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## Women in the Legal Academy: A Brief History of Feminist Legal Theory

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# WOMEN IN THE LEGAL ACADEMY: A BRIEF HISTORY OF FEMINIST LEGAL THEORY

*Robin West\**

## INTRODUCTION

Women's entry into the legal academy in significant numbers—first as students, then as faculty—was a 1970s and 1980s phenomenon.<sup>1</sup> During those decades, women in law schools struggled: first, for admission and inclusion as individual students on a formally equal footing with male students; then for parity in their numbers in classes and on faculties; and, eventually, for some measure of substantive equality across various parameters, including their performance and evaluation both in and in front of the classroom, as well as in the quality of their experiences as students and faculty members and in the benefits to be reaped from their tenure.<sup>2</sup> This

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1. See FEMINIST JURISPRUDENCE: CASES AND MATERIALS 961 (Cynthia Grant Bowman et al. eds., 4th ed. 2011). For a history of women's entry into the legal profession, see generally CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (2d ed. 1993), and KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 210–17 (1986). For a history of women at Harvard Law School and Harvard's refusal to admit women until the 1950s, see DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* 478–99 (2015).

2. FEMINIST JURISPRUDENCE: CASES AND MATERIALS, *supra* note 1, at 961–79; see also EPSTEIN, *supra* note 1, at 62–67; MORELLO, *supra* note 1, at 103–05. There is now a sizeable literature on the differences between women's experiences of law school and men's, from the 1970s to the present. For an early account, see Alice D. Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 *J. LEGAL EDUC.* 462, 470 (1972). For studies that are school specific, see, for example, WORKING GRP. ON STUDENT EXPERIENCES, HARVARD LAW SCH., *STUDY ON WOMEN'S EXPERIENCES AT HARVARD LAW SCHOOL* (2004), <https://web.archive.org/web/20180422223356/http://www.law.harvard.edu/students/experiences/FullReport.pdf> [<https://perma.cc/V5Z9-3FYX>]; Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 *J. LEGAL EDUC.* 137 (1988) (reporting on an empirical study of, among other differences, patterns of participation in the classroom); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 *TEX. J. WOMEN & L.* 117 (2000); Celestial S. D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 *U.C. DAVIS L. REV.* 1209 (2005); Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 *MICH. J. GENDER & L.* 515 (1996); and Joan M.

part of the story of women's entry into the legal academy in the 1970s and 1980s—a story of attempted admission, then inclusion, then integration and assimilation, and then, finally, equality—is now a familiar one, at least in broad outline. It is not, in its entirety, an uplifting story. According to a raft of articles produced by women law students in the 1980s, 1990s, and 2000s, women law students during those decades participated less in the classroom, were called on and responded to differently when they did participate, suffered from more law-school-induced anxiety disorders and other mental health issues, graduated with lower GPAs and less law review experience, published fewer notes and filled fewer editorial positions on those journals, held fewer leadership positions overall while in law school, and had far more difficulties connecting with mentors, teachers, and would-be recommenders among the faculty than male students.<sup>3</sup> Women law professors during those decades were tenured at significantly lower rates than men and, particularly at high prestige schools and at schools with fewer female faculty among the tenured ranks, were hired at lower rates that did not reflect their number in the pool of qualified applicants,<sup>4</sup> had trouble asserting or maintaining authority in the classroom or being perceived as having authority, taught lower-prestige courses and received low teaching evaluations, and, like their students, were published far less frequently in the major and most prestigious law reviews.<sup>5</sup>

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Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 314 (1994). For what may be the most extensive empirical study, see Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 2 (1994).

3. Yale Law School women have been the most forthcoming about their experiences. For contemporaneous accounts of women at Yale in the 1980s, see generally Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988). For descriptions of the experiences of women at Yale in the 1990s, see Paula Gaber, "Just Trying to Be Human in This Place": *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165 (1998), and for an account of women law students at Yale in the 2000s, see Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389 (2006).

4. For an analysis of the statistics from the 1970s and 1980s, see Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988), which reviews the past fifteen years of hiring and retention rates of women on law faculty, with a focus on high-prestige, laggard schools with far fewer women than men; for analysis of the statistics from the 1990s, see Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 337 (2000), which shows that the tenure divide worsened during the nineties; for analysis of the numbers that includes the 2000s, see FEMINIST JURISPRUDENCE: CASES AND MATERIALS, *supra* note 1, at 975–79. For a study of the gender divisions by subject area, with women in less prestigious and lower-paying fields, see Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004).

5. For early discussions of women's experiences as faculty in the classroom, see Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988). On student evaluations, see Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235 (2008). On course assignments, see Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, and on rates of publication in law reviews, see

Much of this, albeit not all, has not changed much for either students or faculty.<sup>6</sup> As women in law schools enter the posttenure and midcareer phase, many of the old problems persist while new ones appear: women faculty are invited to participate on panels less often than men, and both women students and faculty are underrepresented as authors in law reviews.<sup>7</sup> Although gender-neutral parental leave is now available to faculty at most law schools, many such policies are still ad hoc. There is considerable worry, although no hard evidence, over whether men disproportionately use the time off to write rather than care for children.<sup>8</sup> Women are still disproportionately overrepresented in some fields and underrepresented or unrepresented in others, and those fields correlate in unsurprising ways with levels of prestige: the more women in a field, the less prestigious.<sup>9</sup> As elsewhere in the workforce, women faculty in legal education suffer from sexual harassment, most of which is unremedied.<sup>10</sup> Women still suffer a pay gap in law schools that remains unaddressed at most universities, as it does elsewhere in

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Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269 (2009).

6. There is a vast literature on how women faculty in law schools are faring. For excellent general discussion and survey of the literature, in addition to the authorities cited *supra* in note 5, see Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8–10 (1991); Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 662–65 (2006), and see also Edward S. Adams & Samuel P. Engel, *Gender Diversity and Disparity in the Legal Profession: An Empirical Analysis of the Gender Profile in National Law Firms and Law Schools*, 63 BUFF. L. REV. 1211, 1211–13 (2015); Hannah Brenner, *Expanding the Pathways to Gender Equality in the Legal Profession*, 17 LEGAL ETHICS 261 (2014); and Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745.

7. Bridget Crawford, *Are You Willing to Ask About the Diversity of an Academic Panel Before Accepting a Speaking Invitation?*, FEMINIST L. PROFESSORS BLOG (May 31, 2018), <http://www.feministlawprofessors.com/2018/05/are-you-willing-to-ask-about-the-diversity-of-an-academic-panel-before-accepting-a-speaking-invitation/> [https://perma.cc/7SZP-PHKP] (discussing the makeup of panels, and calling for all faculty members to inquire about the diversity efforts before committing to being on a panel); see also Nancy Leong, *Discursive Disparities*, 8 FIU L. REV. 369, 373 (2013) (discussing disparities in authorship of articles and notes).

8. See generally Kessler, *supra* note 6. One study of family leave in universities found plenty of anecdotal complaints about men using parental leave to advance careerist aims but no hard evidence of fathers “shirking” use of parental leave by employing nannies or relying on spouses or partners. See Jennifer H. Lundquist et al., *Parental Leave Usage by Fathers and Mothers at an American University*, 10 FATHERING 337, 341–42 (2012). Older studies make clear how far law schools have come in providing family leave for faculty members. See generally Richard H. Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568 (1985); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994).

9. See Kornhauser, *supra* note 4, at 310–12 (describing a study that found that women law professors are clustered in lower-prestige fields).

10. See generally Yxta Maya Murray, *Draft of a Letter of Recommendation to the Honorable Alex Kozinski, Which I Guess I’m Not Going to Send Now*, 25 MICH. J. GENDER & L. 59 (2018) (commenting on sexual harassment of law clerks).

academia.<sup>11</sup> There is a sizeable literature on these depressing phenomena that stubbornly do not seem to abate.

In these comments, however, I want to focus on another, less appreciated, part of the story of women's entry into the legal academy in the 1970s and 1980s: the emergence of a body of scholarship—sometimes called feminist legal theory—produced by some of these women legal scholars over the same time period. The story I want to focus on, in other words, is not that of second- or third-wave women's struggles within the academy, either for admission, acceptance, assimilation, or equality in law schools. Rather, this Article focuses on the story of the scholarship some of those second-wave assimilated women produced once they got there. Feminist jurisprudence, understood largely as scholarship on issues pertaining to gender equality, was launched in the 1970s, endures today, and continues to shape debates.<sup>12</sup> Feminist legal theory, however, was in effect a subfield within feminist jurisprudence and, as its name implies, was an attempt to fashion a broad-based theoretical account of the relationship of law in liberal legal regimes to women's subordination, patriarchy, and gender and sexual inequality—particularly in a post-civil rights era, when women enjoyed broad access to rights of formal equality, reproductive liberty, and liberal antidiscrimination law.<sup>13</sup> Feminist legal theory so understood—a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination or, more simply, of law and patriarchy—was birthed in the

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11. For a general discussion of the pay gap in academia, see Debra A. Barbezat & James W. Hughes, *Salary Structure Effects and the Gender Pay Gap in Academia*, 46 RES. HIGHER EDUC. 621 (2005).

