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A Personal Journey Through Feminist Legal Theory

by Diane M. Bessette*

They sat there in the fresh young darkness close together. Phoeby eager to feel and do through Janie, but hating to show her zest for life for fear it might be thought mere curiosity. Janie full of that oldest human longing - self revelation. Phoeby held her tongue for a long time, but she couldn't help moving her feet. So Janie spoke.¹

Zora Neale Hurston

Last fall I took on an independent study in order to dive into the subject of feminist legal theory. This Essay is the written result of that work.

I originally intended to weave an analysis of feminist legal theory into a work on literature by a woman writer. I read the writings of women from Sor Juana Inez de la Cruz and Emily Dickinson to Andrea Dworkin and Florynce Kennedy. I also read articles and books by the leading feminist legal theory scholars (fem-crits). After reading, thinking and discussing these issues with friends, I decided on a patchwork approach to the subject. This approach allows me to expose some ideas which I hope will stimulate the reader to explore this subject more. The literary focus of my work has evolved into selections of works of poetry by women to introduce the different sections of this Essay.

In the first sections of the Essay I attempt a brief description of feminist legal theory. This discussion concentrates on the work of three leading fem-crits and explains the two major schools of feminist legal theory, cultural feminism and radical feminism. In the second section, I offer stories of women's lives. Professor Robin

* B.A. Tufts University, 1985. Member of the Hastings Class of 1990. This Essay is dedicated to my parents, Janet and Norman Bessette. Janet Bessette, Sharon Chatman, Peter Denwood, Frank Kennamer, and Audrey Lyness read various drafts of this Essay and offered much advice and encouragement. Special thanks to Professor Vivian Wilson, for helping me see my wings.

1. Z. HURSTON, *THEIR EYES WERE WATCHING GOD* 18 (1937).

West, one of the fem-crits described in the first section, is the leading proponent of a fem-crit movement that says that women must tell true stories of their lives in order to show how we are left out of the legal system. In the third part, I explain why women in the generation currently entering the legal profession need to be aware of feminist legal theory and what role we can play to improve the lives of women in our society. So I suppose I can describe my paper by saying that first, it offers some basic explanations of feminist legal theory, then it applies some of the theory to personal situations. Finally, I propose a call to action.

I

Here I am, seated, with all my words,
like a basket of green fruit, intact.
The fragments
of a thousand destroyed ancient gods
seek and draw near each other in my blood. They long
to rebuild their statue.²

Rosario Castellanos

In the first section of this Essay, I provide a brief primer on feminist legal theory. I have chosen to concentrate on the works of three women: Carol Gilligan, Catharine MacKinnon, and Robin West. Although Gilligan is a sociologist and not a law professor, she must be included since her work has become saturated into the entire genre of feminist legal theory. MacKinnon is probably the best known fem-crit outside of the fem-crit community because her work has been widely published. I include her because her viewpoint is decidedly non-mainstream and she writes in a bold and empowering style. Finally I focus on West because I see her work as bringing us forward.

A major weakness in these choices is that all of the fem-crits

2. Castellanos, *Silence Concerning An Ancient Stone*, in THE PENGUIN BOOK OF WOMEN POETS 336 (1978).

are white. The women's movement has undergone some well-deserved bashing from women of color for ignoring their concerns. As Audre Lorde puts it, "Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down the street, and you will turn your backs upon the reasons they are dying."³

In my choices for the literary notations I have selected exclusively works by women of color, partly to make up for the choices regarding theory but mostly because these women say, in words more powerful than words of most white women, what needs to be heard. This whole issue has been a source of frustration for me. As a straight white woman, I cannot pretend to speak for women of color, lesbians, physically challenged women. I invite women of all groups to ponder my words and write their own stories so that we may begin to understand the differences within ourselves.

