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## Women, Feminism, Gender, and Law in Political Science: Ruminations of a Feminist Academic

Sally J. Kenney

**ABSTRACT.** Research on women and the law within the discipline of Political Science has advanced from inserting women into conventional legal paradigms, to attacking law itself as male, to understanding law as gendered. Obstacles within the discipline, however, hinder scholars in incorporating the latest and most sophisticated work in feminist theory. Understanding the conditions of the production of knowledge within our discipline leads to an accounting of the most frequent problems: appropriating a conservative reading of the work of Carol Gilligan or importing a circumscribed version of the insights of Catharine MacKinnon. After diagnosing some problems with scholarship in our subfield and accounting for improvement that occurs, I offer some tentative suggestions for improvement. [Article copies available from The Haworth Document Delivery Service: 1-800-342-9678.]

### INTRODUCTION

The proliferation of feminist legal journals<sup>1</sup> and the number of articles on gender in mainstream elite law journals demonstrate that feminist legal scholars have clearly launched the field of legal feminism within law schools, even though they have not yet arrived at their destination (MacKinnon 1991; Minow 1987; West 1988).<sup>2</sup> Trends favoring interdisciplin-

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ary work have improved their scholarship. Many legal academics now affirmatively encourage forays into literature, social science, and even music. We political scientists in the subfield of public law have been slower to incorporate developments in feminist theory. This essay characterizes the changes in how we have theorized women, gender, and feminism in our subfield and offers a number of suggestions and critiques. These reflections attempt to articulate the uneasiness those well versed in feminist theory feel about work in our subfield and to encourage change. I also aim to explore why political science as a discipline fails to provide fertile ground for feminist theorizing. Even those political scientists who read feminist theory appropriate it or limit its application so that the revolutionary implications of feminist theory for political science are lost. The questions I raise about the politics of the production of knowledge may be instructive to feminist scholars in other disciplines who experience similar uneasiness when they see their disciplines incorporating feminist insights. Finally, as my mother's daughter and a "glass is half full" kind of feminist, I remain optimistic that once the conditions of sterility in our discipline are exposed, we can understand and address them.

My perspective reflects my training, research, and teaching interests as a nonlawyer, recently-tenured associate professor. On the continuum in our subfield, I am closer to the public law than to the judicial process end of the spectrum. Because I hold a joint appointment in women's studies and political science, I think often about how to bridge the gulf I encounter between the two, and I also benefit from opportunities for interdisciplinary connections. Since my research compares U.S., British, and European Community sex discrimination law,<sup>3</sup> I share the comparativist's fervent belief that a comparative approach enhances our capacity to think critically about our own problems and practices. Recent writings on the exclusionary nature of canons combined with my ability to claim expertise in only part of the burgeoning literature on feminist legal thought, however, counsels modesty in anyone who attempts to pronounce definitively on a topic as broad as the intersection of women and the law in political science and feminist theory. The politics of our times demand not only intellectual caution, but critical self-reflection on my own role in producing, shaping, and fixing that canon.<sup>4</sup> I am increasingly disturbed by the narrow and distorted visions of feminist theory some scholars import into political science, troubled by gate-keeping that disfavors the most theoretically sophisticated work on gender while rewarding the less progressive, and unhappy about how even the least radical work is marginalized and ignored. Although the same process occurs in other disciplines, I am envious of colleagues whose disciplines provide a more congenial home for theo-

rizing gender.<sup>5</sup> Unless we political scientists change course, our subfield and discipline will repeat the mistakes of our predecessors in other disciplines, bolstering narrow conceptions of the political while simultaneously excluding important perspectives of subgroups of women, including women of color and lesbians, rather than opening the discipline.

Despite my concern that political science remains resistant to feminist questions, a growing body of work suggests that feminist theory is slowly transforming the subfield. In the intersection of political theory and public law, feminist scholars have explored gender, justice, and equality (Baer 1991, 1991a; Z. Eisenstein 1988; Okin 1989; Pateman 1988; Wolgast 1980; Young 1990). Those in judicial process have deployed sex as a variable to analyze sex discrimination cases and the impact of women judges and lawyers on legal decision making (Cook 1988; Gruhl, Spohn, and Welch 1981; Martin 1987, 1989, 1990a, 1991, 1991a, O'Connor and Segal 1990; O'Connor and Epstein 1983). Those in law and public policy have written on parental leave, comparable worth (Kahn and Meehan 1992; Nelson and Evans 1989), abortion (Peichesky 1990), childcare, pregnancy (Z. Eisenstein 1988), and the feminist interest groups and feminism as a social movement, more generally (McGlen and O'Connor 1995; Mezey 1992). Specialists in constitutional law have assessed the significance of the changes in constitutional interpretation on feminist issues (Goldstein 1988) and analyzed the causes of our failure to ratify an Equal Rights Amendment (Berry 1986; Boles 1979; Mansbridge 1986; Matthews and DeHart 1990). Comparativists address a complex series of questions such as what legal compromises on abortion are most stable (Schepete 1993) and what determines feminists' ability to effectively harness the legal system and rights discourse to achieve their objectives (Provine 1992). Others have examined U.S. feminists' ability to use the law for social change (Baer 1978; O'Connor 1980). Those with "Law and Society" leanings explore gender and criminal law, alternative dispute resolution (Harrington 1989), divorce and custody (Mather 1992), juries, and the like.<sup>6</sup>

#### APPROACHES TO THE TOPIC

Although we in the subfield self-identity as working on women and the law, I would distinguish studying women, doing feminist scholarship, and exploring gender. Many critical essays have demonstrated that political scientists regularly exclude any discussion of women at all from their work. Consequently, simply adding women is a dramatic improvement.

