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FOREWORD

WOMEN AND THE LAW: TAKING STOCK AFTER TWENTY-FIVE YEARS

Grace Ganz Blumberg*

Last year, several editors of the *UCLA Women's Law Journal* came to my office to discuss the possibility of putting together a symposium issue — the issue you are now reading. In the course of our ongoing discussion, a number of matters surfaced. Not surprisingly, these students, editors of a women's law journal, are interested in women's issues. They are also moving through an intensely formative stage of their lives. They have already chosen law as a career, and are now actively contemplating both what they shall do vocationally and paravocationally (by way of professional voluntarism) as well as how they shall reconcile the demands of professional life with the content of personal life — love, family, and leisure.

These students came to law school hoping, among other things, that they would learn more about what they could do in law for women. They have been somewhat disappointed. What they have largely encountered in their quest is a good deal of theory about the oppression of women, which they have labored hard to master, but which seems to have limited relationship to law and limited bearing on their lives or those of less economically and socially privileged women. They have learned little about legal institutions that bear directly on the material conditions of women's lives. Consequently, they have little sense of the direction that beneficial law reform might take. Indeed,

* Professor of Law, UCLA School of Law. I thank my colleague Christine Littleton and the editors of the *UCLA Women's Law Journal*, particularly Geniveve Ruskus, Peggy Chen, Andrea Lessani, and Penny Manship, for their helpful comments.

structurally, they have little sense of what needs reform. Despite their best efforts, they find themselves unrooted in the very subjects they had hoped to master and find illuminating. Many students report that they have studied, for example, poverty law but they have learned little about the structure and content of the categorical welfare programs and social security. They have studied family law but cannot describe, much less critique, the child support formula of their own state, or of any other state for that matter. Many women students have not studied tax law because it promised to be both "hard" (mathematical) and outside their range of interests; no one ever advised them that it might relate directly to their concerns.

Out of these discussions and reflections about the importance of economic institutions and arrangements to the material conditions of women's lives, the editors developed the theme of this symposium issue and accompanying daylong program, *Institutional Barriers to Women in the Workplace: Barriers to Entry, to Continuing Employment, and to Advancement*. The theme crosses the law school curriculum, invoking a variety of subject matter areas: tax law, employment law, social welfare law, poverty law, and social and political organization.

On the day of the symposium, the attendees came in good number — law students and attorneys, mostly women, a few men. Of the handful of UCLA women faculty, a majority participated or attended; of the forty or so male faculty, one male faculty member participated and one attended.

The day was pronounced a resounding success by all. Many of the attendees reported that they learned a great deal, that their eyes were opened, that they never before understood or identified some or all of these structural impediments to women's labor force participation. They were equally amazed to discover that there were relatively simple, nonutopian solutions to some of the impediments, and that other problems, more intractable, could probably be overcome by rolling up one's sleeves and joining together with other persons of goodwill.

Although the day was understandably judged a great success, as a law professor I was troubled. Every member of the audience, with the possible exception of first-year law students, *should* have found the day pedestrian and largely repetitive of what they already knew. That the day was an eye opener was a bad sign indeed, a sign that something has gone awry in legal education.

In this foreword, I shall offer an impressionistic participant-observer account of what has gone wrong. This account is unavoidably provocative and will be offensive to some. I apologize in advance. It is not my desire to offend; on the contrary, I generally prefer to please, to disarm, to avoid conflict. (My students sometimes observe that I exhibit these tendencies to a fault.) But here I shall speak plainly, even harshly. And I am aware, painfully aware, that what I say may be unfair, incorrect, or distorted by my own experience, limitations, tastes, and preferences. Yet I think that it needs to be said. As time passes and there are no other volunteers, I will say it. It is for you, my reader, to decide whether and to what extent my observations and analysis are sound. Within intellectual debate, legal and otherwise, the truth generally lies somewhere “in between.” In this foreword I am not going to carefully sketch out the *in between*, as I generally try to do in my scholarly work, but rather I am going to stake out one pole. The other pole is implicit, and I leave it to the reader to strike the right balance, to determine the truth *in between*.