12. The premise of early scholarship, casebooks, and courses on feminist jurisprudence was that law's differential treatment of women was far more harmful to women's interests than widely believed, thereby laying the groundwork for the demand for formal equality that dominated the liberal feminism that followed. By the late 1980s, however, major feminists in various doctrinal areas were also sounding cultural, intersectional, and radical feminist themes. For some major early contributions in this evolution, see, for example, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) (providing an overview of feminist tort scholarship); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789; Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986) (addressing and redefining the problem of difference in the workplace); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (questioning the privacy rationale of *Roe v. Wade*); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); and Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) (defending the equal-treatment approach to pregnancy in the workplace).

13. The major figure in this development was unquestionably Catharine MacKinnon. Her early writings were the most embracing, as well as the most bracing, seeking an explanation of women's subordination to men in legal systems worldwide and locating the expropriation of sexuality as the nexus. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD*]. Compilations of feminist legal theory writings include, for example, *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION* (D. Kelly Weisberg ed., 1996).

1970s, nurtured in the 1980s, and matured in the 1990s. I suggest in this Article that it is now seemingly in decline, and may soon disappear altogether.

The reasons for this trajectory, I believe, are to date unexplored. Some reasons are fairly self-evident. Feminist legal theory was a product of three time-specific factors peculiar to the 1970s and 1980s: it reflected the political and the legal struggles of second-wave feminism.<sup>14</sup> The critical theory schools were, to varying degrees, present or thriving in the academy in the 1970s and 1980s,<sup>15</sup> within which feminist legal theory was birthed, grew, and then coexisted with critical theory, albeit at times very uneasily; and this feminist theory reflected second-wave women faculty and students' mixed experiences of assimilation, success, and alienation in law schools themselves, as briefly recited above.<sup>16</sup> Those three factors—the background politics, the presence of critical theory in law schools, and the differences in women's experience of those schools—are all themselves either disappearing or dissipating in felt urgency, albeit in different ways and at different speeds, and that dissipation clearly is a part of the story of feminist legal theory's decline. There are other reasons for its decline as well, however. Some are internal to feminism and feminist theory, and some pertain to the changing nature of legal scholarship from the 1980s to the present. I explore these reasons in Part II below.

The story of the development of a distinctively feminist legal theory during the 1970s through the 1990s, and the story of its decline in the 2000s, is of obvious relevance to the history of second- and third-wave feminism. It should also be of interest for what it reveals about the nature of legal scholarship as it was understood, received, and produced in those decades. Its decline likewise reveals something about the changing nature of legal scholarship and the legal academy today. Thus, one conclusion I draw is that the feminist legal theory of the 1970s through the 1990s—regardless of the truth or lasting power of its claims—stands as an example of a type of legal scholarship that was somewhat distinctive to those decades. That form of legal scholarship, furthermore, likely can only emanate from the legal academy. For a host of reasons, we are currently in danger of losing this entire genre of intellectual work, which would be the polity's loss, not just feminism's or the legal academy's.

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14. Abortion rights were constitutionalized in *Roe v. Wade*, 410 U.S. 113 (1973), in the early 1970s, and women were included in Title VII's prohibition on employment discrimination and Title IX's prohibition on unequal education in the mid-1960s. 42 U.S.C. § 2000e-2 (2012) (codifying Title VII of the Civil Rights Act's prohibition on employment discrimination on the basis of sex); *see also* 20 U.S.C. §§ 1681–1688 (2012) (codifying Title IX of the Education Amendments Act of 1972).

15. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (introducing the theory and major theorists of the critical legal studies tradition); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998).

16. *See supra* notes 2–11 and accompanying text.

I. FEMINIST LEGAL THEORY AND ITS ORIGINS: FEMINIST POLITICS,  
LIBERAL LEGALISM, AND CRITICAL LEGAL STUDIES

As women entered law schools in significant numbers, first as students and then as faculty in the 1970s and 1980s, there developed a growing recognition that even while individual female students, faculty, lawyers, and judges were more or less succeeding, in spite of the challenges, at this man's game, women overall were not doing so well in liberal legalism's empire, whether measured in terms of wealth, well-being, or hedonic happiness.<sup>17</sup> There also developed a sense that the reason for this, at least in part, was neither biology nor culture—neither nature nor nurture, not in the stars and not in ourselves—but, rather, in law.<sup>18</sup> This dawning recognition came, we can say some decades later, as a bit of a shock. It happened, after all, in the 1970s and 1980s, in what can be fairly called the post-civil rights era, after the major battles of second-wave liberal feminism in both Congress and the courts had already been won and after the law had been metaphorically purified of bias. Title VII and Title IX had already passed, forbidding overt and sometimes covert discrimination at work and school.<sup>19</sup> It is worth stressing that these laws were already on the books during this period and had been for over a decade. Discrimination against women in the workforce and in schools was already illegal. Ruth Bader Ginsburg, now Justice Ginsburg of the U.S. Supreme Court, was in the process of winning lawsuits that would establish gender as something akin to a suspect class under the Equal Protection Clause of the Fourteenth Amendment and would soon render all gender distinctions in federal and state law presumptively unconstitutional.<sup>20</sup> The Equal Rights Amendment (ERA) had been proposed and failed, but the Supreme Court had largely picked up the slack by enshrining formal gender equality as a condition of the constitutionality of scores of federal and state laws.<sup>21</sup> Sexual harassment was soon to be firmly established as a civil rights violation under a generous, and by no means obvious, interpretation of Title VII's prohibition

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17. Thus, the impetus for the first wave of "Women and the Law" courses in American law schools. See generally Kay, *supra* note 6; Ann Shalleck, *Report of the Women and the Law Project: Gender Bias and the Law School Curriculum*, 38 J. LEGAL EDUC. 97 (1988).

18. For an early, thorough, and still-definitive analysis of disparities in U.S. women's education, wealth, and empowerment, which links those disparities to law, see JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991). For further discussion, see EPSTEIN, *supra* note 1, at 49–249 (discussing women's experiences in law schools and the legal profession as well as the impact of women in law on substantive law); and CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989) (discussing the impact of feminist legal theory on criminal law).

19. See Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)); see also Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

20. See generally *United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

21. For a history of the failed attempt to pass the ERA, see generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

against discrimination.<sup>22</sup> *Roe v. Wade*<sup>23</sup> and *Griswold v. Connecticut*<sup>24</sup> were already decided and had accorded women considerable power over their reproductive lives. No-fault divorce was on the books, freeing women from oppressive and sometimes violent marriages.<sup>25</sup> Illegitimacy was first a suspect class, and then not much of a class at all, further severing the felt necessity of the bond between mothering and traditional marital heterosexuality.<sup>26</sup>

Yet even with nondiscrimination guarantees in the workplace and reproductive choice in private life secured—by any reckoning the two major priorities of second-wave feminism, both politically and legally—women of all races, sexualities, and classes were not making the substantial strides one might have hoped or sensibly predicted. Look first at money: at the top, glass ceilings were proving to be impenetrable.<sup>27</sup> In the middle, a sizeable pay and prestige gap endured, even with Title VII protections, through a seeming combination of invisible and unprovable discrimination. Arguably, this was coupled with women's somewhat coerced and somewhat free choices to occupy fields that were compatible with mothering, and hence paid less, or to leave the workforce altogether during the early years of childhood, with subsequent reentry at lower pay.<sup>28</sup> At the bottom of the wage scale,

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22. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

23. 410 U.S. 113 (1973).

24. 381 U.S. 479 (1965).

25. Lenore Weitzman argued influentially that no-fault divorce hurt traditional domestic housewives financially, setting off a debate regarding the overall impact of the no-fault revolution on women's equality and liberty. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). *But see* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987) (arguing for the beneficial consequences of no-fault divorce for women overall, even if some women are hurt financially).

26. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (finding the denial of paternal support to illegitimate children to be a violation of equal protection and therefore unconstitutional); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169–70 (1972) (finding the denial of workers compensation survival benefits to illegitimate children to be a denial of equal protection and therefore unconstitutional). For a general discussion of the relevance of the transformation of the status of illegitimacy to changing understandings of marriage, gender, and gay and lesbian family rights, see Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529 (2009).