Yet, merely adding women to existing paradigms advances our understanding only so far (Tronto 1992). It is possible to distinguish between men and women while analyzing the political in ways that naturalize gender differences, essentialize women as a category, blame women for perceived political deficiencies, and legitimate the existing order. A feminist approach to women and the law would acknowledge that women are not merely different from men, but oppressed by them. Moreover, such an approach would examine how law both contributes to that process and may be used to undermine it. Finally, a gender analysis would recognize gender to be socially constructed. One could examine the construction of gender—in the socialization of soldiers or the formation of concepts such as the state—without necessarily focusing on women exclusively as subjects. In fact, theorizing about gender in fields most vociferously declared gender neutral, whether they be science, economics, or international relations, (Enloe 1989; Grant and Newland, 1991; Halliday 1991; Peterson 1992; Walker 1992) and thereby problematizing the erasure of women as subjects, may be the most revolutionary of the three approaches (Brown 1988; Butler and Scott 1992; Scott 1988) provided we avoid the pitfall of forgetting about women as subjects altogether (Modleski 1991).

These different approaches have evolved over the past two decades. British sociologist Carol Smart writes about three distinct phases of feminist legal scholarship which parallel developments in the subfield of women and law in political science. Feminist theorists across disciplines agree that women are oppressed, that oppression is wrong and can be changed, and that gender is socially constructed. Beyond sharing an interest in a common set of questions, most feminist theorists accept as a matter of epistemology that feminist theory starts from women's experience. They disagree about whether women share a common experience or standpoint, how to explain ideological differences among women (e.g. non- or anti-feminist women), and the extent to which gender, race, class, and sexual orientation are mutually constituting categories of oppression. Despite these differences, all feminists would agree that placing women at the center of analysis exposes women's exclusion from legal categories and legal life.

Smart labels the first phase of feminist interaction with the law "Law is Sexist" (Smart 1991). This position, associated with liberal feminism, parallels what Sandra Harding calls feminist empiricism (Harding 1986). This approach denounces exclusion and bias without fundamentally challenging aspirations to objectivity and neutrality or legal hierarchy. It fits women into the existing paradigm without theorizing the significance of their absence.<sup>7</sup> This position assumes that the system can be made fair by

opening the doors to women, by passing laws to include women and to prohibit differential treatment, and by educating those who manifest "gender bias." Demonstrating that judges did not view women as persons (Sachs and Wilson 1978), recounting women's exclusion from juries (Mahoney 1987), and exposing "judicial bias" (Iowa Report 1993; Schafran 1987) are certainly illuminating (and downright shocking for undergraduates steeped in the rhetoric of the "post-feminist era"), but even more importantly, this first moment of critique forms the basis of the more radical position that evolved from it (Z. Eisenstein 1981).

As I continually remind my students in feminist theory—whose immersion in contemporary feminist theory leads them often to be harshly critical and dismissive of early feminist theorists—the "law as sexist" position was neither primitive nor misguided. Instead, it reflected the conditions of work of the times, represented a radical departure from conventional paradigms, was undertaken at considerable risk to the authors, and resulted from engagement with feminist politics of the times. Beverly Cook expresses these ideas eloquently in her review of this piece:

Since I would locate myself in the primitive stage of "studying women," I was relieved that the author did not criticize this kind of scholarship too harshly. As the author points out, "feminist theory starts from women's experience," and my generation of women in public law had a very different experience in graduate school, in university departments, in APSA, and in relation to grant-giving institutions than the author's generation. The living generations of women in public law include the youngest (graduate students), the author's (non-tenured [at the time of submission]), the middle (new tenured), the established (full professors) and the oldest (retired but writing). The oldest generation worked without the theoretical frameworks which appeared and are contested in the 1980s and 1990s. We also worked in grimly sexist environments and took considerable risks in publishing simple percentages and locations of women in law and politics. The situations within which "women and law" scholarship has been produced have been very different for each generation, and, of course, the earlier generations created the situations in which the succeeding generations work. Our eyes have opened slowly to facts and to theories, and our consciousness of our own situation in academia and of law women's situations in public and private law work had to come before we could write and professionalize others. Perhaps women's studies are paradigmatically inductive in creating theory. This essay is also about women in the sub-field as politicians (strategists) within the scholarly domain. The

generation that produced and disseminated facts and women's place were also engaged in politics, as well as scholarship. I think most of us have been very conscious of this second role. I have been part of an atypical triangle (not an iron one) among scholars, reporters, and officeholders, providing my data to reporters (Ellen Goodman and NYT columnists on law), who in turn use it in their writing with the direct intent of influencing decision makers. Male political scientists (particularly in the party and foreign affairs subfields) have always belonged to such triangles. The interdisciplinary networks are vital for our thinking and for our psychological sustenance, but the practical political networks are also necessary if our work is to effect change. I would see the three stages of women and law scholarship not as a chain or as "progress" but as a pyramid, with the factual basis continually requiring reexploration. The "facts" continue to be useful in real politics, more so than the Foucaultian theorizing that is difficult to translate for newspaper readers or for elected officials.

Smart labels the second phase of incorporating feminist theory into legal scholarship "Law is Male." This body of work attacks the foundations of law and liberal epistemology and is associated with radical feminist theories and critical theory.<sup>8</sup> The bias and the sexism in the law this approach identifies cannot be easily remedied if, as the "law is male" approach contends, the very purpose of law is to legitimate power and domination and to effectively maintain women's subordination by making legal categories appear neutral, natural, inevitable, and therefore reasonable. In other words, this approach sees law as a tool of patriarchy. This body of scholarship exposes not only how women are the victims of discrimination, but also how notions of equality and discrimination contain within them a male norm or comparator. For example, Catharine Mackinnon illustrates how the law on rape incorporates the male point of view (Mackinnon 1983). A man may feel that a woman consented to sex by "asking for it" while the woman experienced the sexual encounter as coerced. The way the law determines consent, the element distinguishing rape from "normal sex," and the way it decides whose account is credible will determine whose experience the law validates (Bumiller 1987, 1987a). Susan Estrich argues that the way rape law is written, interpreted, and enforced privileges men's view of social and sexual relations over women's. In other words, the law incorporates, validates, and enforces men's view of the world (Estrich 1987).

