AT THE BOUNDARIES OF LAW

Feminism and Legal Theory

Edited by
Martha Albertson Fineman and
Nancy Sweet Thomadsen

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Dedication

From Martha: To the memory of my Mother, the promise of my daughters and the joy of my granddaughter.

From Nancy: To my parents, Arthur and Shirley Sweet and to Larry, Raph, Jordie T. and Kevin P.

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M.A.F.—Madison, 1990

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Introduction

Martha Albertson Fineman

This book is the product of an increased interest in feminist scholarship as it relates to legal issues. Law is an area relatively untouched by the post-modern currents that have washed through other disciplines, but now appears to be caught within tides of critical methodologies and conclusions that threaten its very roots. This collection of papers was selected from a larger group presented over a four year period at sessions of the Feminism and Legal Theory Conference at the University of Wisconsin. They reveal that feminist legal theory represents both a subject and a methodology that are still in the process of being born. There are no "right" paths, clearly defined. This scholarship, however, can be described as sharing the objective of raising questions about women's relationships to law and legal institutions.

Theory and Practice

Given the newness of the inquiry, many practitioners of feminist legal theory are more comfortable describing their work as an example of feminist "methodology" rather than an exposition of "theory." Some in fact believe that method *is* theory in its most (and perhaps only) relevant form.

In my opinion, the real distinction between feminist approaches to theory (legal and otherwise) and the more traditional varieties of legal theory is a belief in the desirability of the concrete. Such an emphasis also has had rather honorable nonfeminist adherents. For example, Robert Merton coined the term "theory of the middle range" to describe work that mediated between "stories" and "grand" theory. He described such

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This Introduction is based on a presentation made at the University of Florida in 1989. It will be published in the Florida Law Review in 1990.

scholarship as being better than mere storytelling or mindless empiricism as well as superior to vague references to the relationships between ill-defined abstractions (Merton, 1967, p. 68).

Feminist scholarship, in nonlaw areas at least, has tended to focus on specifics (Weedon, 1987, p. 11). Feminist legal scholarship, however, recently seems to be drifting toward abstract grand theory presentations. Carol Smart has warned that feminist legal theorists are in danger of creating in their writing the impression that it is possible to identify from among the various feminist legal theories that are in competition one specific form of feminist jurisprudence that will represent the "superior" (or true) version. She labels this totalizing tendency, evident in the work of many of the most well-known North American legal feminists, as the construction of a "scientific feminism," and she is explicitly critical of such grand theorizing (Smart, 1988, p. 71). The papers presented here avoid such theorizing and are connected with the material and concrete.

Grand theorizing represents the creation of a new form of positivism in a search for universal truths discoverable and ascertainable within the confines of the methodology of critical legal analysis. Middle range theory, by contrast, mediates between the material circumstances of women's lives and the grand realizations that law is gendered, that law is a manifestation of power, that law is detrimental to women. These realizations have previously been hidden or ignored in considerations of those laws that regulate women's lives. As the articles in this collection illustrate, such inequities in the legal treatment of women are best exposed by referencing and emphasizing the circumstances of their lives.

One cannot help but be aware of the difficulty of trying to do work using middle range feminist methodology within the confines of legal theory, however. Not only is there the pull toward grand theory that operates to categorize less grand scholarship as "nontheoretical," but I fear that feminist sensibilities become lost or absorbed into the morass of legal concepts and words. I, for one, am a legal scholar who has lost faith. Feminism, it seems, has not and, perhaps, cannot transform the law. Rather, the law, when it becomes the battleground, threatens to transform feminism. This is true I believe because of the obvious pull and power of the law as a "dominant discourse"—one which is self-contained (though incomplete and imperfect), self-congratulatory (though not introspective nor self-reflective) and self-fulfilling (though not inevitable nor infallible).

In order to even have a chance to be incorporated into and considered compatible with legal theory, feminist thought must adapt, even if it does not totally conform, to the words and concepts of legal discourse. Feminism may enter as the challenger, but the tools inevitably employed are those of the androphile master. And, the character of the tools

determines to a large extent the shape and design of the resulting construction. It seems to me, therefore, that the task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the existing totalizing nature of grand legal theory. Such a feminist strategy would set its middle range theory in opposition to law—outside of law. That is the task that has also defined the creation of this collection.

Feminist Methodologies

In these articles, there are several characteristics that in various permutations and combinations provide examples for the construction of feminist legal analyses that challenge existing legal theory and paradigms. First, feminist methodology is often critical. The critical stance is gained from adopting an explicitly woman-focused perspective, a perspective informed by women's experiences. I personally believe that anything labeled feminist theory can *not* be "gender-neutral" and will often be explicitly critical of that paradigm as having historically excluded women's perspectives from legal thought. "Gender-sensitive" feminism, however, should not be viewed as lacking legitimacy because of an inappropriate bias. Rather, it is premised on the need to expose and correct *existing* bias. "Gender-sensitive" feminism seeks to correct the imbalance and unfairness in the legal system resulting from the implementation of perspectives excluding attention to the circumstances of women's gendered lives, even on issues that intimately affect those lives.

There is a tendency in traditional legal scholarship to view the status quo as unbiased or neutral. This is the logical place for feminist analysis to begin—as an explicit challenge to the notion of bias, as contrasted with the concepts of perspective and position. Feminist legal theory can demonstrate that what *is* is *not* neutral. What *is* is as "biased" as that which challenges it, and what *is* is certainly no more "correct" than that which challenges it, and there can be no refuge in the status quo. Law has developed over time in the context of theories and institutions which are controlled by men and reflect their concerns. Historically, law has been a "public" arena and its focus has been on public concerns. Traditionally, women belonged to the "private" recesses of society, in families, in relationships controlled and defined by men, in silence.