A

New grass grows on the ancient ramparts.
 On the abandoned monuments
 The old inscriptions are lost in time.
 I am bound on a journey without end,
 And cannot bear the song of the cuckoo.⁴

Sun Yun-feng

If there is one word that causes the fem-crits more trouble than any other, it is the word "different". The intellectual struggle goes something like this: "We want to be treated equally but in some ways we're different. But the ways we're different are ways that have been defined by men. Yes, but we like how we're different so maybe it's ok. No it's not, we have to define how we're different

3. Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, SISTER OUTSIDER 114, 117 (1984).

4. Yun-feng, *The Trail Up Wu Gorge*, in THE PENGUIN BOOK OF WOMEN POETS 157 (1976).

ourselves. Oh and by the way, don't treat us differently, except in ways that we're different."

Confused? You're not alone. The confusion rises all the way to the United States Supreme Court. Look, for example, at the way it has addressed the issue of pregnancy and women. In *Geduldig v. Aiello*⁵, the Court held that according to the United States Constitution, pregnancy discrimination had nothing to do with sex discrimination. Instead the Court created a distinction between pregnant women and "non-pregnant people." Then, with the enactment of the Pregnancy Discrimination Act in 1978⁶, the Court was forced to consider pregnancy discrimination from a statutory viewpoint. Based on this analysis, the Court found that sex discrimination encompassed pregnancy discrimination. The members of the Court came to the stunning conclusion that pregnancy is one way that women are different from men.⁷

Some people say, "You're asking for it both ways." Not really. We are merely pointing out that society and our legal system must also begin to view life and issues through the eyes of all women. Our legal system claims a sort of obliquely blind rationality as its cornerstone. But legal terms, crimes, standards of reasonableness, and judicial tests are defined with words by people. Up to now, these people have been almost exclusively male. A certain subjectiveness is bound to come through. As Martha Minow says, "The inconsistency lies in a world and set of symbolic constructs that simultaneously used men as the norm and denigrated any departure from the norm."⁸

A perfect example of how men's needs are the standard is the traditional law firm career path. If a man hopes to make partner in the typical seven to nine years, he normally takes no substantial leaves of absence. Traditionally, he didn't have to, and if he did, it was certainly not to raise a child, since in our society child-rearing has been the primary responsibility of women.

Enter large numbers of women into the legal profession. Now

5. 417 U.S. 484 (1974).

6. 42 U.S.C. § 2000e(k) (1978).

7. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

8. Minow, *Feminist Reason: Getting It And Losing It*, 38 J. LEGAL EDUC. 39, 49 (Mar.-June 1988).

the career path considerations become more complicated--for women. Because the primary responsibility for child-rearing has remained on women, substantial numbers of women attorneys are faced with the quandary of motherhood versus career, an issue men almost never face.

Rather than attempting to view this issue from the standpoint of the group of people most affected by the issue, managing partners and other law firm policy makers have continued to view parenthood and careers from a traditional man's perspective. Consequently, the legal profession has made nothing more than minor and inconsequential changes that are still based upon the view that a career is a man's prerogative. These changes create a sub-class of women who often end up either leaving firms or remaining in a permanent associate status for which we are supposed to be grateful.

That one word "different" has caused as much dissension within the community of fem-crits as it has in the legal community at large. What has emerged are two major schools of feminist legal theory: the first is termed "cultural" or "female voice" feminism; the second is called "radical" or "dominance-power" feminism.

B

My grandmothers are full of memories.
Smelling of soap and onions and wet clay
With veins rolling roughly over quick hands
They have many clean words to say.⁹

Margaret Walker

The "cultural" path has been fueled by the writings of Carol Gilligan -- principally her 1982 book, *In A Different Voice*. Using sociological studies, Gilligan hypothesizes that women and men have different ways of moral reasoning. As women we are socialized to

9. Walker, *Lineage*, in *THE PENGUIN BOOK OF WOMEN POETS* 346.

build our lives around caring for others and to base our lives on a web of relationships. Consequently, the moral reasoning of women tends to be more contextual and subjective.