The "Law is Male" approach offers a powerful critique of discrimination law. Under current law, women filing discrimination suits must be able to compare their situation with men's: they must argue that an em-

ployer treated them less favorably than male employees. For example, if an employer promotes men on the basis of their billable hours and for generating lucrative contracts but denies promotion to a woman who met this standard because she uses profanity and does not wear makeup or jewelry, she has a good claim of sex discrimination (Chamallas 1990). Under the comparative approach, women win rights and privileges only when they can draw parallels between their circumstances and those of male workers. Women gain pregnancy leave, for example, by comparing themselves to disabled men. They gain access and accommodation in the workplace only to the extent that they can conform to a male norm. Men are the baseline for comparison (Minow 1987). This vision of equality fails to ask a crucial question. Why is it justifiable to exclude from the workplace or from positions of power and privilege those who do not share the characteristics of the dominant group? The very notion of equality conceals male privilege: men's experience, occupational characteristics, and life cycles make up the standards by which women will be measured.

The third phase or type of feminist critique of law coincides with the emergence of postmodern feminist theory; Smart calls it "Law as Gendered." Drawing on Michel Foucault's understanding of power, this body of work eschews characterizing patriarchy as the ahistorical, conspiratorial, monolithic force that perpetuates the subordination of women through law. Instead, the "Law as Gendered" approach sees gender as socially constructed, deployed to subordinate women, yet periodically resisted through law. Under this view, power is not simply repressive but constitutive (Bordo 1989), and both law's repressive and constitutive powers are constantly contested, resisted, and subverted. Power, or the dominant group's attempts to control society, are never totally effective. "Law as Gendered" studies ask how the discourse and practice of law create and reinforce gender relations at many points.<sup>9</sup> Law is neither the tool for women's liberation nor irretrievably patriarchal but inconsistent, partial, self-contradictory, and complex. Not only does this body of work posit a more complex relation among legal discourse, gender, and women's oppression, than previous feminist approaches, but it transforms either/or debates within feminism about ideology to considerations of strategy. For example, rather than arguing about special versus equal treatment in law (particularly with respect to pregnancy leave), it may be that treating women differently from men in some contexts may help eradicate women's oppression while in other contexts such an approach reinforces their subordination (Scott 1988). No one strategy or all-consuming position can be appropriate in all contexts. The construction of alternatives

may itself be an example of how gender is reinscribed through legal discourse.

The "Law as Gendered" approach enables us to differentiate the category gender from women. Initially, feminist theorists drew a distinction between sex and gender to expose the socially constructed nature of gender characteristics and gender roles. Sex was the biologically given, fixed, knowable, physical truths about sex difference while gender consisted of the attributes a given culture or class assigned to each sex, qualities that changed over time. Rather than flowing naturally from sex differences, gender characteristics were socially imposed. Indeed, the perspective that sex differences are natural is itself a social construction. After recognizing that gender was socially constructed, many feminist theorists began to question the "givenness" of the category sex, leading them to question the sex/gender dichotomy itself. Poststructuralist theory posited gender to be a "discursively produced set of categories whose meanings are continually contested rather than fixed."<sup>10</sup> To apply this insight to the field of public law, I would argue that studying how law is gendered is much more disruptive to legal discourse than merely studying women. Feminist scholars in this camp not only study women judges, attorneys, or litigants to see if they are different from men, but they also examine how legal discourse constitutes gender and how that discourse itself is gendered.

If the language of postmodernism gave us the tools to better articulate and theorize the relations among sex and gender, it also coincided with the creation of a theoretical context for hearing voices criticizing the construction of the monolithic category "women." Women of color, lesbians, working class women, and the colonized, to name a few, argued that the category women, in fact, refers to the characteristics of privileged women and therefore ignores and erases differences among women, silences those less privileged, and skews feminist politics to favor white, heterosexual, western, middle-class women (King 1988; Fried 1990; Spelman 1988; Mohanty, Russo, and Torres 1991; Anzaldúa 1990). The value and contribution of postmodern theory to feminism remains a hotly contested topic among feminist theorists (Flax 1990; Butler and Scott 1992; Donaldson 1992). Whether or not one wants to attribute the problematizing of universal woman to postmodernists or not (hooks 1989, 177-182; Mascia-Lees, Sharpe, and Cohen 1989), and regardless of whether one believes that postmodern feminists have a better track record on questions of diversity (Modleski 1991, 18), I most admire feminist theorists who clearly recognize the theoretical problems of the unified category "women" (Harding 1986). What remains of the category either for political struggle or academic analysis is an important question within feminist theory and

feminist politics, but one can no longer speak simple-mindedly of a "women's position" or of the views of women without being charged with essentialism, heterosexism, racism, insensitivity, and poor scholarship. Once we make visible the particularity of the male in "citizen," for example, we must next interrogate exactly which women we are talking about when we bandy about the category "women" (Fuss 1990).

While Smart's chronology plots feminist theory's turn toward the postmodern as a more highly evolved state, Elizabeth Gross characterizes the development of feminist theory within the disciplines as beginning within the dominant paradigm and moving to a questioning of that paradigm:

In the diverse disciplines constituting the social sciences and humanities, in which most feminist theorists received their training, many matured from a position akin to apprenticeship (where women learned the skills of prevailing masculine forms of scholarship and research) to a position of relative self-determination (where women are able to use the techniques and skills they have acquired against the very disciplines in which they were trained). These disciplines, and the specific texts and practices associated with them, have become the objects of feminist analysis and criticism. Theory, rather than "Woman" is now the terrain of contestation between feminists and non- or anti-feminists (Gross 1987, 194-95).