27. For a discussion of the glass ceiling from the 1980s to the present, see Fatih Guvenen, Greg Kaplan & Jae Song, *The Glass Ceiling and the Paper Floor: Gender Differences among Top Earners, 1981–2012* (Nat'l Bureau of Econ. Research, Working Paper No. 20,560, 2014), <https://www.nber.org/papers/w20560.pdf> [<https://perma.cc/S545-5GVV>]. For a comparison and contrast of the glass escalator (for men in women-dominated professions) from the 1980s to the 2010s, see generally Christine L. Williams, *The Glass Escalator, Revisited: Gender Inequality in Neoliberal Times*, 27 GENDER & SOC'Y 609 (2013).

28. Explanations for the persistent pay gap have varied widely. See, e.g., PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT AND GENDER: A SOCIAL, ECONOMIC AND DEMOGRAPHIC VIEW* (1986) (stating that sex-segregated jobs and continuing second-shift labor at home contribute to a persistent gap); ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (holding the gap attributable in substantial part to disproportionate domestic labor in the home); Paula England, *The Gender*



conditions remained dire for all women workers, but particularly for single mothers performing both unskilled paid labor in the workplace and unpaid labor in the home.<sup>29</sup>

Look at culture: women were still boxed out of the production of art, music, fiction, and entertainment in venues ranging from Hollywood and videogaming to the Museum of Modern Art.<sup>30</sup>

Look at political power: in government, the gap between the 50 percent of the represented population and the miniscule number of female representatives in both houses of Congress, and similar gaps in the judicial and executive branches, yawned.<sup>31</sup>

Look at family life: for all classes, women in the private sphere continued to do the bulk of both child and elder care in the home, regardless of marital status and regardless of whether they paired off with male partners, which depressed women's wages and maximized female exhaustion.<sup>32</sup>

And look of course at sex: women of all classes, races, ages, and orientations continued to suffer unchecked sexual assault on the street, underdeterred sexual harassment in the workplace and at school, and imperious marital rape in the home, while stranger and acquaintance rape were policed only fitfully and inadequately.<sup>33</sup> At work, at school, in the home, on the street, in the bedroom, in the nursery, in the factory, and in the office, equality and well-being both proved elusive, even in the era of nondiscrimination and enhanced reproductive choice.

Women faculty in the legal academy in the 1970s and 1980s responded to this paradox—the abundance of formal gender equality in the law, secured through victories in Congress and the Supreme Court contrasted with an

*Revolution: Uneven and Stalled*, 24 GENDER & SOC'Y 149 (2010) (finding the pay gap largely attributable to women and men entering sex-segregated jobs defined by gender).

29. For discussion of the struggles of low-wage mothers, see KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997); KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005); and Joan Acker, *Inequality Regimes: Gender, Class, and Race in Organizations*, 20 GENDER & SOC'Y 441 (2006).

30. See generally TILLIE OLSEN, SILENCES (1978) (canonical text discussing the relative absence of women as authors in high culture); Denise D. Bielby & William T. Bielby, *Women and Men in Film: Gender Inequality Among Writers in a Culture Industry*, 10 GENDER & SOC'Y 248 (1996); Marc J. Natale, *The Effect of a Male-Oriented Computer Gaming Culture on Careers in the Computer Industry*, 32 COMPUTER & SOC'Y 24 (2002) (discussing gender inequality in the computer industry).

31. For discussions of the continuing impact of gender disparity in politics, see, for example, Kevin Arceneaux, *The "Gender Gap" in State Legislative Representation: New Data to Tackle an Old Question*, 54 POL. RES. Q. 143 (2001); Kathleen A. Bratton, *Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures*, 1 POL. & GENDER 97 (2005); Sarah Fulton, Cherie Maestas & L. Sandy Maisel, *The Sense of a Woman: Gender, Ambition, and the Decision to Run for Congress*, 59 POL. RES. Q. 235 (2006); and Sidney Verba, Nancy Burns & Kay Lehman Schlozman, *Knowing and Caring About Politics: Gender and Political Engagement*, 59 J. POL. 1051 (1997).

32. See HOCHSCHILD, *supra* note 28.

33. See MACKINNON, TOWARD, *supra* note 13, at 155–234 (discussing and analyzing the data on pornography as well as the sexual assault, harassment, and trafficking of women in this time period).

abundance of inequality in the lived experiences of women—with a flood of amici briefs in scores of cases, which sought to enlarge the scope of those second-wave liberal and feminist victories by either enhancing or broadening the principles underlying them or, in some cases, unearthing their more radical anti-subordinationist legal potential.<sup>34</sup> Feminist legal scholars also responded, however, to the apparent limits of liberal legalism, including liberal feminist legalism, with the creation of a new field of academic study and inquiry, which later came to be called “feminist legal theory.”<sup>35</sup> Reflecting, in part, its origin in this conundrum—a recognition of both the promise and the limits of the profoundly liberal norms of antidiscrimination law that had already been encoded in Title VII, the reproductive rights that had been recognized by the Supreme Court, and the formal equality that was by this point seemingly mandated by the Constitution—the feminist legal theory that developed during those decades was driven by at least two

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34. Feminist law professors filed amici briefs, represented parties, or otherwise played significant roles in a number of pivotal Supreme Court cases, including, among others, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating parts of the Violence Against Women Act as unconstitutional under the Commerce Clause and the Fourteenth Amendment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (finding several limitations on abortion rights unconstitutional, upholding *Roe v. Wade*, and redefining the scope of abortion rights); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding limitations on abortion rights unconstitutional); *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (upholding California law requiring employers to provide leave to women for childbirth, but not requiring unpaid leave for workers with other disabilities, with briefs filed by feminist groups on both sides of the case); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding sexual harassment to be a violation of Title VII, with a brief for petitioner written by Catharine MacKinnon); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (upholding *Roe v. Wade*). For discussion of the issue in *Guerra*, in which feminists filed briefs on both sides, see generally Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1297–301 (1987), which argues that laws should be upheld where they accommodate differences that follow from women’s role in reproduction, and Williams, *supra* note 12, which advocates a formal-equality approach that would characterize pregnancy and childbirth as disabilities for purposes of employment law. For a discussion of the amici briefs filed in *Webster*, see Ruth Colker, *Feminist Litigation: An Oxymoron—a Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN’S L.J. 137 (1990). The amici brief filed by the National Abortion Rights Action League and others became known as the “Voices Brief” because it included stories directly from women’s experiences of abortion or its criminality. The brief is reprinted in Lynn M. Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN’S RTS. L. REP. 3, 7–24 (1986). See generally Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 40 (2010); Lynn M. Paltrow, *Women, Abortion and Civil Disobedience*, 13 NOVA L. REV. 471 (1989).

35. For discussions of the emergence of feminist legal theory as a discrete body of scholarship from the 1980s through the early 2000s see generally Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL’Y & L. 13 (2005); Ruth Fletcher, *Feminist Legal Theory*, in AN INTRODUCTION TO LAW AND SOCIAL THEORY 135 (Reza Banakar & Max Travers eds., 2002); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Nicola Lacey, *Feminist Legal Theory*, 9 OXFORD J. LEGAL STUD. 383 (1989); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61 (1988); and Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987).

defining, albeit mostly unstated, fundamental insights. These two insights, or assumptions, were in considerable tension with each other. The first was a deeply critical and interpretive claim, which partly echoed themes from critical legal studies but mostly rested on the experienced limits of liberal legalism in the lives of women, its directly intended beneficiaries. I will call it the “critical-feminist claim.” The critical-feminist claim was simply that at least one reason for women’s continuing subordination to men in liberal legal regimes was, in some measure, law itself.<sup>36</sup> Some feminist theorists, most prominently Catharine MacKinnon, focused their critique directly and concretely on those laws or areas of law which were themselves the product of liberal and feminist political activism. Some examples include antidiscrimination laws from the 1960s;<sup>37</sup> the privacy jurisprudence generated by the Supreme Court in the 1970s, which accords some measure of reproductive choice;<sup>38</sup> and the norm of formal equality that constituted the basis for the judiciary’s invalidation of scores of gender-based distinctions in federal and state law.<sup>39</sup> MacKinnon’s now-familiar arguments, taken collectively and in a nutshell, were threefold: (1) the nondiscrimination norm enshrined in Title VII provides relief only for the most privileged women while legitimating the injustice and hardship that cannot be captured in its formulaic rules through, at best, benign neglect;<sup>40</sup> (2) the privacy doctrine developed in *Roe* and *Griswold* is a Faustian bargain that obfuscates, masks, and privatizes domestic and sexual violence, and more broadly protects rather than dismantles the patriarchal hierarchies that persist in private homes;<sup>41</sup> and (3) the formal equality enshrined in the Court’s jurisprudence entrenches the status quo by making man the measure of all things, yielding only the compromised and Trojan-horse-like concession that those few women who have always measured up, but have not been fully acknowledged as having done so, will heretofore be given their due.<sup>42</sup> These three claims can today fairly be ascribed to radical feminism rather than solely to MacKinnon, but it was not, by any means, only radical feminists who embraced the most basic critical claim of which these are instances—that liberal legalism as it had developed through the civil rights era was at least a part of the cause of women’s continuing relative disempowerment and disadvantage. Liberal feminists parted company with these radical

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36. For impactful studies from the 1970s, 1980s, and 1990s of the role of law in shaping and misshaping women’s lives, see generally ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1989); HOFF, *supra* note 18; MACKINNON, *TOWARD*, *supra* note 13; and ELIZABETH SCHNEIDER & CLARE DALTON, *BATTERED WOMEN AND THE LAW* (2000).

37. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 32–45; MACKINNON, *TOWARD*, *supra* note 13 at 215–34.

38. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 93–102; MACKINNON, *TOWARD*, *supra* note 13, at 184–94; Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281 (1991).

39. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 21–32.

40. MacKinnon, *supra* note 38, at 1283–97; *see also* MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 70–77.

41. MacKinnon, *supra* note 38, at 1311; *see also* MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 93–102.

42. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 13, at 32–45.

arguments but nevertheless argued for a distinctively different and richer conception of autonomy, including sexual autonomy, than that enshrined in the Court's privacy jurisprudence precisely in order to accord greater protection for victims of sexual violence as well as sexual and gender minorities.<sup>43</sup> Relational feminists, as well as some liberal feminists, argued for a conception of well-being that would recognize relationality as well as autonomy as essentially human and as deserving of the protection of law, thereby suggesting the need for and justification of greater benefits to women and men caregivers.<sup>44</sup> Thus, the basis for the critical-feminist claim in those decades was not simply an orientation toward Marxism, or skepticism regarding the redemptive powers of sexuality, or a Gramscian structural claim about women's consciousness, all of which came to characterize in different ways varying strands of radical feminist scholarship.<sup>45</sup> The critical-feminist claim was, for many feminists writing at the time, grounded in the felt reality of the limited capacity of liberal legalism's most defining ideals to reach the core of women's experiences in law's liberal empire, including the experiences of women in the liberal legal academy of the time.

The second defining claim of what came to be called feminist legal theory, which was and is in considerable tension with the first, was the aspirational insistence that, *nevertheless*, law, liberalism, and legalism all, imaginatively rendered, are central to progress toward greater substantive gender equality and well-being.<sup>46</sup> I call this second prong the "feminist-aspirational claim." This claim rested on the assumption, which was almost never explicitly stated within feminism, that law in liberal legal regimes has within it, so to speak, the seeds of a promise of equality, no less than the more widely acknowledged seeds of a promise of ordered liberty. Although those seeds can be sometimes smothered by law's subordinating branches, and although they have never matured to become the trunk of a solid tree, and although they require obsessive and relentless tending and care, they do nevertheless *exist*.<sup>47</sup> What came to be called feminist legal theory thus generally shared

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43. For similar liberal-legal feminist accounts that argue for a stronger conception of autonomy, or for a conception of autonomy more attuned to women's needs or interests, see EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); Law, *supra* note 12; and Linda McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999).

44. See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin West, *Relational Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Cynthia Bowman & Robin West eds., Elgar Press forthcoming 2019).

45. See MACKINNON, TOWARD, *supra* note 13, at 1–81.

46. I discuss the prominence of the aspirational claim in Catharine MacKinnon's scholarship and advocacy in detail in Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385 (2005).

47. This is almost a trivially true claim regarding liberal legal feminism, which seeks an extension of legalism's liberal umbrella to include women. It is also true, though, of radical feminism. Catharine MacKinnon begins her monumental casebook, *Sex Equality*, with an exegesis of the idea of equality in the western legal academy, beginning with Aristotle. CATHARINE A. MACKINNON, *SEX EQUALITY: RAPE LAW 4–12* (2001). Although the orientation is critical, it is clearly internal criticism: the entire book, and her entire oeuvre, is committed to the legalist project of employing law in a way that helps women and other

liberal legalism's defining faith in law's redemptive potential, its compromised but nevertheless essential relation to justice, and its necessity to the achievement of any meaningful progress toward a decent life for all the world's inhabitants. Combining these claims, the feminist legal theory of those decades unabashedly had the dual mission of understanding the depth of legal complicity in the ongoing subordination of women, even in the post-civil rights era of formal equality and nondiscrimination, *and* of reversing that subordination with law and legal tools, including those that were the subject of feminist critique.

An outpouring of aspirational legal scholarship attests to the power and breadth of the feminist-aspirational conviction, which crossed all the ordinary divides within legal feminism. Radical feminists looked not only to criticize but also to *reinterpret* and then to deploy existing law—notably, constitutional law, criminal law, tort law, and civil rights law—all toward the end of aligning legalism in feminism's political and legal battle against patriarchy.<sup>48</sup> And, for very good reason. To the considerable degree to which the subordination of women has sexual violence and violation at its core, radical feminists sought to direct law—which has always had at its core a prohibition against private violence—to address sexual violence through interpretations of civil rights law to reach sexual harassment and through constant and ongoing efforts to reorient the criminal law of rape and sexual assault so as to provide women the equal protection of law guaranteed by something resembling the original meaning of the Fourteenth Amendment. This is a radical *reorientation* of liberal legalism's defining, Hobbesian commitment to battle private violence toward violence admixed with sex. Radical though it may be, it is, nevertheless, a reorientation of law that relies on law's deep and preexisting “always there” commitments against private violence, not a revolutionary displacement of it. Liberal feminists sought, in scholarship as well as amici briefs, to interpret the privacy rights recognized

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subordinated persons. *Id.*; see also Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 816 (2002).

48. For examples of the reinterpretation of constitutional law or constitutional law principles, see MacKinnon, *supra* note 38 (reinterpreting the Equal Protection Clause so as to protect women from sexual violence); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (reinterpreting Fourteenth Amendment equality principles to embrace reproductive rights); and Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) (reinterpreting the Equal Protection Clause to protect wives from marital rape). For examples of the reinterpretation of criminal law to protect women's interests, see Orit Kamir, *A Dignitarian Feminist Jurisprudence with Applications to Rape, Sexual Harassment and Honor Codes*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, *supra* note 44 (rethinking criminal law and jurisprudence under a dignitarian framework, partly to better protect women in honor societies); and Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553 (2014) (rethinking criminal law to make it more protective of women and less intrusive of violators' liberty). On feminist reconstructions of tort law, see Martha Chamallas, *Feminist Legal Theory and Tort Law*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, *supra* note 44. On feminist reconstructions of civil rights, see Littleton, *supra* note 34.

in *Roe* and *Griswold* to include rights for sexual minorities<sup>49</sup> and to extend the rights of nondiscrimination recognized in Title VII to include rights against gender-neutral employment policies with gender-specific adverse impacts.<sup>50</sup> Again, these interventions constituted a reorientation, not a displacement, of liberal legal commitments to privacy, liberty, and equal treatment. Relational and liberal feminists sought or supported in their scholarship the quest for new legislation—and eventually for the deeply compromised Family and Medical Leave Act<sup>51</sup>—that would accord greater equality for women at work through ensuring a right to some job security for women workers who face a necessary separation from employment for caregiving reasons.<sup>52</sup> This was a reorientation as well—not a displacement of liberal commitments to nondiscrimination. All of these efforts reflected a conviction that liberal legalism rests solidly on a not-to-be-ignored mandate, internal to its deep structure, to extend, reshape, modify, and, when need be, amend itself in such a way as to fairly protect women as equally as men. Further, these efforts demonstrated that the tools with which to do so exist internal to legalism. This basic faith in legalism coexisted in the formative years of feminist legal theory with the equally basic critical claim that liberal legalism had failed to do so. As such, this commitment to legalism, alongside a commitment to criticism, came to characterize and broadly define feminist legal theory. The two prongs of this grounding—critical and aspirational legalism—were in tension with each other and required the development of not just scholarship, but theory. I take them in order and then speak to the implications of their joint embrace.