A second characteristic of much of feminist work is that it uses a methodology that critically evaluates not only outcomes but the fundamental concepts, values and assumptions embedded in legal thought (MacKinnon, 1982, pp. 239–40). Results or outcomes in cases decided under existing legal doctrines are not irrelevant to this inquiry, but criticizing them is only a starting point. Too many legal scholars end their

inquiry with a critique of results and recommendations for "tinkering"-type reforms without considering how the very conceptual structure of legal thought condemns such reforms to merely replicating injustices (Fineman, 1986). When, as is so often the case, the basic tenets of legal ideology are at odds with women's gendered lives, reforms based on those same tenets will do little more than the original rules to validate and accommodate women's experiences.

From this perspective, feminism is a political theory concerned with issues of power. It challenges the conceptual bases of the status quo by assessing the ways that power controls the production of values and standards against which specific results and rules are measured. Law represents both a discourse and a process of power. Norms created by and enshrined in law are manifestations of power relationships. These norms are coercively applied and justified in part by the perception that they are "neutral" and "objective." An appreciation of this fact has led many feminist scholars to focus on the legislative and political processes in the construction of law rather than on what judges are doing. It has also led many feminists to concentrate on social and cultural perceptions and manifestations of law and legality at least as much as on formal legal doctrinal developments.

Implicit in the assertion that feminism must be a politically rather than a legally focused method or theory is a belief about law and social change that assumes the relative powerlessness of law to transform society as compared to other ideological institutions of social constitution within our culture. Law can reflect social change, even facilitate it, but can seldom if ever initiate it. No matter what the formal legal articulation, implementation of legal rules will track and reflect the dominant conceptualizations and conclusions of the majority culture. Thus, while law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change.

A third characteristic of much of feminist legal methodology is that the vision it propounds or employs seeks to present alternatives to the existing order. This may be, of course, a natural outgrowth of other characteristics of feminist legal thought, particularly when it is critical and political. I place it as separate, however, because an independent goal of much of feminist work is to present oppositional values. It is often at its core radically nonassimilationist, resistant to mere inclusion in dominant social institutions as the solution to the problems in women's gendered lives. In fact, the larger social value of feminist methodology may lie in its ability to make explicit oppositional stances vis-à-vis the existing culture. The objective of feminism has to be to transform society, and it can do so only by persistently challenging dominant values and defiantly not assimilating into the status quo. The point of making wom-

en's experiences and perspective a central factor in developing social theory is to change "things," not to merely change women's perspective or their position vis-à-vis existing power relationships. To many feminist scholars, therefore, assimilation is failure, while opposition is essential for a feminist methodology applied to law.

One other characteristic of much of feminist legal theory is that it is evolutionary in nature. It does not represent doctrine carved in stone or even printed in statute books. Feminist methodology at its best represents a contribution to a series of ongoing debates and discussions which take as a given that "truth" changes over time as circumstances change and that gains and losses, along with wisdom recorded, are not immutable but part of an evolving story. Feminist legal theory referencing women's lives, then, must define and undertake the "tasks of the moment." As the tasks of the future cannot yet be defined, any particular piece of feminist legal scholarship is only a step in the long journey feminist legal scholars have begun.

Within feminist legal thought and, indeed, within the articles included in this collection, there is explicit contest and criticism as well as implicit disagreement about the wisdom of pragmatic uses of law, the effectiveness of law as an instrument of social change and, most broadly, the importance of law as a focus for feminist study. Some feminist scholarship reveals antagonist, even violent disagreement with other feminist works. Disagreements aside, however, it seems clear to me that feminist legal theory has lessons for all of society, not just for women or legal scholars. Ultimately, it is the members of our audience that will judge the effectiveness of our individual and collective voices.

Conclusion

Feminist concerns are, and must continue to be, the subject of discourses located outside of law. Law as a dominant rhetorical system has established concepts that limit and contain feminist criticisms. Feminist theory must develop free of the restraints imposed by legalized concepts of equality and neutrality or it will be defined by them. Law is too crude an instrument to be employed for the development of theory that is anchored in an appreciation of differences in the social and symbolic position of women and men in our culture. Law can be and should be the *object* of feminist inquiry, but to position law and law reform as the *objective* of such theorizing is to risk having incompletely developed feminist innovations distorted and appropriated by the historically institutionalized and inextractable dictates of the "Law."

The scholarship presented here is critical, is political, is part of ongoing debates and is concerned with methods and processes that comprise

law. It is typical of the very best feminist legal scholarship in that it is about law in its broadest form, as a manifestation of power in society, and, for the most part, it recognizes that there is no division between law and power. Many of the articles recognize that law is not only found in courts and cases, in legislatures and statutes, but also in implementing institutions such as the professions of social work and law enforcement. Others reflect the fact that law is found in discourse and language used in everyday life reflecting understandings about "Law." It is evident in the beliefs and assumptions we hold about the world in which we live and in the norms and values we cherish.

I hope that the reader enjoys the excursion to the boundaries of law undertaken in this volume. A few are sure to be disturbed by some of the work presented, others, hopefully, will be inspired. Feminist legal theory has begun to expand the boundaries, redefine the borders of the law.

Madison, 1990

I

Perspectives from the Personal

Feminists assume that experiences of certain sorts facilitate genuine theoretical insights and that recreation of such experiences are legitimate contributions to legal discourse. Not only can the right "stories" provoke insights into the nature of law, they do so with a richness that eludes traditional presentations by summary or succinct arguments. Just as an appropriate picture may be "worth a thousand words," so too the representations of personal experience can be worth an indefinite number of conventionally relevant abstract-theoretic arguments.

In affirming the connection between the personal and more theoretical discussions, feminist authors acknowledge the relevance of experience, social position, and perspective to the development of theories of law. All scholars approach their subject from some particular point in the social universe and from that perspective; no "unbiased" points of view exist. In feminist scholarship, explication of the position from which the scholarship emanates is a significant part of the methodology.

In Kathleen Lahey's "Reasonable Women and the Law," for example, the author uses descriptions of encounters between women and the law to reveal how the normative notion of "reasonable" behavior functions as a justification for dismissing the voices of persons judged not to conform. This presents a particular dilemma for feminist practitioners of law. On the one hand, women lawyers and judges, as well as clients, must exemplify "reasonableness" in order to be taken seriously. At the same time, women who exemplify the accepted norms of reasonable behavior serve as standards against

which non-conforming women are judged deficient. They are thus often unwittingly complicit in the victimization of "unreasonable" women. There are deep psychic costs of adopting an alien persona in order to conform to accepted societal standards.