Like Smart, I see the "Law as Gendered" phase as the more nuanced and theoretically useful approach to incorporating feminist theory into the disciplines. Those scholars whose work I most value are conversant with all three approaches and, like Smart and Dalton, incorporate insights gleaned from each while avoiding some of the theoretical pitfalls and limitations of earlier approaches.

#### OBSTACLES WITHIN THE DISCIPLINE

This brief description of the intersection of feminist theory and women and the law in political science would seem to suggest that feminist theory has already successfully transformed the field of political science. This is hardly the case. I want to consider why the law as gendered approach does not always prevail. Therefore, I want to move from an emphasis on the contributions of feminist theory to ask why such contributions are ignored. Rather than castigate individuals for their "mistakes," I find it more instructive to explore how the workings of the discipline of political sci-

ence impedes the progress of feminist theory. Political science creates obstacles to the importation of a complex understanding of feminist theory and rewards gender analyses that mischaracterize feminist theorizing or imports one feminist theorist to stand for all. One need not be a Marxist to appreciate the importance of the conditions of work for the work product itself. Only by examining how the discipline of political science (in the most Foucaultian sense) seeks to control, exclude, and contain feminist theorizing, can we understand the limitations of feminist work and overcome them. To move to the next phase of feminist inquiry, therefore, we need to ask under what conditions do scholars produce work on women and the law in political science? By understanding the conditions under which we work, we can more fully explain the quality of our work products.

First, many women scholars, whether they do feminist research or not, are disproportionately excluded from sharing in knowledge about the production of scholarship itself. Annette Kolodny offers a common example of the problem:

Senior male faculty express no hesitation inviting a new junior male colleague to join them for a beer at the end of the day or to try out for the noon basketball league at the gym. And many powerful male bonds have been established at the Friday night poker game. Women are rarely invited to participate in such activities. Married women are generally invited only to social gatherings to which spouses (or other guests) are also invited. And single women are sometimes altogether shunned (or, even worse, "hit upon" sexually). As a result, the informal networks of friendship and collegial exchange that silently influence the promotion and tenure review remain largely unavailable to women. As long as these informal networks provide opportunities for senior males to assess the collegiality and the intellectual worth of their juniors, this continues to be a serious problem for women (Kolodny 1993, 22).

How do we climb the greasy pole that is our discipline (Boice 1992)? Women academics have to be scrappy, rugged individualists to discover how our departments, institutions, and discipline work, and we have to unearth what is valued and rewarded before it is too late. It takes many junior women some time even to learn the questions. How does one find a publisher? Which projects should be done in what order? Which conference papers are most promising for revision? To which journal should one submit an article? How does one find mentors? How does one learn to manage teaching demands and still write? What service activities are most

worth doing? To answer these questions, it is crucial for women to seek out sympathetic men and women outside their department, within the institution, or at conferences. Thus, attending conferences and joining women's caucuses can be preconditions for survival, even if some of our more conservative colleagues frown on such associations. Electronic mail (with lists for Women's Studies and Feminist Jurisprudence) offer a new and wonderful way of connecting with others in the field.

Second, women academics not only find it difficult to acquire information about professional advancement but often find that their colleagues view their research areas as marginal. Moreover, this marginalization can be complicated by hierarchies within the department that are not explicitly gender related. For example, just as some men are "out of the loop" in regard to survival skills while some women are "in," other subfields, too, are marginal and disfavored in ways similar to the subfield of feminist theory. In the case of the subfield of women and the law, two marginal subfields in political science intersect. Most departments have a very small number of scholars in public law or judicial process (I am in a department with two out of 26).<sup>11</sup> Still fewer have one person, much less a critical mass of people, working in gender politics or feminist theory. Isolated scholars lack specialized advice, colleagues with whom to share ideas, and advocates during the tenure and promotion process.

Third, feminist scholars are often isolated from others inside and outside of the discipline.<sup>12</sup> Because political science has been so slow to incorporate gender studies and because the feminist scholarship that has been produced is ghettoized and contained, one can easily pass through a graduate program, attend conferences, and peruse journals without encountering feminism. This seeming absence leads one to believe it does not exist. (The argument goes like this: few feminist articles have been published in the *American Political Science Review*, ergo it does not exist, ergo it is not important.) Despite the growth of feminist theory, then, our work products are hidden and hard to discover as are those of our predecessors. Some women faculty have tried to escape the isolation and lack of respect they encounter in political science programs by turning to women's studies. However, women's studies programs did not exist when most feminist scholars were trained (my first year of graduate school at Princeton was the first year there was a line in women's studies for a director). The programs that do exist are small, and often cater to undergraduates. Courses listed under women's studies seldom count toward a major and graduate students are seldom permitted to enroll. The lack of connection between women's studies and political science disadvantages both fields. On the one hand, graduate students who want to work on

women and the law are often supervised by an adviser who knows nothing about the women half of that equation. On the other hand, women's studies programs are not dominated by scholars in law or political science (that's another story), and it is difficult for overburdened junior scholars or graduate students to make links across disciplines. Political science graduate students and faculty who want to enter the field of feminist studies—unless they are blessed by having been well-trained as an undergraduate, by having a mentor, or by being unusually resourceful—thus produce their work in isolation,<sup>13</sup> often with little knowledge of what has already been done with no sense of who else is working on similar problems, and in fear that their potential employers or senior colleagues will punish their forays into work on gender. Their work has no context and suffers from their inability to participate in the ongoing conversations of other scholars. These problems are compounded if students without a mentor have no experience themselves with feminist activism. They not only fail to have the opportunities for discovering sources outside the academy, but lack any personal experience of activism which would counter backlash messages or conservative readings of texts on gender.