Men, on the other hand, are socialized to build their lives around individual achievement and scientific clarity. Consequently the moral reasoning of men tends to be based on linear logic and normative truths.¹⁰

Gilligan's classic example of this dichotomy is the story of Amy and Jake. As part of a sociological study, each child is asked to morally analyze the situation of Heinz. Heinz' wife is dying and he is too poor to buy the medicine she needs. What should Heinz do? Jake sees the dilemma as "sort of like a math problem with humans."¹¹ He says that human life is worth more than money and therefore Heinz should steal the medicine. Amy does not see the problem as an either/or situation. She suggests that Heinz and the pharmacist get together and work out a solution that will work for all concerned. She notes that if Heinz did steal the medicine, he might have to go to jail and would then be unable to help his wife and she might get sick again.¹²

Fem-crits have moved beyond a strong embrace of Gilligan's theory. One of the main reasons for this is that Gilligan's theory has been construed to mean that there is just one female voice, an analysis alienating to women who don't fit into the dominant categories of white, heterosexual, Christian and able-bodied. Nevertheless, the appeal of Gilligan's proposition remains a focal point in the writings of fem-crits. In an issue of the *Journal of Legal Education* published in the summer of 1988, 11 of the 13 articles printed as part of the theme "Women and the Law" cite Gilligan's work.¹³

10. Here I make the obligatory disclaimer that Gilligan does not purport that the female voice exists only and completely in women nor the male voice only in men. Rather, she discusses prevalent behavior patterns.

11. C. GILLIGAN, IN A DIFFERENT VOICE 26 (1982).

12. *Id.* at 28.

13. 38 J. LEGAL EDUC. (March/June 1988).

C

And one day, all under heaven
Will see beautiful free women,
Blooming like fields of flowers,
And bearing brilliant and noble human beings.¹⁴

Ch'iu Chin

Catharine MacKinnon offers a succinct and effective rebuttal to the relational analysis. While praising Gilligan for giving dignity to the idea of gender differences in moral reasoning, she says that ultimately Gilligan:

achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use.¹⁵

MacKinnon continues by stating that:

women value care because men have valued us according to the care we give them . . . Women think in relational terms because our existence is defined in relation to men. . . . All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.¹⁶

MacKinnon offers a more radical view of feminist legal theory-based on the notions of power and control. MacKinnon calls her analysis "the dominance approach".¹⁷ She first observes that "an

14. Chin, *To The Tune 'The River Is Red'*, in *THE PENGUIN BOOK OF WOMEN POETS* 281 (1976).

15. C. MACKINNON, *FEMINISM UNMODIFIED* 38 (1987).

16. *Id.* at 39.

17. *Id.* at 40.

equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination."¹⁸

In her writing MacKinnon repeatedly cites striking statistics that show how women are victimized as a class in ways in which men largely are not. The statistics range from economic figures demonstrating that women earn about half of what men earn to those relating to violence which tell us that 44 percent of all women in the United States are victims of rape or attempted rape, at least 25 to 33 percent of women are battered in their homes and 70 percent of murdered women are murdered by a husband, lover or or ex-lover.¹⁹ According to MacKinnon, "[t]he whole point of women's social relegation to inferiority as a gender is that for the most part these things aren't done to men."²⁰

There is also a marxist element to MacKinnon's theory. She proposes that feminism, like marxism, is a theory of the unequal distribution of power. MacKinnon sees definitions of sexuality as determining patterns of dominance. She states that "the molding, direction, and expression of sexuality organize society into two sexes, women and men. This division underlies the totality of social relations; it is as structural and pervasive as class is in marxist theory . . ."²¹ Finally MacKinnon calls for a society that allows women to take an equal position of power in society and to define what is important to us.