Patricia Williams's personal struggle to come to terms with her family history, particularly in relation to her great-great grandmother's experience as a slave woman, leads with startling directness to insight into the legal saga of "surrogate" mother Mary Beth Whitehead. Williams's stories, although very different from those presented by Lahey, echoes many of the same general themes: the experience of wrestling with feelings of self-betrayal in choosing to enter the legal profession, recognition of the deep effect the perceptions of others have on one's own sense of being, sensitivity to the process of making distinctions between those persons who "count" and those who don't, as well as an appreciation of the vast categories of things about which we dare not speak.

From a different perspective, unacknowledged barriers to speech in the courtroom is the focus of Lucie White's paper. Her story is based on her experience representing a woman from whom reimbursement for an alleged welfare "overpayment" had been demanded. The author uses this to show how, although guaranteed the formal right to a hearing, persons in socially subordinate positions often find their ability to speak and be heard undercut by their vulnerability to retaliation, by their lack of skill in the dominant mode of courtroom discourse, and by the externally legally imposed constraints of "relevancy." The emphasis of this paper is on barriers to the speech of women who are legal clients, but the pressure on practitioners of law to endorse strategies which are likely to be effective, rather than ones which genuinely reflect their understanding of the case, is also illustrated.

1

Reasonable Women and the Law

Kathleen A. Lahey

I

Women's struggle for access to the legal process has been many things: It has been a strategy for improving the distribution of social goods between women and men; it has been a goal in its own right; it has been a method of defending women against the worst oppressions of women; it is a way to construct the "public" (in patriarchal terms) for women, and on terms that women can tolerate. Over the last one hundred and fifty years, a lot has been thought, said, and written about these faces of women's struggles in law, and an impressive body of feminist jurisprudence is now being constructed out of this discourse.

There is another aspect of this struggle, an aspect that is not as easy to think, talk, or write about: the strategies that men and male sympathizers have used to keep women from succeeding in their struggles have affected the women who engage in them. These strategies—men's strategies—have also affected our beliefs about the ways that women should be.

On one level, this is merely a statement of the all too obvious. One of the greatest accomplishments of feminist legal scholarship has been to identify the ideological content of masculist legal theory, of legal reasoning, and indeed, of reasoning itself. To point out that this ideological content actually affects the real and lived lives of women is merely to demonstrate that ideas become real through ideology and that reality affects ideology. This is nothing new.

On another level, however, women who involve themselves with power processes live within the shadow of ideologies that are compatible with the acquisition and exercise of power. Thus it would not be surprising

to find that women who are involved in power processes are themselves influenced by the very forces they think they are combatting. And to the extent that this influence is effective, those women (all of us) must be blind to it, or think that it is minimal, or think that it is something they can control, or think that it is not relevant to what they are trying to do.

In other words, this second level of women's struggle has to do with the ways in which women who are involved in using the legal process to improve the status of women embody or become complicit in the very values, processes, ideologies, and structures against which they are struggling.

This embodiment, complicity, goes by many names. Some women think of it as a survival technique under conditions of male supremacy. Other women describe it as the "gatekeeper price." Others talk in terms of cooptation or assimilation. All of these labels are accurate. Women do have to survive, especially when they live under conditions of male supremacy. Women do have to pay a price to the gatekeeper who—male or female—enforces ideologies that perpetuate male supremacy. These forces do coopt, because power is powerful. Many women do become assimilated to existing power structures, because in assimilation lies safety, a sense of accomplishment, a source of enhanced self esteem. And women who do not have to struggle for bare survival, but who have some racial or class or other privileges, are also motivated by their particular wants: they want to feel safe, they want to feel a sense of accomplishment in their living and working, they want to enjoy enhanced self esteem. All of this seems to be entirely natural.

But this essay is not just about women's embodiment of oppression, of complicity. It is also about the steps we might all take toward liberating ourselves from our own personal and political histories as we work within law for the liberation of women as a sex class. The first step toward changing women's relationships to structures of sex-gender oppression is to identify the ways we, women working in law, embody many of the forces we are trying to change. The second step might be to imagine ways of talking about this embodiment, this complicity, that show respect and compassion for women's realities at the same time that we do not deny them. This is a difficult balance to achieve; without compassion and respect, naming our own complicities can all too easily slide into nihilism, trashing, the search for "political correctness," knowing better, betrayal, or moralism. Ways of addressing our complicities must avoid those reactions.

The third step, and by far the most difficult one, I think, is to imagine how women can work with each other despite our varying commitments to respect, compassion, responsibility for the quality of our interactions, and honesty, and despite our varying abilities to refrain from nihilism,

trashing, the search for "political correctness," denial, betrayal, or moralizing. Talking about internalized oppression, complicity, might in fact be easier than actually working together to change the conditions of women's existence, because the process of rejecting personal complicity may well uncover the personal damage that has made that complicity inevitable. This culture damages women, and damaged people have even more reason to hold tightly to their own survival techniques. In this third step, then, women need to create healing processes within and alongside their own liberatory processes.

I do not claim to have any special insight into any of these three steps, beyond being able to say that I think we need to take them, are taking them. My contribution to taking these steps is to begin by talking about the concept of "reasonableness" in legal discourse from my vantage point as a "white" lesbian survivor of various kinds of abuse. "Reasonableness" is perhaps one of the most central fixtures of north american legal culture, and it is used to silence women who try to speak in law, often before they even get to open their mouths. It is my contention that various kinds of abuse—racism, sexism, classism, heterosexism, able-ism, as well as physical, sexual, and emotional abuse—condition and shape people in ways that often make it easy to label them "unreasonable," and hence not entitled to the same respect, compassion, and legal protections that others enjoy.