A fourth condition, having our work ignored and or denigrated, is a barrier shared by fewer political scientists. We have graduated from strict exclusion to toleration as a separate and unequal entity. We have our own conference panels. Yet I often leave political science conferences feeling as though I have attended two concurrent conferences rather than one.<sup>14</sup> As I sprint between the "women's panels" and the public law panels (stopping occasionally at a comparative session), I notice that the women's panels, usually organized by the Women and Politics Organized Section or the Women's Caucus, are attended largely, though not exclusively, by women, and by those who concentrate in gender studies across subfields. These panels, occasionally on legal matters, often fail to attract even those "mainstream" scholars who have just presented work on gender in a conventional public law panel. It appears that the traditional subfields are exploring gender issues with little awareness of or interaction with specialists on gender and feminist theory. (That they are taking up these questions at all is an advance.) The public law conference panels, even if they include papers addressing gender, draw few members from the women and politics crowd. The audience, not surprisingly, usually wants to address the public law (read non-gender, often methodological) dimensions of their papers, leaving the gender analysis untouched. Scholars who pride themselves on their breadth of knowledge and on keeping up with intellectual trends unapologetically declare their total ignorance of scholarship on gender. (A visiting scholar in our department actually laughed out loud

when I told him what I worked on.<sup>15</sup> Rather than a source of embarrassment, for some, it appears that being uninformed about feminist research is a badge of honor. They seem convinced they are missing nothing of value. As Kolodny reports, "In too many cases, unfamiliarity breeds contempt (or, even worse, suspicion and devaluation)" (Kolodny 1993, 19).

Feminist analyses have repeatedly addressed the reasons why normally rigorous scholars are comfortable with such ignorance of feminist theories. Gross identifies this set of behaviors as "patriarchal counterstrategies:"

Patriarchal intellectual systems are unlikely to allow such attempts at political subversion to proceed uncontested. In fact, it is clear that traditional discourses and the positions they support have developed a series of counter-strategies and tactical response to the incursions of feminism, and indeed, women, into its fields of operation. These range from more or less personal or petty tactics to more serious, far-ranging threats—from personal ridicule, ignorance, stereotyping, to forms of counterattack including willful misrepresentation, being refused access to professional status and/or livelihood or having one's work co-opted or neutralized. Such counterattacks are by no means mutually exclusive and are exercised with greater or lesser strength according to the degree of threat feminist theories and objections pose. Without at least some awareness of the range and ferocity of these counterattacks, feminism may be unable to effect the wide-ranging subversions it seeks. (Gross 1987, 197-98)

Feminist philosopher Susan Sherwin frequently encounters these forms of dismissal. She finds "mainstream" philosophers especially hostile and notes that "feminist methodology directs us to look for the political significance of personal experience. What is the political message underlying the scorn with which our individual work is frequently received within the profession (1989, 23-24)?"<sup>16</sup> Although she is generally optimistic, at one point in the essay she despairs that, "If may just be, though, that there is no way to do genuinely feminist research and have it thoroughly respected by one's nonfeminist colleagues. . . . Hence, I shall proceed to explore this intuition—which, qua philosopher, I find disturbing—to see whether or not it is possible to discuss feminism in a way that is 'philosophically respectable'" (1989, 24).

The separate but unequal analogy applies to journals as well. We have our own journal, *Women & Politics*, which frequently does not "count" as a significant outlet for tenure and promotion. (A friend in another discipline recently told me that her colleagues referred to an article she had

published in a peer-reviewed feminist journal as not "peer reviewed in the technical sense.") Just as one can often use a shorthand measure of the number of women in a political institution as a way of assessing its power—women are more likely to be elected to weaker, rather than stronger legislatures, for example—so, too, in women's studies, often the best feminist programs, articles, journals, and publishers are in the least elite outlets. When the most elite journals do publish work on gender, they publish the least innovative and least challenging to conventional political science paradigms, unless they have exceptional boards or reviewers.

Though we may be flourishing in our separate and unequal institutions—conference panels, journals, and programs—staying in the ghetto has its costs to the individuals and to the discipline. The costs of marginalizing gender are not "merely" intellectual. Because conference papers lay the groundwork for journal articles and books, one's sense of what work is new and important often stems from which panels one attends and who one talks with whether one is a publisher, editor, researcher, or teacher.<sup>17</sup> While defining oneself as a feminist scholar no longer means career death—thanks to the efforts of women and men in the discipline who cleared the narrow, if still rocky, path—survival and even success depend on the quality of links to the mainstream. Section heads, discussants, journal editors, tenure review committees, readers for publishers, and department chairs will have difficulty evaluating work on gender if they have not been exposed to it.<sup>18</sup> While my interaction with those few feminist scholars in the subfield may be intellectually more rewarding than interacting with colleagues uninformed about gender, my success in the discipline is contingent upon speaking to a more general audience.

How we are perceived by colleagues, however, may thwart our ability to position ourselves within the mainstream. Women scholars who work on gender, as well as those who work on race and are of color, often experience their gender or race characteristic as rendering their other attributes invisible. Dichotomous and exclusionary thinking leads one to be the "woman person" rather than, simultaneously, a scholar of public law and comparative politics. My law school colleagues report the same phenomenon. An African-American law professor is asked to serve on a panel about Clarence Thomas, but not questioned about commercial law, his area of expertise. A white woman law professor is called upon to comment on a state Equal Rights Amendment but not tort reform, her "slot" in conventional law terms.

So what happens to those who fight for inclusion in mainstream panels and journals? The sixth condition (the relevance of which to other groups I find hard to assess) is the demand that we stay within the traditional

paradigms of political science and especially within the discipline. Sherwin labels this problem in philosophy as "one of the most insidious barriers to development of feminist thought" (Sherwin 1989, 27). In political science, it seems to me that the greatest prestige is conferred when a scholar's work crosses into a more "scientific" discipline such as psychology or economics. Yet when a researcher who knows nothing about feminist theory places his or her question within a scientific framework, the questions are often improperly framed, the project poorly designed, and as a result, the findings do not advance our understanding. I find conference papers of this sort frustrating.