First, a little history. Some twenty-five years ago, a pioneering legal scholar, reflecting on the already isolated position in the law school curriculum of *Women and the Law*, as the fledgling survey course was then called, proposed an alternative vision. In 1972, Ruth Bader Ginsburg convened at New York University Law School a two-day conference entitled *The Law School Curriculum and the Legal Rights of Women*, which was sponsored by the American Association of Law Schools. She organized panels by traditional curricular disciplines — constitutional law, property law, family law, tax law, labor law, and so on. She invited the leading and nascent scholars of the day, men and women, to participate in panels that would begin the process of reconceptualizing all subjects to include women’s issues and to reflect women’s concerns.

Although this project was not without effect on the teaching of both men and women professors in the standard law school curriculum, this project of mainstreaming *Women and the Law* has largely been neglected, if not abandoned, in legal academe, particularly in the more prestigious institutions, both by the academy itself and by many of those who purport to speak for women in the academy. In this foreword, I shall both describe the hijacking of *Women and the Law* and critique this development from various perspectives, including that of the hijackers themselves.

Feminist legal theory, feminist jurisprudence. Over the past two decades, the project originally denominated *Women and the Law* has become increasingly marginalized into an area loosely termed *feminist legal theory, or feminist jurisprudence*. This development has been fostered by legal academe, perhaps because it tends to isolate the practitioners and students of feminist jurisprudence from the regular curriculum. It enables the academy to feel comfortable with its own openmindedness, its inclusiveness, without having to contemplate or understand what has become an increasingly obscure corner of the law school curriculum. Although the occupants of this corner tend to be quite vociferous, even feisty, they largely preach to the already converted in ghettoized small courses and seminars and do little or nothing to alter the fabric of the traditional legal subject matter that deeply affects women's lives.

The replication of the conditions of sexual oppression is visible not only in the isolation of the subject, but also in the way that the academy fosters (tolerates) the development of the subject and the way that the academy increasingly chooses, as persons "to represent women," persons who may make a lot of noise but are virtually certain to make no waves in the traditional disciplines.

In selecting new faculty who express an interest in women's issues,¹ I am struck by how the higher ranked schools are looking for "interesting" women in a way that they are not looking for "interesting" men.² Men are expected to have specific subject matter mastery and expertise in mainstream curricular areas.

1. I confine these observations to women who wish to pursue subject matter in the traditional areas of concern to women, not to the hiring of all women. Women considered for subject matter areas that are generally understood not to involve issues of gender justice, for example, administrative law, business associations, or intellectual property, are more likely to be evaluated by the standards generally applied to men.

2. My colleague, Christine Littleton, counters that some male hires may similarly be described as "interesting" and that law schools are, in her opinion, unduly attracted to candidates whose work or thinking is based on "totalizing" theories, that is, theories that purport to explain everything, such as law and economics or feminist jurisprudence. She agrees that with male candidates, this is generally the exception rather than the rule and tends to be relatively harmless (perhaps even salubrious, I would think) because the "interesting" candidate will join a pre-existing body of more traditional scholars, becoming, for example, a school's fifth or sixth constitutional scholar, third or fourth bankruptcy scholar. In such case, the "interesting" hire can plausibly be expected to both join and enrich the scholarly discourse in a subject matter area already well represented in the law school curriculum. This is not the situation I describe in the text below.

Men are expected to bring keen intelligence and, if possible, interdisciplinary perspective to their subject matter areas, and they are expected to use a common language and participate in a common discourse. In contrast, women who express interest in subjects that bear on women are expected to be "interesting" and divergent in their perspective. The very minimum of doctrinal mastery of discrete areas of traditional subject matter is not required of women who are thought to have something else to offer, some sort of marginal intellectual spice, some sort of intellectual sex appeal. They are not expected or required to interest themselves in such mundane matters as mastery and analysis of legal doctrine, rigorous argumentation or, particularly, numbers in any form. Often they do not, and often they cannot. It is almost as though they are chosen more for what they cannot offer than for what they do offer; what they cannot offer effectively insures that they need never be taken seriously in an academy that otherwise understands these abilities as bare minima.