The method of this essay is experiential. I first think through some of my own senses of difference and how that has affected my consciousness. I then quote at length Kobina Sekyi's story of Kwesi, an alienated British-trained African barrister. The rest of the essay is made up of other stories of women whose lives have been profoundly affected by their encounters with "reasonableness" in law. Not surprisingly, these are stories of abuse. I try to tell them with respect and compassion because I think these are the people we have to have respect for before we can begin to understand the relationship between reasonableness and law.

II

I am five years old, maybe nearly six. I am strong, fast, usually sort of funny. I feel myself somewhat damaged, but the important thing is that I do feel myself. Damaged in my being, I have only a few memories. I treasure one memory in particular, both for the simple reason that I have it and because of what it is.

When I have this memory, it is more like looking at a picture than like having sensations. I remember having the picture of what I am about to tell you in my eyes, and I remember this picture going from my eyes to my mind, where it is stored and can be called up at will for me to look

at inside my head, talk about. But the memory is empty in a curious way, an emptiness of knowing that it is I who have this memory, I who made this memory, but that I am walled off from myself within myself because I can remember the seeing of what I am about to tell you without remembering the I who was seeing it.

This distinction is crucial:

It is the difference
between
remembering being
and
remembering pictures
of being.

If you can imagine that distinction, then you can understand what this emptiness is. You can also understand why remembering is so important even when I cannot remember being the child who has done the remembering, can remember only as pictures what others might actually remember.

I try once more to remember that moment: I remember seeing through the eyes that made these pictures that I call a memory; I remember that I must have had legs to stand on, to see this thing that became this memory; I remember that I must have felt the air with my skin—the air was probably hot, this is a summer story—when I saw this thing that became this memory; I remember that my face must have felt hot when I realized what I must have realized when I saw this thing that has become this memory; I remember that I felt sort of invisible at that moment; I remember that I felt sort of neat inside myself for feeling what I was feeling at that moment; I remember that I felt sure that this was something I would not be able to talk to anyone about for a long, long time, if ever. It is difficult to keep my present sense of how I feel in my being out of my memory, if any, of how I felt while I saw what has become this memory. As best I can reconstruct it, this is how I felt then: seeing, standing, possibly hot, maybe a bit embarrassed, sort of invisible, neat, certain that I would not be able to tell anyone. And quite possibly totally fascinated, because I think I knew that I was seeing part of my life.

I am five years old, maybe nearly six. I am strong, fast, usually sort of funny. I feel myself somewhat damaged. I am standing at the side of an enormous hole, a huge excavation that will become the basement of our new house. It is a bright blue summer day, there is no breeze, but there is some edge to the air because it is not quite hot. It is very bright, there are not many other buildings because this is a new neighborhood, not

even a neighborhood yet: it is just a field with some houses here and there, and this huge excavation that will become the basement of a house.

I am five years old, maybe nearly six. I am strong, fast, usually sort of funny. I feel myself somewhat damaged. There I am at the side of this huge excavation, not big enough to climb down in it, knowing that if I were to try to do it (and I do not seriously think about trying to do it, that thought does not actually crystallize in my mind), I would get into trouble, never mind with who, I just know it the way I knew a lot of things.

I am five years old, maybe nearly six. I am strong, fast, usually sort of funny. I feel myself somewhat damaged. I am at the side of this huge excavation, not big enough to climb down into it, knowing that if I were to try to do it, I could do it, that it would be fun, but that I am not to try to do that. Not now, anyway. And I watch a big girl, a bigger girl than I, a strong, fast, and totally serious girl, climb nonchalantly down into this huge excavation, taking her time, completely absorbed, having a good time. And I can only watch.

I know that the fascination I felt when I watched this big girl, this bigger girl, nonchalantly climb down into this huge excavation and seriously poke around in what was to become the basement of our new house was due not only to the fact that this girl was doing this, but was also due to the fact that I had only recently, in meeting her, found out what it felt like to be in love with/totally fascinated by/completely and dopily and uncontrollably infatuated with another girl: a bigger girl, it is true, but a girl nonetheless. And I felt myself to be somewhat damaged.

So this is the memory, the remembering that I cannot remember the feeling of, but can remember the image of, the picture of: I am standing at the edge of this huge excavation, this enormous hole, my future basement, on a bright blue and somewhat hard-edged day, my entire body suffused with the thrill of seeing this girl that I loved absolutely with my entire and whole being, completely fascinated by her nonchalance and her climbing down there, poking around with a stick, I think, not paying any attention to me at all, ignoring me, even, knowing that it was totally out of the question for me even to think about climbing down there too or trying to talk to her, loving being able simply to see her do all of that, wondering why I felt the way I did about her, loving the look of her very beautiful and quite serious face, her shiny dark hair, her energy, her nonchalance, her climbing, my loving her. And knowing that I remember that I felt sure this was something I would not be able to talk to anyone about for a long, long time, if ever.

So there I was: captured in that moment of knowledge that something had happened to me, something that had to do with the fact that watching this particular girl climb down into that huge excavation on that particu-

lar bright blue and hard-edged day touched my sense of what it is that makes life so wonderful. It was, as they say, a moment of self-recognition. It was also and at the same time: a moment of celebration; a moment of despair; a moment that I still cannot remember actually feeling, although it is obvious that I must have felt a lot right then; a moment in which I learned, if I had not known before then, what conscious silence felt like, what not-being-able-to-name-something felt like, what not being able to do or be what I wanted to do or be felt like, and what being infatuated with girls felt like.

The end of this story of remembering is not nearly as important as the actual memory itself.

> I never did tell anyone.
>
> The girl and I became next door neighbors.
>
> I loved her for ten or twenty years, I forget exactly which.
>
> I even forgot which of the two sisters who lived together next door was the one that I loved. (I think it might have been the one who was three or four years older than me.)
>
> I forget when it was that I actually stopped loving her.
>
> If it is the sister that I think it was, she now lives in the same small town my own sister lives in on the other side of this continent. This is unremarkable to me now.
>
> My own sister reported to me recently that shortly after the time that this thing I remember took place, I became hysterical, cried and cried one evening, was unconsolable, crying because I said that I would never have any children.
>
> I never did have any children from my own body, but I do have two daughters from my heart.