The critical ambition—understanding the ways in which a liberal legal regime and its basic commitments, including commitments to nondiscrimination, reproductive freedom, and formal equality, were complicit in the ongoing subordination of women—grounded the production of a body of scholarship that differed fundamentally from the reformist impulses that had typified the bulk of doctrinal legal scholarship in the legal academy through the 1950s and 1960s. The point of it was, again, critique. Feminist scholarship sought an understanding of the ways in which liberal legalism was undermining the quest for substantive equality in spite of the considerable liberal and feminist legal victories of the 1960s and early 1970s. That, in turn, required a broadened set of academic tools, skills, and entire disciplines. It required interdisciplinary work, for one. But more fundamentally, it required scholarly tools that could pierce the legitimating

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49. See Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996).

50. See Littleton, *supra* note 34.

51. See, e.g., Cornelia T. L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941 (2007); Williams, *supra* note 12.

52. See generally Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65 (2004) (discussing and assessing reasons for liberal feminist support of a weak piece of family leave legislation, on the grounds that it may be better than nothing).

veil of formal equality and formal individualism, a veil that thickly shrouded the experiences of subordination—experiences that persisted in spite of the celebrated liberal victories of the decade prior.

The extant critical legal studies movement of the time—with its already nuanced understanding of the workings of legitimation, hegemony, and obfuscation (particularly the detailed application of these concepts to the various doctrines forbidding race discrimination in public and private law)—provided some of the tools of that quest.<sup>53</sup> As in the context of race discrimination, doctrines forbidding gender discrimination and mandating formal equality on the basis of sex can both enforce norms against treating likes differently and, at the same time, legitimate the considerable degree to which women who are most unlike men—whether because of caregiving status or burdens, or because of the sufferance of continual sexual violation—can remain in subordinate roles. Legitimation, the critics had shown, could be understood as a fundamental function, and even purpose, of even the most generous liberal laws, particularly nondiscrimination law. While targeting the unlike treatment of likes, it legitimates the continuing subordination of those made unlike by political, economic, and social forces. This can readily be shown to be true of women, no less than of racial and ethnic minorities. Even more broadly, legitimation theory, particularly as developed by the European critical theorist Antonio Gramsci,<sup>54</sup> could help explain the ways in which women's consent to coerced choices—particularly women's consent to unwanted sex, routinized and mandated caregiving, and submissive roles and ways of being—was legitimating the structures of coercion that rendered all of that consent both fully rational but nevertheless conducive to oppression rather than liberation. Consent, then, as well as the nondiscrimination norm, can be understood as legitimating continuing subordination; the critical legal scholars' development of the idea of legitimation in the context of American law unquestionably facilitated that understanding. The related idea of hegemony, also made familiar by critical legal scholars, could account for the ways in which commitments to gender as well as race blindness created a false sense of the justice of current distributions of wealth and power along gender lines and a refusal to countenance more deeply entrenched injustice. Similarly, the idea of

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53. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L.L. REV. 295 (1988).

54. On Gramsci's influence on critical legal studies, see generally Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 531–39. For early critical legal studies pieces broadly incorporating Gramscian theories of hegemony and legitimation, see Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641 (David Kairys ed., 3d ed. 1998); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 216–20 (1987); and Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32 (1982).

masking or of obfuscation, introduced into the legal lexicon by critical scholars, could go some distance toward an explication of the ways in which ballyhooed Supreme Court victories and legislative wins mask the continuing evils yet untouched by those victories.

It was not, however, solely critical theory that informed feminism's critical dimension. Although less understood, liberal political theory did as well. Liberal political theory, from Locke and Hobbes and others, provided an understanding of the necessity of the state's protection against private violence to the enjoyment of liberty and equality in liberal regimes and, hence, a deeply liberal—in fact Hobbesian—understanding of why the state's myriad failures to protect against private violence has proven to be so devastating for women, as well as for liberalism itself.<sup>55</sup> Liberalism, if we focus on the central liberal commitment to the state's monopoly on private violence, is itself incompatible with patriarchy to the considerable degree to which patriarchy depends upon private sexual violence as a pillar of its grip on power. Liberalism therefore, no less than critical theory, provides tools with which to understand this political and psychic dynamic. And finally, classical Marxism—meaning Marxism as espoused by Marx, not “neo” anything—played a pivotal role in the development of feminist legal theory. Marx's accounts of the alienation of the worker from his labor and from the value produced by that labor, as well as the commodification of that labor for sale and resale on markets controlled by the whims, desires, and greed of capitalists,<sup>56</sup> provided a compelling analogy to the accounts of the alienation of women from their sexuality and the value, including the pleasure, produced by that sexuality, as well as the commodification of that sexuality on markets controlled by the whims and desires of men.<sup>57</sup> A similar analogical account, which was never quite forthcoming in the legal literature, could be and perhaps should be mounted on the alienation of women from their reproductive labor and the products of that labor, meaning their own children.<sup>58</sup> In fact, I believe that the lack of such an account is one reason for the shortfall in feminist legal theory's ambition to understand the role of law in the complicity in women's subordination.

However, none of these tools—critical theory, liberal political theory, or Marxism—were sufficient, even if all might have been necessary, to understand the persistence of patriarchy in the face of liberal legal victories. That understanding also required “feminism unadulterated,” so to speak. One lesson, and perhaps the central lesson, of late-twentieth-century political

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55. I explore the Hobbesian dimension of radical feminism in West, *supra* note 46, at 400–07.

56. KARL MARX, *DAS KAPITAL* 123 (1867).

57. MACKINNON, *TOWARD*, *supra* note 13, at 13–36, 131.

58. MacKinnon's debt to Marx is clear in MACKINNON, *TOWARD*, *supra* note 13, at 60–80. Cynthia Bowman has argued for a reinvigoration of socialist feminism, with an eye toward its utility for feminist legal thought. Cynthia Bowman, *Socialist Feminist Legal Theory: A Plea*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE*, *supra* note 44. However, neither Bowman nor MacKinnon explore the possibility of extending to reproductive labor the analysis that MacKinnon has provided for sexual labor.



feminism is that the harms women sustain and have sustained by virtue of their unequal status across two millennia have been thoroughly privatized and, for that reason, rendered invisible to law. These harms have been blocked from view by literal and figurative walls of patriarchal privilege, modernist commitments to familial privacy, ideologies weaponizing the differences in the basic humanity of men and women, and widely shared beliefs in women's lesser capacities for reason, principled moral action, and political capacity, as well as shared beliefs in their greater propensity toward not just domesticity, but also toward submission and obsequious deference, all viewed, collectively, as central to either female maternalism or female sexuality. Liberalism, and therefore liberal legalism, in short, does not countenance these invisible harms because they have walled them off inside a domain of intimacy, ceding authority—including the authority to use force, once called “chastisement”—to male rather than state authority. Left-wing twentieth-century critical theory did not come anywhere even close to this basic truth because it could not countenance the degree to which patriarchy had been constructed by a regime in which violence itself was both sexualized and maternalized, such that what was perceived by some as sexual or maternal was experienced by others as violence. This entire dynamic is quite different from the more familiar forms of invisible oppression that were comprehensible to the male critical theorist, including the legitimating functions of consent, antidiscrimination law itself, hegemony, and the masking and obfuscation of state and private-sphere economic power. To understand inequality as an injury or a harm and to understand sexual and reproductive violence its mechanism, in the face of descriptive accounts of the world in which the injurious nature of that inequality is denied, trivialized, or gaslighted, required a form of analysis that was (and is) only available through feminism.

That way of knowing and that way of understanding, furthermore, can only be characterized, methodologically, as consciousness-raising. And, that method is itself not at all straightforward, has nowhere been adequately theorized, and is not understood academically in the slightest. But it was nevertheless, as MacKinnon claimed forty years ago, an indispensable part of feminism and therefore an indispensable part of feminist legal theory.<sup>59</sup> When victims themselves understand their own victimization as consensual, or as delusional, or as trivial, or as inconsequential, or even as oxymoronic, more than simple listening is required to even address, much less rectify, those harms. What is required is a raising of the consciousness of those perceptions as harms themselves, which is by necessity an objective assessment and a crediting of the authenticity of long-denied subjective experience. It is not simply having an open mind. It is paying heed to women's accounts of their own lesser lives and mapping those interior lines of reduced significance, perception, and experience. It is then judging those accounts against an admixture of idealism, comparative value, and phenomenological awareness.

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59. MACKINNON, TOWARD, *supra* note 13, at 83–105.