MacKinnon is, of course, right. Men have ruled Western society throughout its history. As rulers, they have defined the role of women as caretakers and nurturers. Likewise "equality" is viewed from the vantage point of men. But emotionally I cannot throw out the relational-voice analysis. I cannot think of or find words better than those below to express how I feel.

I like and use the "female voice" metonymy because for me it works: it seems to help explain some troubling existential quandaries in a way that energizes rather than anesthetizes. The

18. *Id.*

19. *Id.* at 41, 51, 52.

20. *Id.* at 49.

21. *Id.*

idea that "male voice" rationality is not *the only* form of legitimate thought is really liberating: it encourages one to strive for ideological freedom, self-understanding, and social change. It is an adrenalin rush that wakes one up from the stupor of accepting the status quo without question or recognition of the choices involved.²²

Call me an apologist for the male-dominated structure, but I see a lot of good in embracing the practices of nurturing and caring for others, in basing moral decision-making on webs of relationships instead of individual victories. Since men delegated these societal roles to women, one may logically say that this means men value these roles less than the goals and characteristics dominant in men. This may be so. This delegation leaves women with a wonderful opportunity to change society.

I'm not sure which is more utopian: the MacKinnon "let us define ourselves" model or a model that challenges women to use their admittedly male-imposed characteristics to build a world that is less combative and more oriented to finding solutions that benefit all concerned.

22. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141, 1144 (1985).

D

Soft grey ghosts crawl up my sleeve
to peer into my eyes
while I within deny their threats
and answer them with lies.

Mushlike memories perform
a ritual on my lips
I lie in stolid hopelessness
and they lay my soul in strips.²³

Maya Angelou

Robin West is leading a new movement in feminist legal theory, which calls on women to change the legal system by telling "true stories of women's lives".²⁴ In fact, *The Los Angeles Times* referred to Professor West in a recent article as a "storytelling feminist".²⁵ West's rationale for storytelling actually is based on traditional jurisprudence. First she explains that basic jurisprudence begins with descriptions of human nature. She goes on to say that we must begin with descriptions of women.²⁶

According to West, women must tell true stories in order to demonstrate the gap between how human nature is perceived and explained in traditional legal theory and how women's nature is defined in feminist legal theory.²⁷ As she says, "feminists take women's humanity seriously, and jurisprudence does not, because the law does not."²⁸ West puts out a call for women to

flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of

23. M. ANGELOU, *Remembering*, in MAYA ANGELOU POEMS 11 (1986).

24. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 64 (Winter 1988).

25. L.A. Times, Oct. 7, 1988, at V8.

26. West, *supra* note 24, at 4.

27. *Id.*

28. *Id.*

law. We need to dislodge legal theorists' confidence that they speak for women, and we need to fill the gap that will develop when we succeed in doing so.²⁹

West's ideas about "storytelling" receive support from other members of the fem-crit community. Martha Minow also counsels us that "distinctive aspects of women's experiences and perspectives offer resources for constructing more representative, more empathic, more creative and, in general, better theories, laws and social practices."³⁰

In that spirit, I offer these stories.

29. *Id.* at 65.

30. Minow, *supra* note 8, at 49.

her topic, which has strong social justice ramifications. Her voice is strained and she looks like she's about to start crying. I can see the pain in her face and I recognize signs of self-doubt. I've been there.

The man responds, "You have every right to write a journal note. After all you are smart enough to get into one of the top 20 law schools in the country." She looks unconvinced.

The woman tries another angle. "I know how you feel. Just take it one step at a time. It will help that you're writing about something that means something to you personally." Then she joked, "If I can do it, anyone can."

On my way home that night, I thought about this conversation. First it struck me that I have never heard a male law student express that kind of self-doubt about his intellectual abilities. Then I thought about the responses of the man and woman who tried to offer their encouragement. Both responses were textbook Gilligan: the man's was full of linear logic, citing numbers and status all adding up to some sort of rational right. The woman, on the other hand, related to the woman, and advised the woman to put the situation in context. She also used self-deprecating humor. More than an explanation of Gilligan's theory, this story paints a picture of the limitations and challenges many women law students feel, in one way or another. Whether the limits are self-imposed or imposed by the patriarchy is something we all need to explore.