The matters most fully developed and widely discussed in feminist jurisprudence are largely sexual subjects, subjects that can be expected to titillate (men) both sexually and intellectually, such as pornography and sexual harassment, subjects in which women are perennially cast as victims, as helpless victims of male (sexual) aggression. Although these topics are significant, they are neither central to our basic legal institutions nor to the everyday lives of most women, while the large and critical subjects of market labor, family, and the distribution of goods, subjects vital to the well-being of most women, languish from inattention.

As Ed McCaffery³ and I have both discovered to our chagrin in the area of tax policy, the academy does not necessarily welcome the newcomer, male or female, feminist or otherwise, who would seriously challenge cherished legal principles and practices in the academy's own terms, with its own logic, its own analytic rubric, its own language. As Ruth Bader Ginsburg surely understood, feminists, male and female, would tend to do precisely this in the traditional disciplines. Thus, it is not surprising that there has been, albeit not necessarily consciously, a good deal of channeling into unproductive and unchallenging byways. The "spots" are filled; but they are occupied by people who pose no challenge, by people who do not really speak the language of the

3. See Edward J. McCaffery, *Equality, of the Right Sort*, 6 UCLA WOMEN'S L. J., 289 (1996), and EDWARD J. McCAFFERY, *TAXING WOMEN* (forthcoming 1996).

academy about the subjects that concern the academy, but rather who tend to speak in the language of other disciplines about subject matter outside the mainstream of academic concern and social importance.

As spots allocated to those who would speak for women about women's issues are occupied by feminist legal theorists, the traditional academic subjects that deeply affect women languish. In California, for example, at one prominent law school, family law has not been taught by a regular faculty member in many years; the subject is relegated to adjunct practitioners and to a stream of "interesting" women, none of whom is apparently interesting enough to hire as a permanent faculty member. Another leading law school in California has long been understaffed in family law and yet makes no apparent effort to fill the gap with regular faculty appointments.

I am not a disinterested observer. I teach family law myself and find it a deeply challenging area, with the doctrinal and conceptual complexity of any other important legal subject matter area. I am dismayed to see it, together with other major curricular areas of particular significance to women, neglected in favor of "spots for interesting women who do feminist jurisprudence." Among the other important but neglected areas are employment and labor law, tax policy, and, particularly, social benefits and welfare law. Although I am happily situated at a law school that I have no wish to leave, I am dismayed to see how hiring is done here and elsewhere with respect to the enterprise that seemed off to such an auspicious start when it was modestly called *Women and the Law* and, as per Ruth Ginsburg's vision, aimed itself at the entire law school curriculum, when its practitioners were assumed to be masters of the traditional substantive areas who would bring new perspectives to those areas, as opposed to devotees of a feminist jurisprudence unrooted and largely untutored in any substantive body of law.

I am not only blaming the academy for isolating and marginalizing, and hence diminishing the opportunity for productive feminist work in the mainstream law school curriculum. I am also calling into account the women who were complicitous in their own marginalization, who eagerly developed an arcane, largely self-referential literature as well as a set of preoccupations and behaviors that tended to isolate them from the rest of the legal academy and from the ordinary and everyday experience of women, including many of their own students. Ironically,

the construction and practice of a feminist jurisprudence in the legal academy has tended to illustrate a prominent theme of feminist jurisprudence — that women tend to be active collaborators in their own oppression.

Feminist legal theory takes its theory seriously, often exceedingly so, but tends to demonstrate little interest (other than the anecdotal and illustrative) in law per se. With its close connection to certain strains of critical legal theory, feminist legal theory does not take law seriously: law is merely an instrument of patriarchal oppression, and law will not substantially change until we wipe out patriarchal oppression. So it is far more sensible to think about and theorize about patriarchal oppression than it is to study law carefully.