To unearth an awareness of the facticity, significance, seriousness, and impact of sexual and reproductive injuries that have been objectively denied and trivialized is indeed to re-form consciousness, including legal consciousness. Therefore it is not at all surprising, in retrospect, that feminist legal theorists in those decades, and to some degree continuing through to today, relied so heavily on women's accounts of their own experiences, including their own, to heighten understanding of any analysis that surrounded it. Susan Estrich,<sup>60</sup> Lynne Henderson,<sup>61</sup> Susan Brison,<sup>62</sup> Michelle Anderson,<sup>63</sup> this author,<sup>64</sup> and scores of others wrote of their own experiences of sexual assault, in part to connect with readers who had similar and unacknowledged experiences, in part to heighten understanding, in part to trigger empathy, and in part to underscore the sexuality of the violence as well as the violence at the heart of the act of rape. Others wrote of sexual harassment at work or sexual assault on the street to underscore the frequency of these events and therefore their constitutive nature—the ways in which they operate not as disruptive events in the otherwise placid lives of women, but as defining events that, for many, constitute womanhood or girlhood.<sup>65</sup> Others wrote similar narrative accounts, whether journalistic, memoir-styled, or fictitious, to convey the seriousness and ubiquity of domestic violence—violence that escapes notice by states, in part because truly and seriously violent events are widely understood to be occasional or exceptional disruptions of the king's peace as well as that of his subjects, and not defining events that demarcate an arena of delegated authority.<sup>66</sup> To convey domestic violence as a political reality that serves that function—to demarcate an arena of delegated authority—requires conveying its frequency conjoined with its severity, and in an era when these violations are shrouded in privacy, that in turn requires anecdotal recordation. This writing filled a middle premise for both liberal-feminist and radical-feminist arguments. For liberals and liberal feminists, the point was to establish the injury, which could then be addressed with liberal tools of the state. For radical feminists, the point was to establish the subordinating impact of those injuries, which required a radical realignment of both law and politics. For both, however, “feminism unadulterated” provided the phenomenological grounding.

All of that taken collectively constituted feminism's critical wing. Now I turn to feminist legal theory's aspirational-legalist commitments. The aspirational commitment of the feminist legal theory of those decades required a very different set of conceptual tools, which were often in direct opposition to those required by its critical commitments. It required a clear

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60. See SUSAN ESTRICH, *REAL RAPE* 1–7 (1987).

61. Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127, 127 (1992).

62. See generally SUSAN BRISON, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* (2002).

63. See generally Michelle J. Anderson, *Negotiating Sex*, 78 *S. CAL. L. REV.* 1401 (2005).

64. See generally West, *supra* note 35.

65. Cynthia Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 *HARV. L. REV.* 517, 522–34 (1993).

66. For a modern example, see Murray, *supra* note 10.

understanding of law's redemptive potential, in the face of its massively subordinating capacity. Criticism, by contrast, required a clear understanding of law's subordinating and oppressive potential in the face of its seeming liberality. The aspirational dimension of feminist legal theory required, in short, a commitment to the ideals not only of liberalism but also of *legalism*, with the latter understood not only as a vocabulary, tool kit, or propensity toward rule governance, but also as a set of ideals, a way of viewing the world, and a way of embracing the institutional past of the nation as one's own. As a number of legal theorists have argued, albeit in very different ways and toward different ends, legalism professes what is best understood as a Burkean kind of conservatism: a belief in the value of that which has been decided, a commitment to honoring the decisions of decades-long and sometimes centuries-long vintage, and a willingness to align oneself with those legal decisions and decision makers in a chain of shared professionalism, with shared professional commitments.<sup>67</sup> In its feminist mode, then, it requires a generous appraisal of the capacity of legalism's guardians to recognize women—cis, trans, children, and raced individuals—to understand law as existing for them and for their protection, and not only for the whims or needs of dominant groups to oppress. It requires starry-eyed appreciation of law's capacity for nobility, as well as clear-eyed appreciation of its turns through the centuries toward mendacity. More than recognition or appreciation, it requires a participatory stance in law's evolution, and so it requires the faith in legal institutions that participation in them presupposes: that the paths and subpaths of law's evolution that point toward enhanced democratization of its protective umbrella can collectively point toward justice, such that it is worth the effort expended in doing some of the clearing required for those paths to be visible, much less trodden.

The capacity and willingness to hold onto both the critical and aspirational commitments described above defined the feminist legal theory of the last quarter of the last century. In feminist terms, this meant holding the simultaneous beliefs that legalism was a long-standing support of patriarchy (for centuries it had served to legitimate and obfuscate its oppressive qualities, facilitate the alienation of female sexuality, protect a cultural sphere of subservience and consensual submission, and wall off its violence within a familial sphere) while also holding the belief that legalism was grounded in ideals (the liberation of the individual from fears of private violence and violation, as well as the equality and individuation that liberation generates) that are antithetical to the patriarchal regimes it buttressed. It meant holding a willful double consciousness toward legalism's virtues and legalism's malignancy, embracing its double-sidedness, and acknowledging its conflicted stance toward the centers of power—some benign, some malignant—that challenge its hegemony. It required, distinctively, a recognition that the contradictory impulses toward liberation and oppression, with respect to gender itself, lies in law and not in ourselves or in our culture.

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67. See, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

## II. FEMINIST LEGAL THEORY, FEMINIST JURISPRUDENCE, AND NORMATIVE LEGAL SCHOLARSHIP

Feminist jurisprudence—largely understood as a body of legal scholarship dedicated to understanding issues of relevance to the law’s treatment of gender and sexuality—is thriving. Feminist legal theory, however—a body of theoretical scholarship committed to jointly understanding the role of law in the continuing subordination of women and the use of law as a tool with which to combat that subordination—is not. It reached an apex in the early 1990s, and it has been in retreat since then. It is worth exploring why. Some reasons have to do with turns taken within academic feminism and feminist activism. Some have to do, however, with turns taken in law schools, in legal scholarship, and in the overall nature of the legal academy’s posture toward law as an object of study.

Within feminist jurisprudence and within academic feminism, a number of forces have converged to sideline theory. Foremost is the postmodern turn that swept the humanities, and then law, in the 1990s and 2000s, which has evinced a skepticism toward large interpretive claims (among much else), including both liberal and radical feminism’s large interpretive claims about the nature of patriarchy, women, male dominance, power, sexuality, and law.<sup>68</sup> Claims central to radical feminism regarding the omnipresence of false consciousness—particularly the claim that women’s capacity to render self-regarding consent is compromised by internalized patriarchal conceptions of female nature—and its embrace of methods that require some measure of consciousness-raising for gaining both greater self-regard and awareness, and hence knowledge, were the most vulnerable to postmodern critique. This vulnerability to criticism stemmed particularly from their overt reliance on objective understandings of women’s true nature and interests, against which extant consciousness can be adjudged false, and a better consciousness adjudged as higher. Thus, skeptical claims regarding the value of women’s consensual choices, central to any number of radical-feminist arguments, became the subject of postmodern and skeptical analysis as the basis for the comparative judgments was rendered suspect. A regard for a reconstituted liberalism, and hence liberal feminism, converged with postmodernism to cast campaigns against pornography and sex work, as well as, to a lesser degree, sexual harassment, in some doubt within feminism. The postmodern turn was also bolstered within feminism by the emergence of intersectional feminism, or critical race feminism, which sought to

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68. Internal, postmodern critiques of feminist legal theory that suggest related themes include, for example, JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 3–41 (2006); Laura A. Rosenbury, *Channeling Mary Joe Frug*, 50 *NEW ENG. L. REV.* 305 (2016); and Laura A. Rosenbury, *Postmodern Feminist Legal Theory*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE*, *supra* note 44. For a critical response to Halley’s invocation of the postmodern turn, see Marc Spindelman, *Sex Equality Panic*, 13 *COLUM. J. GENDER & L.* 1 (2004), and see generally J. JACK HALBERSTAM, *GAGA FEMINISM: SEX, GENDER, AND THE EDGE OF NORMAL* (2012), which explores how sexual politics has upended traditional feminism by in part questioning and decentering the concept of womanhood, as well as the female body.

decenter the experiences of white women as the prototype for understanding patriarchy and for guiding feminist reform.<sup>69</sup> Intersectional feminism is in no way dependent upon postmodernism. Nevertheless, they overlap strategically at various points. They counsel a more pragmatic and less dogmatic stance toward claims regarding women's nature and the evidentiary bases for such claims, when that evidence itself consists of truths ostensibly borne of women's experience but in fact unduly reliant upon the experience of white or otherwise privileged women.