### PROBLEMATIC CONSEQUENCES OF THE CONDITIONS OF WORK

A good example of the problems that arise when scholars try to force the paradigm of political science to include women is illustrated by the attempt to construct women as an interest and then to analyze them under interest group analyses (Sapiro 1981, Diamond and Hartsock 1981). Imbedded within most paradigms of political science are not only endorsement of scientific objectivity, but also liberal assumptions about power, domination, and social change (McClure 1992). Thinking of women as an interest group softens the rhetoric from oppression to interest and from patriarchy and oppression to pluralist conceptions of groups, while narrowing the arenas and domains of the political. The results have become predictable to those of us who are reading feminist theory and listening to scholars who have not. The first problem with imposing a political science framework on gender questions is the likelihood that a scholar will leave out feminist theory altogether by uncritically forcing women into conventional political science categories.

Another problem occurs when researchers, insufficiently informed by feminist theory, selectively import certain feminist thinkers to stand for "feminism." No one singular feminist theory exists which can be imported neatly into legal research, nor can the insights of feminist theory be generated without an appreciation of the debate and revisions they have generated (Collins 1990; Donovan 1990; H. Eisenstein 1984; Tong 1989). Instead, feminist theory offers a debate around a shared set of questions such as the causes of women's oppression, the social construction of gender, the strategies that will work to reduce oppression, the relation of women's oppression to other forms of oppression, the relationship between gender and sexuality, and even whether theorizing itself is gendered. No one person articulates THE feminist position. Rather than

plucking a theory out of context, scholars who use feminist theory in a responsible way acknowledge the debates surrounding the theory and its evolution.

My initial reaction to presenters who appear to be ignorant of the many works in the specific area they are addressing is often to conclude that they are poor scholars: in fact, their slipshod theorizing may result from working under the conditions of isolation and marginality. My reaction to the phenomenon of importing feminist theory in a way that distorts it is anger rather than disappointment: the work has been taken completely out of context and applied in ways antithetical to the intention of the author. But this "flaw," too, has its causes beyond the failings of individual scholars. To understand this result, we must examine which feminists get imported, explore how their insights are appropriated, uncover who controls this process, and determine the consequences.

Two thinkers often imported are Catharine Mackinnon and Carol Gilligan. Interestingly, both scholars fall under Smart's rubric of "law as male" or Dalton's "feminist jurisprudence." Mackinnon is frequently demonized because of her involvement with the anti-pornography campaign. Furthermore, because she questions the extent to which women can consent to heterosexual sex under conditions where forced sex is paradigmatic, she is often read as claiming that heterosexual sex is indistinguishable from rape. Although Mackinnon is a brilliant and complex legal theorist, a scholar who invokes her insights is frequently read as endorsing one or both of the above two propositions, completely overshadowing the author's intention to invoke some other important aspect of her work. The insights are lost because one is simply, "a radical feminist." The invocation of Mackinnon's name leads to the eclipse of any other issues about how one uses her work. Pat Cain labels this phenomenon a "gendered misunderstanding."

Fear is often expressed as anger. . . . Although Catharine Mackinnon seems to produce more anger in men than do other feminists, she is certainly not alone in invoking that emotion. I can recall several Mackinnon speeches at which women in the audience nod their head knowingly while men turn red in the face. Her "abstract theory," which is founded on the notion that men (as a class) dominate women (as a class) is heard by males in the audience as a personal attack on them. (Cain 1991, 21)

If Mackinnon represents an example of how invoking feminist theory might lead to being branded as a dreaded "radical feminist" (read lesbian), examining the reception to Carol Gilligan's work demonstrates how

feminist theory can be distorted, deracialized, and made safe prior to importation. For a variety of reasons, Gilligan's *In a Different Voice* has been canonized as the premier text of feminist theory by those outside the field of feminist theory who have decided to dabble with gender, or more accurately, who have noticed that women exist and that theories must account for our behavior.

Mary Jo Frug described this phenomenon in legal scholarship.

Because of the affinity between Gilligan's work and law, or perhaps for reasons I haven't identified, some version of Gilligan's argument seems to constitute the definition of legal feminism for a number of armchair-feminists, readers for whom the political stakes of interpreting Gilligan may not be particularly important. . . . in my circle the reductive popularization of Gilligan's argument is almost always drowned by the epithet "crude Gilliganism" . . . . (Frug 1992a, 50)

Linda Kerber warns historians against the dangers of a nonreflective incorporation of Gilligan's work.

*In a Different Voice* is a study of psychological theory written by psychologist Carol Gilligan. It makes only a single, brief reference to women's history. Nevertheless, the book has been widely read and often acclaimed by historians, some of whom now seem to be attempting to integrate its findings and suggestions into their own scholarship. Since most of this work is at the prepublication stage, appearing at present in working papers and discussed in professional conversations, [note: political scientists manage to be about six years behind trends in history yet unable to benefit from their mistakes or insights] the following remarks are intended to encourage second thoughts and a more careful reading of Gilligan's work. (Kerber 1986, 304-5)<sup>19</sup>

Pat Cain agrees.