III

What does any of this have to do with complicity? with reasonable women in the law? with women's possibilities for political action?

I can only say what I, as an adult remembering myself at that moment of self-recognition, have learned from that remembering—and from that not-feeling: I have learned that central to my identity in ways that go beyond the socially-ascribed meaning of the word *lesbian* is my woman focus. I have learned that if I think of myself as a woman who is as indifferent to other women as are women who are not so centrally woman-identified, I get out of touch with what I am really thinking, really

feeling, when I interact with other women. I have learned that I have been aware of this since I was at least five or six years old, and that I must have learned to act as if I were not this way at the very moment that I knew this about myself. I have learned that I have been totally silenced about the way I feel about women for a major portion of my life; even though I formally crystallized the thought that women could be lesbian, and that I might be lesbian myself, when I was around fifteen years old, my entire life has been a continuous coming out to the recognition of how powerful this identification has always been for me. I have learned that it is better to not tell, to not identify, to not bother other women with the details of my feelings for women, to distance myself from other women as a way to protect myself from their reactions to my feelings about women, to avoid intimacy as a method of self-protection, to separate my lesbianness from my politics, to always try to seem to be reasonable.

These are the lessons of denial. These are also the lessons of silence, of complicity, of self-imposed separation from others.

> Not that other women are actually endangered by my attentions. I am not usually attracted to women who are not attracted to me at some level; indeed, one of the ways I know whether a woman is at all woman-centered is by whether she seems to be at all attracted to me. Few straight women actually are.
>
> But women who are attracted to me—even on a friendly level—who do not want me, themselves, or other people to suspect them of being anything but heterosexually identified, usually stay well away from me. This destroys on a deep level many possibilities for creating our own meanings of "reasonable," for working together.

IV

Kobina Sekyi published "a psychological study of a type of present-day [1930] young Gold Coastian who has been educated partly in the English manner" as "Extracts from 'The Anglo-Fanti' " in Nancy Cunard's *Negro: An Anthology* (Paris: Hours Press, 1934). The problem he struggles to name and make real is "Europeanization," a process by which colonized people are rendered intolerable to themselves at the same time that their mannerisms do not make them tolerable enough to their colonizers to bring the condition of colonization to an end. Here are extracts from his story of Kwesi, a young Fanti. Kobina Sekyi wrote this after returning from England, where he was educated as a barrister:

"There exists a sperm of snobbishness in the character of our young friend; it is involved in Europeanisation as it exists in spheres of influence,

and shows itself clearly in the feeling of superiority exhibited by the boy in European clothes, or the boy whose parents are educated in the European sense. This feeling is supported by the meek acceptance of the situation which characterises the boy in national costume or the boy whose parents are illiterate. The burden of bad precedent and illegitimate prestige established under the aegis of the early missionaries is too much for the boys on either side. . . .

"The sperm of snobbishness develops. Strange conceptions of behaviour proper to Europeans and their satellites are gathered from the many books on European life put forth in Europe by European authors. Kwesi and his companions are convinced that European life is the ideal. Clubs are therefore formed with the avowed object of cultivating the accomplishments of the perfect European gentleman. The acquisition of fluency in speaking English is sought by means of debating societies and daily conversations in English. Boys who have passed through the Low School and are signalising their completed education by discarding the national costume give "breakfasts" at which etiquette as prescribed in books such as *Don't,* and *Rules and Manners of Good Society,* is *de rigueur.*

[Kobina Seyki then tells how Kwesi travels to England to study a profession. The narrative then focuses on his life in England.]

"It does not take him long to find out he is regarded as a savage even by the starving unemployed who ask him for alms. Amusing questions are often put to him as to whether he wore clothes before he came to England; whether it was safe for white men to go to his country since their climate was unsuitable to civilised people; whether wild animals wandered at large in the streets of his native town. He concludes that the people of the class to which his landlady belongs are, to say the least, poorly informed as to the peoples of other countries, especially of those parts known as 'The Colonies.' On the whole he is much disappointed with England as he has seen it by the time he is six months in England. His countrymen resident in London hear of him. Those of his own age or thereabouts call on him and he calls on them. He complains of his disillusionment; but some laugh and say he is not the only one disappointed, and others tell him he has not yet seen anything of England. . . . At the educational establishments he notices that there is no better information possessed by his fellow-students respecting 'natives' in 'The Colonies' than is possessed by those less educated; the only difference is that the better educated people ask questions that are less rude.

"For the next three years at least Kwesi is engaged in qualifying himself for his professional career. He possesses no mean ability for study, therefore his professional course has no terrors for him; he knows he will finish in time. But the professional is such a small part of the more general training in all sorts of other pursuits and accomplishments which

he receives during his sojourn in England. . . . In matters outside his professional course he is self-taught. The groundwork of these by-studies is the belief in the superiority of things European to things non-European, a belief he brought with him to England. It is true that his old ideas of European superiority have been much disturbed since he began to see England with his own eyes; but his friends, even those who have been similarly disillusioned have begun to accept certain disconcerting matters as incidental to civilisation, and, instead of arguing from the unpleasantness of such incidents to the inherent unwholesomeness of that to which they are incidental, they conclude somewhat perversely that whoever cannot explain away such unpleasantness is not civilised. This view, moreover, is much strengthened by the remarks let fall by certain friends belonging to classes reckoned as high, who, speaking from their very insular standpoint, by reason of their pardonable and exclusive appreciation of things English as against things non-English, and of things European as against things non-European, have given Kwesi and his friends to understand that those incidents of civilised life at first sight undesirable to those visiting Europe from Africa and Asia, are hallmarks of refinement.

[Kwesi acquires the class biases of the English upper classes; he feels patronized by white women, who act as though they are "conferring a favour" on Black men; Kwesi returns to Africa and sees himself through the eyes of his neighbors at the same time that he sees his neighbors through his own Europeanized eyes.]