Second, feminists quite famously split in the 1980s on a host of pressing political issues, including, prominently, the wisdom of legislating against pornography. Liberal, pro-sex, and postmodern feminists sided with nonfeminist liberals over the dangers of legislating against pornography, echoing old liberal worries over anti-obscenity statutes.<sup>70</sup> For similar reasons, the same coalition later sided again with liberals over the dangers of criminalizing prostitution and the value for sex workers in legalization strategies. Radical feminists, by contrast, advocated an active role for the state in prohibiting the alienation and sale of female sexuality in both realms. Behind both divisions lay considerably more than merely strategic divergence. For radicals, the production and then acquisition of female sexual labor was perceived to be the point of women's subordination as well as the means by which it is achieved.<sup>71</sup> For liberals, the suppression of sexuality of both genders by puritanical or religious conceptions of the role of sexuality was a greater danger to women than the production of sex for male consumption.<sup>72</sup> And, for liberal, pro-sex, and postmodern feminists, sexuality itself was a vehicle for personal liberation, not for large-scale subordination.<sup>73</sup> Conflicting views of sex—sex as subordination and sex as liberation—is as close to a contradiction as one can imagine; there is and was no papering over its significance.<sup>74</sup>

Third, radical and liberal feminists split on the wisdom of pursuing strategies to combat sexual violence that were (and still are) dependent upon use of the criminal justice system. Rape, domestic violence, stalking, and sexual assault are all underenforced crimes, and women have suffered the consequences of that underenforcement. Enforcing them, however, means increasing the number of incarcerated citizens, with all the attendant harms associated with our current criminal justice system. This may well decrease the amount of sexual violence suffered by women, but it will also feed the crisis of overincarceration.<sup>75</sup> Consequently, some feminists are pursuing strategies for lowering rates of sexual violence through nonincarceral

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69. See, e.g., Dorothy E. Roberts, *Critical Race Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, *supra* note 44.

70. For a discussion of both sides, see generally Nan D. Hunter, *Feminism, Sexuality and the Law*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, *supra* note 44.

71. MACKINNON, FEMINIST THEORY OF THE STATE, *supra* note 13, at 247–48.

72. For a full discussion, see Hunter, *supra* note 70.

73. See generally HALLEY, *supra* note 68.

74. See, e.g., Hunter, *supra* note 70; Roberts, *supra* note 69.

75. See McLeod, *supra* note 48, at 1554–66.

means.<sup>76</sup> Others, particularly sex-positive and postmodern feminists, are raising doubts about the ubiquity of sexual assault.<sup>77</sup> The debate implicates differing views of the state and the wisdom of relying on the state's punitive arm, but it also involves differing views of sex, violence, and sexual violence.

Fourth, the demise of feminist legal theory also tracks the demise of a number of related theoretical movements within the legal academy, including most prominently the demise of critical legal theory itself. Feminist legal theory in its critical and descriptive mode made startling, descriptive, and largely interpretive claims about law, patriarchy, feminism, and the nature of equality, women, moral reasoning, the role of reproduction and biology in women's lives, and ultimately the fluidity of gender and sexuality. Some of these claims were structural, some were starkly essentialist, and some were large, metahistorical claims spanning centuries. As noted above, most of these large theoretical claims have been largely problematized, if not discredited, by the turn to postmodernism and pragmatism within feminism, as well as within the legal academy generally. Claims establishing sexuality as the linchpin of gender subordination, but also claims regarding structural impediments to female advancement, claims regarding any sort of biological difference between men and women that would require accommodation of the latter rather than assimilation, claims regarding any sort of institutional rather than individualized account of the nature of the subordination women face, or claims regarding women's nature of any sort, including claims drawn from feminist psychology and moral philosophy from the 1970s regarding women's ways of speaking, knowing, thinking, feeling, and moralizing, have all been rendered problematic, not only because they face dissension from within feminism, but also because they partake in a structuralist or simply a general method for understanding the world historic subordination of the female sex.<sup>78</sup> Grand historic, anthropological, biological, or certainly bioevolutionary claims about women's situation, nature, or political subordination are problematic in an academic culture that increasingly prizes particularism, microhistorical narratives, and highly individuated, quantified, or contextualized empirical claims.

There is an additional reason, however, for the demise or decline of feminist legal theory. Feminist legal theory of the 1980s and 1990s was virtually, by definition, committed to the decidedly normative project of understanding what justice requires of law and then in participating in its reconstruction toward that goal. In its basic logic, and more particularly in its normativity, it was utterly conventional, thoroughly legalistic, and entirely professional. The logic of its aspirational and normative side was, simply and starkly, that "the law is X, and it ought to be Y." It was, in other words, for all its radicalism, feminism, Marxism, and structuralism—for all its

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76. *See id.* at 1600–05.

77. *See generally* Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 182 (Catherine A. MacKinnon & Reva B. Seigel eds., 2003).

78. For a strong argument to this effect, see Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1989).

theoretical sophistication—deeply, thoroughly, and *completely* legalist in its most basic logic. “The law is X but it ought to be Y” was the universal, constant refrain. It is important to stress that for decades, and particularly for the formative decades (mid-to-late twentieth century), of what is now called the scholarly mission of the legal academy, this was *also* the skeletal form of almost all legal scholarship. *Most* legal scholarship throughout the last century, in fact, generally urged some degree of difference between existing law and its ideal, and it then argued for some measure of reform that would bring the former in alignment with the latter. Feminist legal scholarship was entirely in line with this overriding normative logic.<sup>79</sup>

Feminist legal theory was an example, and in many ways a prime example, of what I call elsewhere “normative jurisprudence”:<sup>80</sup> legal scholarship that aims to understand not only law but also justice and to advance arguments regarding both the ways in which law can be changed so as to be more just and ways in which existing law can be deployed to make the world more just. The defining ideal of this kind of writing, as is true of the law that is its subject, is *justice*. Normative jurisprudential scholarship aims for justice, in a way that contrasts, rather than compares, with the way that scholarship in other parts of the academy aims for truth. Some of that normative legal scholarship is “strictly doctrinal,” which simply means that the major premises of arguments are drawn from earlier cases and the method of argument is recognizably legal or adjudicative. Some is theoretical, meaning that the major premises are drawn from political, legal, or moral theory. Some is interdisciplinary, meaning that the means of argument and some premises might be drawn from economics, sociology, or one of the humanities. But for all of normative legal scholarship, which is to say the vast majority of the writing produced by legal scholars in law schools, and all of feminist jurisprudence, the goal of the scholarship is better law, as measured by a yardstick of justice, whether spoken or unspoken, defined or undefined. Whether the subject of the piece of legal scholarship is a traffic ordinance or a constitution, the ideal toward which normative legal scholarship aims is good law, the point of which is a just community.

Normative legal scholarship distinctively combines critique of existing law with aspirational claims about the law’s potential to deliver justice, if the suggested reform or reinterpretation is accepted. Feminist legal theory from the 1980s and 1990s was a particularly deep example of both prongs. The critical claim was both deep and broad: that law perpetuates patriarchy and has done so for centuries, across the globe, and in all aspects of life. But so was the aspirational claim, which advanced the idea that law, meaning ordinary law and not only human rights law, moral law, natural law, or constitutional law, can end it. Both definitional prongs of normative legal scholarship—the critical side and the aspirational—are regarded today with considerable suspicion within and outside the legal academy.

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79. For a full discussion and defense, see ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* (2011).

80. *See generally id.*

Knowledgeable critics of legal scholarship from other parts of the academy, including prominently and most recently Stanley Fish, attack its aspirational dimension.<sup>81</sup> Scholarship that aims for justice rather than truth is just not scholarship, and legal writers that participate in law's creation or re-creation rather than studying it are not scholars. Scholars within the legal academy, including prominently Paul Kahn,<sup>82</sup> are also growing increasingly skeptical. Those trained in other disciplines find normative legal scholarship to be singularly unscholarly because it is undisciplined by the standards of the university's nonlegal disciplines. For this sizeable and growing group, law scholars should approach the law as the subject matter of scholarship defined by reference to some other discipline's norms, practices, and methods. So long as producing normative scholarship—that which aims to improve the law or push law to be the best it can be, or, more simply as I have defined it, scholarship of the form “the law is X but it ought to be Y”—is understood as a part of the law schools' mission and as part of a faculty member's obligation, critiques of normative scholarship put that mission and that understanding of a faculty member's scholarly obligation under a cloud. Feminist legal theory has been in retreat, in part, simply because it is an example of normative jurisprudence and normative jurisprudence is itself in a defensive crouch.

