical perspective, and rather than merely teaching a grab bag of women's issues, do not accept the false subject distinctions we create in our legal education. Thus one could create a section of such a course around the material I discussed above about the public/private divide, bringing in material on state regulation of the family, the labour market, sexuality and contracts, to name but a few. Or, to quote one of Reg Graycar's examples, '[i]deological concepts such as the "good mother" permeate cases about custody in family law, as we would expect them to, but they also arise in, for example, crime, in tort, in succession and others.'[79] Still, such courses do not meet all of Mary Jane Mossman's hesitations about women and the law courses: women are still seen as marginal, not in the course itself, but in the position of the course as an elective in law schools which in many other ways exclude and marginalize women.

Yet another approach has been implemented at the University of Oslo, where there is a separate department of women's law, and all compulsory courses must have a feminist component.[80] Mary Jane Mossman argues this may continue to marginalize women's concerns, for the 'feminist bit' will just be 'tacked on' at the end.[81] Still, I believe all these are small steps on the path that Mossman suggests we must take, to 'transform the normative tradition in law'.[82] The Norwegian approach at least addresses the issue of feminist perspective in the traditional 'black letter' courses. Gender affects all aspects of our lives and all aspects of the law: although it may be more difficult to raise these issues in a corporate or a tax course, feminist legal scholars, as I have demonstrated above, are producing analyses of these very areas of the law.

[76] Graycar, R., '"to transform the normative tradition of law . . ." a comment on the feminist project in the law school' (1986) 58 *Australian Quarterly* 366, 369.

[77] Mossman, M.J., '"Otherness" and the Law School: A Comment on Teaching Gender Equality' (1985) 1 *Canadian Journal of Women and the Law* 213.

[78] *Ibid.* 214.

[79] Graycar, *op. cit.* n. 76, 370.

[80] Dahl, T.S., 'Taking Women as a Starting Point: Building Women's Law' (1986) 14 *International Journal of the Sociology of Law* 239.

[81] Mossman, M.J., 'Feminism and Legal Method: The Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 30, 46.

[82] Mossman, *op. cit.* n. 77, 218.

Feminist academics have also addressed a different kind of invisibility of women, that is, women's lack of participation in the classroom. Spender and others[83] have documented the disproportionate participation of men in school and university classrooms, and students at both Yale Law School and Osgoode Hall in Canada have documented a similar phenomenon.[84] My own observations and conversations with colleagues in Australia have indicated that we have a similar problem. I believe some of this lack of participation has to do with the maleness of law and law teaching I have described above: notably the absence of women as actors in the law as presented in casebooks and hypotheticals. Some of it may also have to do with the abstraction and neutrality of the way legal principles are presented and taught. Perhaps 'the Amys' haven't quite all turned into 'Jakes'. Some of it, I have argued elsewhere, is related to the style of teaching.[85] Where lectures are held in large classes and student participation is expected, I believe we may be presenting or encouraging a style of discourse that is more congenial for male students. There is much evidence that men tend to dominate a discourse that is adversarial, that men tend to interrupt, whether literally, or by keeping their hands raised while others are talking (whereas women lower their hands) and that women are thereby excluded. Women, on the other hand, are more likely to participate in, and indeed dominate, co-operatively developed discourse. This is more likely to occur in seminars and tutorials. It is clearly not financially possible to move to seminar teaching for all law courses in all law schools, but we must be vigilant about who is talking in our classrooms, and develop more co-operative styles of teaching where we can. It is interesting to note here that the recent review of Australian legal education by C.T.E.C.[86], the Pearce Report, while it extolled the virtues of small group teaching, it did so without reference to any concern with women's participation in classrooms. It suggested that the University of New South Wales, which currently only teaches in seminars, could consider using more lectures; to make these suggestions without consideration of issues of co-operation versus competition and the particular impact on women law students of large classes, is to neglect a large body of literature and to perpetuate the invisibility of women in our law schools.

Once again, it will be clear that my comments on styles of teaching and women's silence are consistent with some of Gilligan's work described above, and I now return to some of the hesitations about her work previously mentioned. It could be argued that I am suggesting that women are both incapable of operating in the law school environment, and, given that we have an adversarial legal system, in the legal profession. Needless to say, nothing could be further from the truth. We might believe, as Mary Jo Frug seems to, that the characteris-

[83] *E.g.* Sears, P.S., and Feldman, D.H., 'Teacher Interactions with Boys and with Girls' in Stacey, J., Bereaud, S., and Daniels, J., *And Jill Came Tumbling After: Sexism in American Education* (1974); Spender, D., *Invisible Women: The Schooling Scandal* (1982); Spender, D. and Sarah, E., *Learning to Lose: Sexism and Education* (1980); Project on the Status and Education of Women *The Classroom Climate: A Chilly One for Women*, (1982).