Feminist method, authentic voice, and essentialism are only some of the interesting substantive issues currently being debated among feminist legal scholars. As with feminist scholarship on equality, the current debates among feminist legal scholars reflect a diversity of substantive viewpoints. No one familiar with this literature could claim that all feminists believe women are naturally caring and men are not, or that all feminists reject the notion of verifiable truth. Yet these are two of the most common criticisms about feminist scholar-

ship. Cursorry readings of scattered selections of feminist scholarship are likely to result in serious misunderstandings about what is a very rich and diverse body of work. (Cain 1991, 11)

I am not arguing that invoking Gilligan is necessarily bad (although it is an important marker), but rather agreeing with Mary Jo Frug who argued that there are progressive and conservative readings of Gilligan's work. The progressive reading affirms Gilligan's critique of moral development theories which derive exclusively from male subjects and are then deployed to label women deviant or less developed. Gilligan's work celebrates the ethic of care (albeit, defined by her as including equal weight on caring for oneself) which is devalued in development theories and heard but not listened to in the voices of men and women. Listening to these voices leads to a reconfiguration of moral theory (Gilligan 1985; Gilligan 1986).

The conservative reading of Gilligan sees a "woman's" voice rather than a "different" voice and hears the essential and universal feminine in all women. Such a reading reinscribes gender rather than destabilizing it, erasing similarities between men and women and differences among women (Stack 1986). To return to conference anecdotes, I have observed that those who use a critical and progressive reading of Gilligan have been contained within the "women's panels" while those on the "mainstream panels" favor the conservative reading. This reinforces a conservative reading of Gilligan and of feminist theory because those with no knowledge of feminist theory will only encounter those scholars invoking the conservative reading, thus furthering the misconception that feminist theory=Gilligan=women are simply different from men—what "we" thought all along.

Susan Faludi labels this conservative appropriation of Gilligan a backlash. Under the backlash, the proponents of women's "difference" found that they were rewarded with approving critical and media attention. 'Difference' became the new magic word uttered to defuse the feminist campaign for equality. And any author who made use of it, even one who could hardly be considered antifeminist, was in danger of being dragged into the backlash's service. (1991, 327)

[A critic of Gilligan's] voice could not be heard over the roar of acclaim for *In A Different Voice*, which had sold 360,000 copies by 1989. . . . Under the backlash, it became easy to appropriate Gilligan's theories on behalf of discriminatory arguments that could

cause real harm to women. Very much against her will, Gilligan became the expert that backlash mass media loved to cite. (1991, 331)

Faludi concedes that Gilligan has denounced the misuse of her research to rationalize oppression (as in the *Sears* case) and has stated that if she had it to do over again she would not have cast Jake and Amy as so starkly male and female. Faludi concludes, however, that most of those who appropriate Gilligan's work are indifferent to Gilligan's own objections (1991, 332). In the media as in academia, the author has little control over how her work is used.

What is the harm to feminist theory caused by patterns of marginalization and exclusion? When scholars import MacKinnon or Gilligan as "the" feminist position without an appreciation of the debate and without studying the discussion these works have provoked, they not only distort feminist theory but reinvent the wheel. My concern is that political scientists who have begun to integrate feminist theory into their work are taking up ideas that have been discredited and reformulating them as if they were cutting edge. Political theorists have clearly made important contributions to feminist theory; however, I fear that practitioners of other subfields, such as public law, are setting off down paths already known to be dead ends.

What difference does this failure to transfer innovation have on non-academic women? I previously alluded to the dangers of uncritically taking the category women to stand for white, middle-class, straight women. Such generalization perpetuates racism, classism, and heterosexism in our work and politics. In *From Abortion to Reproductive Freedom*, for example, Marlene Gerber Fried explores how the exclusion of working-class women and women of color from the abortion movement shaped the direction of that movement. Conversely, if political scientists import the conservative reading of Gilligan, that is, if we employ essentialist and universalizing categories of "woman," we perpetuate a heterosexism which renders non-heterosexual women invisible, and also precludes alliances between women and men who want to challenge oppression on other fronts beyond gender.

Perhaps even more troubling, by importing a conservative and coopted version of feminist theory, political scientists continue to impose the damagingly narrow definition of what constitutes "the political." Such a definition erases the political activities of many, leaves whole domains such as sexuality out of range, and retards our ability to understand oppression and resist it. Importing a tamed gender analysis may lead us to do the important work of studying gender and voting behavior, women in Congress, and women judges, but may perpetuate our blind omission of

Native American women's role in tribal politics, for example. Such an approach may lead us to study women as an interest group at the expense of appreciating feminism as a social movement: writing a history of feminism as merely passage of the ERA, rather than including the complex theories and practices of the New York Radical Feminists and the Combahee River Collective. Failure to engage with feminist theory encourages not only a conservative field of women and politics, but one which lacks imagination and erases a radical history and practice and perpetuates an overly narrow conception of the political (Tronto 1992).

### POSSIBLE SOLUTIONS

My essay, thus far, has shown why merging feminist theory and public law is a tricky business. I see solutions as well as problems. One solution is to learn from the conditions that enable us to produce knowledge that do not have the flaws I identify. First, scholars who work on women and the law must have knowledge of and access to their predecessors. In *Black Feminist Thought*, Patricia Hill Collins conveys the importance of black feminists creating and discovering a past and a legacy to draw on. In my view, this requires that scholars in women and the law be conversant with our own particular subfield, as well as knowledgeable about feminist legal scholarship and feminist theory more generally. This can be accomplished by feminist theory reading groups, attending "women's" conference panels at political science meetings, attending interdisciplinary feminist conferences, participating in intellectual community through reading the *Women's Review of Books*, *Signs*, or other journals. Beyond the individual level, institutions, too, must change. Our universities must hire a critical mass of feminist scholars rather than merely placing the isolated token woman in each department. They must support interdisciplinary programs and restructure programs to permit students to pursue interdisciplinary research. They need to rethink our reliance on conventional outlets for publication as evidence of merit (Kolodny 1993).

Meeting feminist predecessors and contemporaries requires initiative. I recommend not only attending conferences (which is expensive and sometimes intimidating), but writing to scholars in the field and seeking out possible mentors on campus in other disciplines. It is vital for the survival of feminists and feminist theory that each of us find or create a context in which our work is valued, where we can participate in the production of knowledge, and where we are treated and respected as colleagues with particular expertise rather than as eccentrics (or madwomen).