B

What a happy pilgrimage!
 What laughter and joy! . . .
 And my eyes meanwhile
 are full of tears."³²

Rosalia de Castro

I cry very easily. It is a physical and emotional characteristic I

32. de Castro, *Long May*, in *THE PENGUIN BOOK OF WOMEN POETS* 169 (1976).

have dealt with for as long as I can remember. Little girls are allowed to cry, so it was ok when I was younger. Still I remember being in the sixth grade and discussing ecology with one of my teachers, whom I'll call Mr. Smith. I didn't actually shed tears but my eyes got all full of water and my voice cracked a bit. He said something about not getting so upset about baby seals, and suddenly I felt very weak. I wanted to say that I wasn't really upset, that crying was just something that I do.

This story has been replayed with different "Mr. Smiths" through high school, college and jobs I have had in Boston, Washington, D.C., New York and Sacramento. The "Mr. Smiths" were professors, bosses, and friends. They were also usually men. I could never seem to make them understand that I was not really upset. Crying is just something that I do.

This past fall I read what Robin West said about telling our stories and I thought about my experiences with crying. I mentioned this to a friend. Very matter-of-factly she said, "Oh you mean crying as a form of expression," as though everyone knew that is what crying is. I had never been able to explain that crying is not a sign that something is deeply wrong; it's just a way I show that I care.

As I write this section, I can hear the symphony of some men and not a few women saying, "This isn't legal writing, it's not a legal issue." And I also see lots of women leaning back in their rocking chairs, thinking to themselves, "Crying -- that's happened to me too." And that gives me courage.

How does this relate to feminist jurisprudence? Well it's about seeing things, including behavior patterns, in a new way. And it's about realizing that the way men as a class define "proper" forms of expression, or "proper" standards of reasonableness, or even "correct" legal rationality, isn't how we all see it. And directly it is saying "Don't see me as a weaker person because I cry. See me as passionate, committed and expressive." The legal system must begin to see women's lives and experiences through our eyes and indeed through our tears.

III

I tried to tell her:
This way the twig is bent.
Born of my trunk and strengthened by my roots,
You must stretch newgrown branches
Closer to the sun
Than I can reach.³³

Naomi Long Madgett

What power will feminist legal theory have in the present legal system and in our society? Will these theories effectively contribute to change, to make the law reflect the needs and interests of women? The generation of women just now going through law school and entering the legal profession will be the test.

We are not the vanguard. The vanguard includes the pioneer women who fought for the right to attend law school. They include Belva Lockwood, Myra Bradwell and Hasting's own Clara Foltz.³⁴ The vanguard also includes the women who went through law school in the late 60s and early 70s. In 1964, women composed only four percent of law students in the United States. Over the years, the percentage of women law students grew to 40 percent in 1984.³⁵ The women who went through law school during these years of growth fought and sometimes sued for the right to be on law reviews and to receive equal treatment in placement offices and hiring³⁶. To them we owe a great big THANK YOU and a lot of respect.

In 1984, the American Bar Association (ABA) conducted a major survey on women in the law. The results of that survey include the fact that while women currently make up 20 percent of the attorneys in the United States Black women attorneys make up less than one percent of the attorneys. Currently women make up 41.5 percent of the people in law school. Indeed, 75 percent of all

33. Madgett, *Offspring*, in *THE THIRD WOMAN* 255 (1980).

34. *Foltz v. Hastings*, 54 Cal. 28 (1879).

35. K. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 248 (1986).

36. *Id.* at 86.

the women practicing law today graduated from law school after 1970.³⁷ Never before in the history of the legal profession has there been such a rapid and substantial infusion of a class of people into the legal profession. When I visualize those numbers and the strength those numbers can bring, it seems that substantial change is our destiny.