It is not that feminist legal theory is entirely devoid of law. In feminist legal theory, law occupies the role that the literary text occupies in feminist literary theory. The text is a terrain on which to explore the nature of gendered oppression. The text is read for its sexually oppressive content. Thus when law is addressed in feminist legal theory, the tendency is to use it illustratively, anecdotally. Here, read this case. See how patriarchy operates. See how women are oppressed. This anecdotal use of law is indistinguishable from the use of any sort of anecdotal material; stories and riddles have long been used by the women's movement as "consciousness raising" devices. Reading law anecdotally may be rich in rhetorical payoff, but it is no substitute for the serious study of law.

There is a critical difference between the (now rather pedestrian) exercise of seeing how gendered relations are reflected in legal texts (after all, it is hardly surprising that legal texts, like literary works and other forms of human communication, should reflect gendered relations and gender oppression) and, contradistinctively, discovering how legal institutions and discrete bodies of law create and perpetuate gender inequality and then figuring out how laws and legal institutions can be recast to diminish and overcome gender inequality. The first entails the task of reading texts to pursue a theme of interest; the second entails a demanding, even Herculean, effort to master legal and empirical reality, and then to recast it. The first task is the one that feminist legal theory has assigned itself; the second is the one that Ruth Bader Ginsburg had in mind almost twenty-five years ago and is also the one that the student editors of this journal had in mind when

they chose to study law. I think that they deserve not to be disappointed.

Concluding on a constructive note. Ideally, the legal academy should include both feminist theorists (in small number) and (in large number) subject matter specialists who combine mid-level theory and substance in areas of critical importance to women. Ideally, the work of each group should inform and enrich the work of the other. In practice this has not occurred for at least two discrete reasons. First, the academy has not yet recognized the need for both, treating the two as fungible, and the theorists, adjudged more "interesting," have tended to displace the more traditional substantive scholars. Second, there is considerable tension between the two types of feminists. Feminist legal theorists, with their totalizing⁴ theories of gender oppression, often disparage the focus, content, and utility of more conventional mainstream work. The more traditional substantive scholars, while not untouched by the work of feminist theorists, tend to perceive it as, at best, somewhat distantly connected with the legal substance at hand. Thus we should not reasonably expect feminist legal theorists to lead a movement for a Ginsburgian woman-focused exploration and development of the traditional law school curriculum. Yet the task remains to be done.

At this juncture, now a quarter of a century after the birth of *Women and the Law*, it is time for law schools to take stock of their curricular offerings from the perspective of gender justice, to ask ourselves how responsive our curriculum is, both in terms of course offerings and course content, to the educational needs of our many students who now enter law school with, *inter alia*, the important social goal of working in law on matters of gender justice. The task might appropriately be framed in terms of curricular review and development, following the model we now use when we develop curricular tracks in various areas, such as public interest law, international law, and communications law.

Most importantly, such a curricular track would be rich in the substantive subjects that present important gender issues: family law, employment law, social welfare law, poverty law, and tax policy. Additionally, more specialized curricular offerings might be developed within the traditional subject matter areas, for example, *American and Comparative Tax Policy: Gender Jus-*

4. See *supra* note 2.

tice Issues; The Employment Relation: Gender Justice Issues. Alternatively, courses might be developed across traditional subject matter areas (as this symposium issue was), with courses devoted to broad ranging topics, such as *Institutional Barriers to Women's Labor Force Participation*, and *Lone-Parent Families: Legal and Social Issues*. While course content would, in either event, focus sharply and carefully on law and legal institutions, such courses would also necessarily incorporate the study of empirical data from the social sciences and, when appropriate, cross-national empirical research and legal studies. The curriculum that I envisage would be essentially a law and public policy track devoted to issues of gender justice. It would prepare our students for public interest practice and would create a rich environment for law-centered research and scholarship in *Women and the Law*.