Feminist legal theory of the 1980s and 1990s was a prime example of normative jurisprudence: it was critical, aspirational, and thoroughly legalistic. In sum, it was truly and profoundly critical. All strands, but particularly radical feminism, incorporated tools and insights from critical theory, including legitimation theory, hegemony, and skepticism regarding the public-private divide, to explain the continuing subordination of women in the post-civil rights era. Second, it was distinctively aspirational: all strands propounded visions of community that integrates and includes all. And third, it was consistently both legal and legalistic in method and basic orientation toward law: it urged reforms that drew from existing law and existing legal ideals and employed methods of change that were constitutive of legalism's deepest conservative impulses. Thus, I conclude that feminist legal theory is embattled today, in part, not solely because of postmodernism, sex positivism, or antifeminist fervor, but simply because it is exemplary of a kind of normative legal scholarship that is itself under sustained attack from within and outside the legal academy.

#### CONCLUSION

Whatever might be said of postmodernism, pro-sex politics, or antifeminist animus, this attack on normative legal scholarship is misguided. This kind of intellectual work, which has emanated from and been produced by the legal academy for well over a century now, is of great social value. It is a kind of scholarship about law that will come, and has only come, from the

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81. *See generally* STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008).

82. *See generally* PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999).



legal academy. Other parts of the academy will not produce it. Scholarship from the social sciences and the humanities is not directed toward justice, it is directed toward truth, as well it should be, even when its subject matter is law. More simply, it is aimed at understanding the nature of law using methods drawn from elsewhere; it is not aimed at making law the best it can be. Other parts of the legal profession likewise will not produce it: lawyers do not have the disinterested objectivity or the time that academics have. The bench will not produce it: judges are professionally committed to deciding cases as they arise.

The successes of feminist legal theory in the 1980s and 1990s, I believe, exemplify the value of normative legal scholarship across the board. It generated enormous and, to date, sustained and widely acknowledged social value. The path toward the Family and Medical Leave Act, as well as the Violence Against Women Act, to take just two examples, would have been considerably more torturous without it. The Me Too movement would not be part of our contemporary landscape had feminist legal theory not found a home in the academy and at Yale Law School most particularly. “Something was not right,” to echo Madeline’s beloved Sister Clavel, with the legal academy’s attempt to assimilate women into the law schools as students and then as faculty in the 1970s and 1980s. Something is still not right. As noted above, those battles persist. But something was *very* right with the understanding of legal scholarship, and particularly of normative legal scholarship, that characterized the last three decades of the past century. The consensus that this form of scholarship was both valuable and unique to law schools was widely shared. It also clearly facilitated the production of feminist legal theory and, likewise, of much feminist jurisprudence.

#### APPENDIX: TRANSCRIPT\*

JUDGE GUIDO CALABRESI: I am, myself, totally committed to normative legal scholarship. I don’t understand what legal scholarship is if it isn’t normative, based on trying to achieve some kind of justice. I do think that often scholars get confused between what is our job as scholars and then what happens in the world quickly. My own view is that scholars can look in dark places, see what is going on, say what is wrong, and talk about how it should be righted. And then the world ignores you, but in the long run the world will buy what we are saying or some parts of it, but only slowly. In time we change things, and things are accepted in the world.

My question with respect to many of the different movements going on is what is it that is wanted in terms of equality. We can give equality to a previously subordinated group if it is willing to act like us, the previously dominant group. That is equality we give you quickly and it may be worthwhile if you had been treated badly enough and you care enough about

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\* This discussion followed the author’s presentation of this Article at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 FORDHAM L. REV. 859 (2018).

getting equality quickly. This is what many minorities, especially immigrant groups, have asked for.

An alternative demand is “just leave us alone, don’t do anything for us; let us be ourselves, we want to make our own values, just leave us alone.” Equality for that comes much less quickly because it is much easier for the previously dominant group to offer equality if you behave like us.

For me, the history of the feminist movement has been a deep division between these two points of view. Some women have said, “we are willing to act like men, work twenty-three hours a day, accept the sexual stereotypes of men.” Other feminists have said, “no, perhaps a new standard for everybody, perhaps a separate standard for us in different positions, but we don’t need to and don’t want to accept that which was the male stereotype.”

PROFESSOR ROBIN WEST: I don’t think the whole story is one of these two divisions with everyone both clamoring for equality and thinking through how best to get there because I’m not sure you can make sense of feminism that way. You cannot make sense of where we go solely by anybody’s theory of equality. What is most interesting about some strands of feminism is the aspirational side of it—looking for ways to make the world better for everyone, but not easily captured in terms of equality. You have to rethink what it means to be a relational human being. You have to rethink what it means to be a sexual human being. You have to rethink what it means to work and to affect the world in fundamental ways. The claim is that if you do this in ways that respect women’s equality of worth and dignity, then you’ll get to different answers than the world has produced so far. Feminism is not adequately captured in the two versions of equality; within feminism there is yet another view of what this is all about and that’s really refashioning the world.

PROFESSOR WILLIAM NELSON: I find enormously helpful your distinction between scholarship that is written to seek justice and scholarship that is written to seek truth. Both sorts of scholars belong in law schools. And I think it makes perfect sense since justice has not been attained over the past fifty years to address the truth question about why not. I have a theory about why justice hasn’t happened—that efforts to make it happen were too court-centered. It was a bunch of law professors writing. Feminist theory is much more about legislation than other bodies of reform scholarship, but it was still court-centered. My sense is that most of the issues feminism faces are outside the institutional competence of courts, sometimes even outside the competence of legislative bodies. What is needed, and a lot of feminist scholarship tried to do it but it was hard, is consciousness-raising. People have to change their way of looking at life and at the world. And that’s something that people who teach in law schools probably aren’t terribly effective at writing about and might be something that has to come from elsewhere.

PROFESSOR WEST: First of all, on Guido’s point about the world ignoring scholarship, that’s a lovely, quite romantic vision. Note how at odds it is with the recent way we are judging merit by reference to downloads and

impact statements. As to the move toward interdisciplinarity, I'm not sure one can explain the phenomenon entirely by the fact that efforts for justice were unsuccessful.

PROFESSOR NELSON: I'm not saying entirely, in part.

PROFESSOR WEST: In part, yeah. On the legislation point, you're preaching to the converted. I've been pushing this for thirty years. I think most feminist efforts have been much more explicitly political in the traditional sense of targeting legislation than other sorts of reform movements, which have been about "let's reinterpret this or that line of precedent." On the consciousness-raising stuff, it's an indispensable.

PROFESSOR DANIEL COQUILLETTE: Your analysis was very helpful in the trend here that goes through all of this meeting in terms of the search for truth as opposed to the search for justice. First of all, I love this thing about downloads. When I make a remark about federal practice, I get a huge number of downloads and letters saying "congratulations," and I haven't had an original thought in years. But I have lots of downloads. One of the big problems in writing a major history, like the Harvard Law School history, is that there is more to describing an institution than just what happened. We have to at some point make a moral, a social justice evaluation. Was it good or bad? And that, in turn, means referring to the standards that we have, say, to what Roscoe Pound was doing in the 1930s. So, there is this tension. On the one hand we want to be telling the truth, we want to be doing research that establishes the truth. On the other hand, that's not enough; we've got to, at some point, allow our own normative instincts to come out. How would you advise us?

PROFESSOR WEST: This is the dilemma we've all heard over and over again in our meetings. Historians come in and try to explain the truth of the matter, and someone asks, "So, what? What is your normative judgment about all that?" What you've just expressed, I think, is a deeply felt conviction in law schools that this is the business we are in—making normative judgments. The project of law is an intrinsically normative business. There is absolutely no question in my mind that the more legal historians, economists, philosophers I can recruit to Georgetown the better. This is a pitch for pluralism. But we can't give up the core of normative reasoning in scholarship because that's where it happens on behalf of justice. That's what the distinctive function of the legal academy is. If we give it up, it's not coming from anywhere else.

PROFESSOR KENNETH MACK: I want to ask about women in law schools today. What does feminist legal theory have to say? At least at Harvard, women get lower grades than men. You count up the *magnas* every year—very disproportionately men. Second, the number of women professors is shockingly low. Women law students have been close to 50 percent for probably close to twenty years, but not faculty. There are all these movements for diversity, all these critiques of the racial aspects of law schools, but in terms of gender the critiques are not as strong. Why not? What does feminist legal theory have to say?

PROFESSOR WEST: I feel this personally because my daughter is starting law school, and all her first-year teachers are men, except for the legal writing person. Pressure for change will come from students. Something is not right in law schools. Maybe it has to do with who is getting called on and how they respond when called on. You can come up with all sorts of ideas, including what a real feminist law school would look like and why it would be better for men as well as women. A big chunk of what is accounting for the performance gap is the substance of the law itself.