"Since his return Kwesi . . . feels that . . . he must exercise a great deal of diplomacy. In his own family circle his undisguised partiality for the Fanti mode of doing everything is causing some uneasiness. . . . On the point of the national mode of clothing, therefore, the family have had to intimate to him their views: that no one will take any serious objection to his wearing such garb within the privacy of the family circle itself, if he is so whimsical as to prefer that mode of clothing: that if he seeks to go out in the national costume, such a thing may conceivably be permitted *at night:* that he ought not to forget that nobody before him has ever done such a thing as he evidently proposes to do, a course of conduct which, if he persists in it, will assuredly attach to himself the imputation of lunacy, and to them that of incapacity to control one of their children. . . . He disconcerts them by retorting . . . that if now it is proposed to keep him literally an Anglo-Fanti, Fanti as to his internals and English as to his externals, and such a conjunction pleases them, who are responsible for his having lived up to this time to become such a double person, then he will fall in with their wishes.

[Kwesi struggles against the hegemony of Europeanization; he refuses to marry; his family worries that he is secretly married to a white woman

in England; he finally marries a Europeanized Fanti woman in an English wedding ceremony; he refuses to participate with her in Europeanized social activities; she divorces him through local custom; he finally comes to understand the causes of Europeanization and of his own tragedy; he has a nervous breakdown, becomes ill, and dies. He leaves one last wish:]

"[I]f at any time any other member of the family, trained in England, on coming back, preferred to live as a Fanti man who had merely been trained in England, instead of living as a [B]lack Englishman who understood Fanti, they should leave such a one to live his own life as long as he was not undutiful; they should not seek to constrain him to live an artificial life; for the Fanti man's life was at least as good as the Englishman's life, and the mere accident of scientific development in the invention of machinery was not sufficient in itself to give any nation ground for calling itself civilised."

V

In her book on the moral development of women, *In a Different Voice,* Carol Gilligan reports on the differential impact that legal education has had on the ways that Hilary, a female lawyer, and Alex, a male lawyer, think about the rationalist ethic of justice and the particularized ethic of care.

Before going to law school, Alex apparently existed in an intellectual world of ethical conformity, formal rationality, and instrumentalized ideas of justice which involved logical hierarchies of moral values and insensitivity to the existence of differences. It was in law school, Carol Gilligan reports, that Alex apparently began to discover "the reality of differences" and "the contextual nature of morality and truth" as he realized that "you don't really know everything" and "you don't ever know that there is any absolute. I don't think that you ever know that there is an absolute right. What you do know is that you have to come down one way or the other. You have got to make a decision."

Carol Gilligan interprets Hilary's moral development as running in the opposite direction of Alex's. Describing Hilary as starting with an ethic of care and sensitivity to personal interdependences, she concludes that Hilary had "matured" morally when she decided to not help an opposing lawyer win a case for a client for whom Hilary felt some personal concern. Carol Gilligan concluded that Hilary made this decision out of a sense of self-preservation: she acted in conformity to the rules of professional ethics in order to protect her status as a lawyer.

Carol Gilligan decided that this was a "growth" experience for Hilary because she modified her ethic of care—which is based on an injunction against engaging in behavior that hurts other people—to include the

principle that she is not obliged to honor such a principle when it would cause harm to herself: she says that Hilary discovers that there is "no way not to hurt" in some situations. As Carol Gilligan concludes, Hilary matured morally by recognizing that "both integrity and care must be included in a morality that can encompass the dilemmas of love and work that arise in adult life."

Carol Gilligan reads Hilary and Alex's stories as moving toward mature moralities that both struggle to integrate the "complementary ethics of care and justice at the level of the individual." Because Carol Gilligan's overall project is to demonstrate the gender links between these two opposing ethical grounds, she then argues that just as both Hilary and Alex integrate two distinct ethics—despite divergent starting points—in the course of becoming adults, men and women move toward "a greater convergence in judgment." She stops short of finding a complete synthesis, however, and does recognize "the dual contexts of justice and care," which means that one's "judgment depends on the way in which the problem is framed." Carol Gilligan's personal resolution of the tension between the ethics of justice and care, then, is to treat them as being dialectically interactive. In this dialectic, the absence of sensitivity to one of the two opposing ethics generates a "lack" which then transforms the dominant ethic.

This resolution ignores the disparities in power that usually travel with such a "lack." I found myself musing on Hilary's reasons for acting in an adversarial fashion toward a woman for whom she felt some concern. Many lawyers—among them committed feminist lawyers and other radical lawyers—do not hesitate to tell their adversaries how to win a case that is supposedly being conducted in an adversarial fashion, despite what the rules of practice or canons of ethics may have to say about such conduct. Such occasions are rare, but do occur, as when a feminist lawyer is required by her employer to foreclose on a single woman's house.

I have tentatively decided that Hilary did not necessarily act *against* her own personal sense of ethics as care when she chose to act as she did—she may well have been coerced into acting in conformity with a distasteful set of rules (such as "do not sell out your own client") because of the realities of her dependence on her employer, her perceived need to keep her license to practice law as a condition of her own survival, or her sense of her own powerlessness to change the rules of the game she has, for many reasons, chosen to play. Compared with the quality of Alex's abandonment of a sense of the logical hierarchy of values as a result of what he learned in law school, Hilary's maturing judgment, which is said to converge with Alex's, looks more like a sensible and realistic compromise with extensively organized systems of domination. This does not, to me, seem to be particularly empowering.

Alex's "maturity," however, does look like empowerment. As most law teachers can appreciate, Alex's newfound ability to shift from one ethical paradigm to another, without moral qualms and as the strategy of the case dictates, is the essence of "thinking like a lawyer." Thus Alex emerges as a moral degenerate whose "ethic of care" is largely instrumental—yet Carol Gilligan concludes that he is morally more mature.

Increasingly, feminists are learning that Hilary's decision to cut herself off from her feelings about her adversary's plight is a way to "take care" of herself. And indeed it is. But look at what such self care involves, and look at the professional and personal contexts in which there are no other ways to take care of oneself. And think about who is ultimately empowered when those are women's choices.