Our generation has the opportunity to use the strength of our numbers to change the legal system. Women going through law school and beginning a legal career have the opportunity to guide the legal profession and the justice system in directions never before considered. We must not let that opportunity pass by.

To realize why we need to change the law, consider personal stories like the ones above or ponder any of your own experiences. Alternatively, if you prefer linear logic, you can look at the numbers.

According to statistics determined by the American Bar Association, eight percent of the partners in large firms are women. The percentage rises to 13 percent among all law firms. On its face, and considering that three-fourths of the women attorneys graduated from law school after 1970, that doesn't sound *too* bad. But next consider that the percentage of women partners is growing by just one percent a year, which means that by the year 2000, only 20 percent of partners in law firms will be women.³⁸

Then there's the money issue. According to a 1984 ABA survey of 3000 attorneys, male junior associates average an income of \$30,000, while women average \$25,000. Similarly, male partners annual earnings average \$75,000 compared to women partners \$50,000.

More disturbing are the effects a legal career has on women's lives. Compared to men attorneys, women attorneys are more likely to be divorced (13 percent to four percent), single (22 percent to 15 percent), and childless (56 percent to 40 percent).³⁹ These statistics indicate that women are being forced into a male mold, unsuccessfully. Not surprisingly, the survey found that "almost twice as many women as men working in private practice are dissatisfied

37. ABA JOURNAL, June 1, 1988 at 49-50.

38. *Id.* at 70.

39. *Id.* at 72.

with their jobs."⁴⁰

The statistics demonstrate how women as a class as well as women as lawyers continue to be denied equal stature and opportunity. By trying to fit into the male mold, we are in effect limiting ourselves. It is in response to this self-limiting process that the methods and theories of feminist jurisprudence offer an empowering spirit. This spirit will help us to define our own role and to seek equal and just treatment as lawyers and as women.

Another way of stating it comes from Gloria Steinem. At a recent college graduation she said, "I'll know we're getting someplace when as many young men as young women ask, 'How can I combine a career and family?'"⁴¹

As I finish this litany of facts and figures on female attorneys, I consider how narcissistic the concern for corporate lawyers salaries really is. The problems of women attorneys are real but I see a greater need - a need for universal sisterhood.

In spite of the barriers of race, class, language, religion and other socially imposed factors, women share a common bond. I think that as women attorneys, with the knowledge and the ability to influence society, we have an opportunity and an obligation to remember our sisters and to fight for social justice.

Yes, I have worked hard to get where I am and where I'm going. But there's a fair amount of luck or fate involved too. Simply put, other women have not had the privileges that many of us have had. Still, as women we share common experiences and it seems that if women are to move forward, we must move forward together.

The best way I have thought of to describe feminist legal theory is to think of it as providing a technicolor advantage to all things legal. Sometimes black and white is good. Sure I enjoyed Woody Allen's *Manhattan* and I'd like to sue Ted Turner for colorizing *Casablanca*. Still when we think about it, most of us prefer to watch movies in color. Color provides a completeness and a sense

40. *Id.*

41. Address by Gloria Steinem, 1987 University graduation (May 1987) quoted in *The Tufts Criterion*, Summer 1987, at 17.

of dramatic truth that black and white can't capture. So it is with feminist jurisprudence.

Feminist legal theory provides the best sources for grounding one's thoughts and dreams. It will empower you, educate you, and make you think in ways you never considered before. It helps us to speak our truths. We must ensure that our truths are considered in the development of society.

These fragmented verses
Are only drops of spray
On the sea of knowledge.
Yet they are bright shining
Multitudinous stars, inlaid
On the skies of the heart.⁴²

Ping Hsin

42. Hsin, in *THE PENGUIN BOOK OF WOMEN POETS* 283 (1978).



Illustration by Theresa Muley