Two insights women garnered from consciousness raising (despite its

many limitations) are often forgotten as we struggle with the time constraints imposed by an academic career: knowledge and empowerment comes from an awareness that the same situation is repeated in every discipline in different and similar ways. Isolation not only keeps us from the intellectual fruits of others but creates the impression that the exclusion we experience and the barriers we face stem from our own personal defects rather than larger systems. Just as there are no personal solutions to collective problems, I find it useful to keep in mind that our contribution may be in our resistance and struggle rather than in tangible and immediate successes.

To conclude, it is not enough to have a critical understanding of Gilligan and her analogues. We must also understand the conditions of the discipline and society that make her ideas so popular with both women and conservatives. Finally, feminists in the academy must continue to address issues women think are important. We cannot abandon the field to conservatives eager to capitalize on feminists' insights such as the gender gap (Mueller 1988, 30-33), and who are better able to grasp the significance of difference among women. Rather than merely blaming the victim by demanding high scholarly standards, we must understand the complex context that fosters such shortcomings. We must continue to be self-conscious of the conditions that produce knowledge. And we must work to improve those conditions.

### NOTES

1. *American University Journal of Gender and the Law*, *Berkeley Women's Law Journal*, *Canadian Women's Law Journal*, *Columbia Journal of Gender and Law*, *Harvard Women's Law Journal*, *Hastings Women's Law Journal*, *Southern California Review of Law and Women's Studies*, *Texas Journal of Women and the Law*, *UCLA Women's Law Journal*, *Wisconsin Women's Law Journal*, *Women's Rights Law Reporter*, *Yale Journal of Law and Feminism*.
2. Thanks to Judy Baer, Pat Cain, Martha Chamallas, Barbara Eckstein, Tim Hagle, Christine Harrington, Susan Lawrence, Karen O'Connor, Teresa Mangum, and Margery Wolf for their helpful comments. Thanks, too, to Beverly Cook for her comments and support and to my other anonymous reviewer.
3. For a much fuller bibliography of sex discrimination law in Britain and the United States see Kenney 1992, Meehan 1991, and for women and the law more generally, see Fineman 1991, and Frug 1992.
4. For the canon of feminist legal thought, readers are advised to begin with Bartlett and Kennedy 1991. Two excellent textbooks which contain excerpts of essays as well as cases are Lindgren and Taub 1993 and Frug 1992. Within political science, readers will find useful Mezey 1992 and Baer 1991b.

5. While the acceptance of feminist legal scholarship appears enviable to me, feminist legal scholars are less enthusiastic (Cain 1991). Feminist anthropologists wonder if they are merely tolerated within their discipline and if their work is read at all by their colleagues.
6. Volume 25 of the *Law and Society Review* is a special issue devoted entirely to Gender and Sociological Studies. See especially the review essays by Lynne Henderson ("Law's Patriarchy") and Gayle Binion ("On Women, Marriage, Family, and the Traditions of Political Thought"). See also Volume 13, nos. 3 and 4 of *Women & Politics, special issue on The Politics of Pregnancy: Policy Dilemmas in the Maternal-Fetal Relationship*.
7. Clare Dalton sets out a schema which Smart parallels. She discusses developments in the context of naming courses, and calls the first phase "Women and the Law" or "Sex Discrimination." The second phase's courses are entitled "Feminist Jurisprudence." For the third stage, she advocates a reformulated "Women and the Law" or "Feminist Legal Thought," (Dalton 1987-88).
8. For an insightful essay on problems with extending a Marxist analysis of law to questions of gender, see Kingdom 1980.
9. For an excellent illustration of how law is gendered in the context of women's imprisonment, see Carlen, 1983.
10. Thanks to Catherine Rymph for this definition.
11. One of the barriers to developing intellectual community is the lack of publishing outlets. Law reviews and interdisciplinary journals such as *Signs* have often given a warmer reception to the work of political scientists in public law whose work is on gender than have mainstream political science journals. *Women & Politics* has led the way by publishing a number of important papers on women and the law.
12. "A second constraint is the absence of feminist community within many law schools and universities. Feminist method requires collaboration. . . . Many feminist law professors, however, must rely on telephones and airplanes to create a feminist community," Cain, 17.
13. Suzanne Pharr, in *Homophobia, A Weapon of Sexism*. Inverness, CA: Chardon Press, identifies isolation as "a major component of every oppression," (Pharr 1988, 61). Patricia Hill Collins describes the costs of isolation for African-American women intellectuals and emphasizes the further danger of the pressure to separate thought from action—distancing intellectuals from political activism (Collins 1991, 31).
14. It seems to me that there is less ghettoization of gender issues in other disciplines. The Modern Languages Association and the Association of American Law Schools' conferences seem to reflect greater interaction. Are there ways we structure our conferences which exacerbate fragmentation? One feature of the Law and Society Conference that brings participants together is the use of plenary sessions.
15. Pat Cain characterizes "the institutional response, law review editors aside, as ranging from silent dismissal to polite questions revealing a significant lack of understanding," (Cain 1991, 11).

16. Sherwin later describes philosophic gatherings and journals as "predominately hostile environments for feminists," 33.
17. For an interesting discussion of who cites whom for which proposition see Cain 1991, 14; Delgado 1984, and Delgado 1992. Both provide convincing evidence of how feminists and critical race theorists are marginalized and erased through legal scholarship.
18. This claim should not be mistaken for an essentialist claim that only women can do or evaluate research on gender. Quite the contrary. This essay is founded on the premise that gender studies and public law will both be enhanced by the engagement of greater numbers of men and women scholars.
19. Readers who want to avoid the pitfalls of "crude Gilliganism" are advised to begin by reading Kerber and the others in the *Signs* Interdisciplinary Forum (1986), as well as Frug (1992a).

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