VI

Compare the saga of Julia Girvin. (Julia Girvin is a pseudonym.) Julia Girvin is a labor activist and organizer from atlantic Canada who was admitted to a Canadian law school on alternative criteria. The members of her selection committee were particularly impressed by her published writing, organizing, and political abilities.

Applying her life skills to law school examinations, Julia Girvin failed all but one of her courses in first year. She was allowed on petition to repeat first year, whereupon she failed all of her first year courses the second time through. She was then dismissed from law school. This story has something of a happy ending: Julia Girvin, her life skills honed to near perfection by now, filed a law suit against the then dean of the law school. The suit was settled in her favor. Where had Julia Girvin gone wrong? Julia Girvin had refused (some still say she was unable) to adopt the ungrounded and cynical mode of analysis ("thinking like a lawyer") called for in law school examinations, in which the student is expected to pick through a fact situation, test it for affinity to one or another area of legal doctrine, conjure up "arguments" designed to convince the teacher that one can argue either side of the case with equal facility and conviction, draw in "policy" considerations that have to be balanced off against literalist doctrinal outcomes, and produce a persuasive and qualified result.

In her law school examinations, Julia Girvin chose to apply her life skills by discussing why the participants in these hypothetical transactions were on the verge of (or enmeshed in, or appealing) a law suit, what they ought to do in order to avoid getting involved in (or finishing, or appealing) a law suit, and how to reconcile their differences without compromising them in a way that violated their personal values. In short,

Julia Girvin refused to act as if the participants in these hypotheticals were forced to solve their problems within the legal process.

On the level of morality, Julia Girvin rejected a definition of moral "maturity" which required her to substitute a "converged" ethical base for her own highly contextual and realistic approach. Julia Girvin was not convinced that, in Alex's words, "you have to come down one way or another. You have got to make a decision." She simply refused to view the adversarial legal process as the best or the only way to resolve disputes.

Nor did Julia Girvin feel so intimidated by the canons of ethics—or so convinced that admission to the practice of law was crucial to her survival—that she decided that the principles of personal "integrity" obliged her, as they did Hilary, to adopt an alien mode of thinking purely for survival purposes. With a strong sense of her own identity as an organizer, Julia Girvin was not interested in exhibiting the relativistic adversarial skills of certifiable lawyers, even at the "cost" of never being certified as a lawyer. And in the end, she refused to recognize the legal professions' monopoly claim on dispute resolution, although she had skillfully used the legal process to get her perspective taken seriously.

VII

Linda Watt and Maureen Marshall were initially employed as clerical workers by the regional municipality of Niagara, Ontario. In the late 1970s, they both obtained positions as laborers. Although they were assigned to different work crews, they did work together frequently.

Before becoming a laborer, Linda Watt had already been labelled "difficult." Her "difficulty" might be traced back to her involvement in a disciplinary matter relating to a strike; soon after that matter was resolved (in her favor) she was suspended twice and then voluntarily transferred to the Roads Department under threat of termination. Years later, the personnel director for the municipality described her discipline record as the worst one he had ever seen. Her supervisor considered her work to be "totally unacceptable." He described her as "an immature spoiled child" who reacted strongly to any kind of discipline and whose work performance was so unsatisfactory that he did not feel he could trust her with any task. In performance evaluations, she had been accused of being habitually late, absent from work for various periods of time, and absent from her work station. Her attitude was described as negative and intimidating.

When Linda Watt moved to the Roads Department, she was first a temporary worker, and was later made permanent. Her first supervisor was not very enthusiastic about her work. During the first few months of her probationary period, he issued a reprimand for punctuality; that was

the only occurrence of that kind while he remained her supervisor, and a later work report noted some overall improvement in her work performance. There was some suggestion that Linda Watt had not been able to do some heavy work, or had said she could not do it; that incident was said to have negatively affected her co-workers' attitudes toward her. She was also apparently involved in a relationship with a married co-worker. Her first supervisor later claimed that he would not have offered her permanent employment because he had not been impressed by her work, but said that he had made her permanent because he simply "did what he was told."

Her second supervisor was a different matter. His name was Alex Wales, and he was described variously as a "stern disciplinarian," "tough," "of the old school," and a "real barker." Alex Wales claimed that as an old friend of Linda Watt's father, he felt friendly toward her at the beginning, but that she was "quite unresponsive," "hostile," and "very unlike the only other female laborer in the roads crew, Maureen Marshall."

According to Linda Watt, Alex Wales personally made so many abusive and sexist comments (both to her and generally) that the working atmosphere became intolerable. When he transferred her to another road crew, allegedly for disciplinary reasons, she filed a complaint under the Ontario Human Rights Code for sexual harassment and disparate treatment. The written reasons given by John McCamus, the hearing officer (and then dean of Osgoode Hall Law School) for dismissing her complaint contain a trilogy of viewpoints on this abuse, and offer some insight into what is considered to be reasonable female behavior under such conditions.

"*I do not want . . . women working in my yard*" Alex Wales apparently told Linda Watt "I do not want or approve of women working in my yard." Alex Wales flatly denied making that statement at all, although he had openly conceded that he did not think that this sort of work was suitable for women: "I didn't think actually that women were ever put on this earth to do the work of men. That was my, just my way of being brought up." He had also said that this might not be as true of women "from one of the foreign countries where they are brought up on the farm and everything else, consequently their muscles develop, their leg muscles develop, they become where they are stronger than men."