[84] Submissions to Faculty from Women Students at Yale Law School: Women's Silence in the Classroom (undated); Attridge, I., *et al.* 'Gender in a Law School Classroom: Perceptions and Practices' Osgoode Hall Law School, May 1987.

[85] Morgan, J.J., 'The Socratic Method: Silencing Cooperation' (Unpublished manuscript).

[86] Pearce, D., Campbell, E., and Harding, D., Commonwealth Tertiary Education Commission. *Australian Law Schools: A discipline assessment.*

tics I am talking about are merely associated with the masculine (aggressive, adversarial, abstract), and the feminine (submissive, connected, contextual), with the characteristics associated with the feminine being devalued. Or we might believe that these characteristics in fact belong to (most) men and (most) women respectively. In any case, I would argue that the 'feminine' qualities are essential both for teaching law and practising law. And whether women have these qualities because of gender oppression, or because they just grew like Topsy, it is time to reevaluate legal teaching and legal practice so that they encompass these *human* qualities. After all, there is an awful lot more involved in practising law than the archetypal joust in court.[87] As Carrie Menkel-Meadow has suggested, 'Amy's approach is . . . plausible and legitimate . . . as a style of lawyering'.[88]

The critique of law and legal education undertaken by feminists does of course have similarities to critiques by others — for example, Marxists,[89] critical legal theorists[90] and humanists.[91] Feminist legal scholars may also belong to any of these intellectual traditions, and/or they may consider themselves liberal, socialist or radical feminists,[92] but they all share a focus that is absent from these other scholarly traditions. This is a focus on understanding the oppression of women through law/s and attempts to use law/s to end the subordination of women.

It is obvious that this article hardly accomplishes a 'transformation of the normative tradition in law', but it aims to describe the efforts made to do just that, or at the very least to address the issue of gender subordination and the empowerment of women. Why isn't the project like 'Law and Underwater Basket Weaving'?[93] The reference is clearly to the, perhaps apocryphal, Californian college course of the 70's. In the legal education context, Regina Graycar used it to refer to 'Women and the Law' courses, structured around a grab bag of 'women's issues'. This article has tried to demonstrate that the fundamental critique of other disciplines undertaken by feminists in recent years is also occurring in law.[94] To treat it as just another 'Law and . . .' initiative, is to misconceive the challenge raised by feminist legal scholarship.

87 For the sporting analogy see Menkel-Meadow, C., 'Portia in a Different Voice: Speculations on Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39, 51.

88 *Ibid.* 46.

89 *E.g.* Beirne, P. and Quinney, R. (eds), *Marxism and Law* (1982); O'Malley, P., *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (1983); *cf.* Klare, K.E., 'The Law-School Curriculum in the 1980s: What's Left?' (1982) 32 *Journal of Legal Education* 336.

90 *E.g.* Kennedy, D., *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983) and Kennedy, D., 'Legal Education as Training for Hierarchy' in Kairys, D. (ed.), *The Politics of Law: A Progressive Critique* (1982).

91 Project for the Study of Humanistic Education in Law, *Humanistic Education in Law: Reassessing Law Schooling*; Himmelstein, J., 'Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law' (1978) 53 *New York University Law Review* 514.

92 For detailed exegeses of these schools of thought see Eisenstein, H., *Contemporary Feminist Thought* (1984) and Jaggar, A.M., *Feminist Politics and Human Nature* (1983).

93 Graycar, R., *op. cit.* n. 76, 370 where she said, in reference to courses on 'Law and Gender', '[they] are an improvement on "women and . . ." (here substitute law or underwater basket weaving)'.

94 *E.g.* Langland, E. and Gove, W. (eds), *A Feminist Perspective in the Academy: The Difference it Makes* (1981); Spender, D. (ed.), *Men's Studies Modified: The Impact of Feminism on the Academic Disciplines* (1981); Keller, E.F., *Reflections on Gender and Science* (1985); Harding, S., *The Science Question in Feminism* (1986); Harding, S. and Hintikka, M.B. (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (1983).