John McCamus, the hearing officer, found that Linda Watt's version of this comment was "distorted" because she left off one bit of that statement; according to her original complaint, Alex Watt allegedly said: "I have bent over backwards for Maureen and you even though I do not want . . . women working in my yard." Thus John McCamus found that she lacked credibility. He did find that Alex Wales had made the

statement, but decided that it was "essentially innocuous" when considered in its entirety. It was not evidence of prejudice, because Alex Wales had actually conceded that he was prejudiced. Nor was it evidence that Alex Wales had acted on admitted prejudices: "it is a strong statement to the contrary." He then decided that the transfer had not been motivated by sex discrimination, but merely by concerns over Linda Watt's work attitudes: "[T]he evident feistiness of the complainant's attitude and her apparently cavalier attitude to such matters as safety rules is something which would be especially troubling to a zealous supervisor such as Mr. Wales." And he found confirmation in Maureen Marshall: "The absence of similar treatment being meted out to Ms. Marshall is of some relevance."

Linda Watt "had lost all her femininity" Linda Watt said that Alex Wales had told her that she had "lost all her femininity" working in the yard. In her complaint, Linda Watt had said that this statement had "shocked" her. Alex Wales claimed that he had merely complained to Linda Watt that her "language was disgraceful and that she had 'detracted from her femininity' with her language in the yard." John McCamus agreed that "the language used by workers was quite crude and obscene as a general matter. There was a good deal of abuse, good-natured or otherwise, meted out in conversation." John McCamus pointed to evidence that Linda Watt also used crude language: she had "a notorious tongue," and she had conceded that she regularly used profane language.

John McCamus concluded that correcting Linda Watt for her language in such a situation would ordinarily constitute a double standard: if foul language on such a work site was considered to be acceptable for men, it should also be acceptable for women. He also understood that such a double standard was sexist and violated Linda Watt's civil liberties: "Mr. Wales's views, however naturally they may have come to him as a result of his cultural environment, are virtually a caricature of the sorts of attitudes which led to the social injustice which the Code attempts to remedy."

Nonetheless, John McCamus ruled that such a sexist comment and such a double standard did not in this case violate her civil liberties or constitute sexual harassment because "the holding of such a view, surely, is not a very startling phenomenon." He felt that Alex Wales was merely communicating to Linda Watt "mere personal distaste" for her crude language. Therefore it was not a statement that would "reasonably 'shock' a person in the complainant's position."

The "dead animal" comment A third incident is described in John McCamus' opinion: "At approximately 8:15 one morning, a small group, including at least the complainant, Ms. Marshall and Mr. Brown, were sitting at a picnic table in the yard awaiting work orders. There was a

very unpleasant odor in the yard as someone had apparently left a dead animal in one of the trucks. The complainant asked what the cause of the aroma was and Mr. Brady, who was nearby, is alleged by the complainant to have come over to her and pulled apart her legs, insinuating that she was the source of the unpleasant odor. It was Mr. Brady's evidence that although he did make a remark in general terms about the odor, he did not touch the complainant in the fashion alleged. A good deal of evidence in these proceedings was led on this particular point and I am satisfied that at the very least, Mr. Brady made a remark which specifically referred to the complainant in this context or, more probably, did in some fashion touch the complainant in such a way as to indicate, albeit in a joking manner, that the complainant was the source of the odor."

The "passion pills" comment Another "joke" related to Alex Wales's pillbox. On one occasion, he took a pillbox out of his pocket to take a pill. He showed the pillbox to Linda Watt, pointed to one of the pills, and said: "Watch out for that one, that's a passion pill, if you take it you'll run into the woods and take your pants off." Linda Watt testified that she walked away after that comment. Alex Wales testified that she laughed with him about it.

Linda Watt's complaint was tried as a claim that she was required, as a term or condition of her employment, to work in an "abusive environment." John McCamus realized that perspective was everything in evaluating the evidence, and he felt that he had four perspectives to choose from: the objective viewpoint of a reasonable abuser; the objective viewpoint of a reasonable victiin; the subjective viewpoint of a reasonable abuser; and the subjective viewpoint of a reasonable victim. He decided that "the proper perspective is the objective one of the reasonable victim." He felt that such a standard would "protect women from the offensive behaviour that results from the divergence of male and female perceptions of appropriate conduct, but it would not penalize defendants whose victims were unusually sensitive." He agreed with the authors of the comment that judges could protect sensitive victims—unreasonable women—only when those sensitive women clearly notify the offender of their distaste.

This standard of the reasonable victim is intended to "protect the defendant by ensuring that he would not be held liable for conduct not obviously offensive to a reasonable woman unless the victim had clearly communicated her distaste to him."

In this case, it is painfully apparent that Maureen Marshall—unwittingly or not—played the role of the reasonable woman. John McCamus went to a great deal of trouble to explain precisely why none of the

incidents complained of (there were many more than just these four) constituted sexual harassment, either in the more commonly understood sense or as features of an abusive environment. But it was not until he could use Maureen Marshall as a standard against which to hold Linda Watt that he seemed to feel really confident about his judgment: "In reaching the conclusions that Mr. Wales did genuinely attempt to [go along with employing women], it is of some interest that his relations with Ms. Marshall appear to have been quite cordial and that he had no complaints about her work whatsoever. Nor did Ms. Marshall offer evidence of verbal or other harassment directed at herself by either Wales or Brady. There appears to be no explanation—other than performance or attitudinal problems of the complainant—as to why Mr. Wales would treat the complainant differently from Ms. Marshall."

Linda Watt's complaint was dismissed because the insults or taunts that were directed at her did not reach a level of offensiveness and frequency that was considered to be "abusive." She did offer detailed testimony on the effects this abuse was having on her, but even here, the reasonable woman, Maureen Marshall, helped show why this testimony did not count either: Ms. Marshall, who had had close personal conversations with Linda Watt during the entire period in question, testified that Linda Watt had been very upset by her recent divorce, as well as by the breakup of her affair with a co-worker. On the basis of this testimony, John McCamus concluded that "her evidence on this question is therefore not sufficiently reliable to find a causal link between her contact with Mr. Wales and whatever emotional distress she may have endured during this period."

VIII

Gayle Bezaire was beaten, sexually assaulted, and abandoned when she was a child. She was eventually committed to a refuge for adolescent girls. When she was seventeen, she became pregnant, refused to have an abortion, and got married. She became a battered wife when she became pregnant with her second child. Within a few years of the birth of her second child, she came out as a lesbian, laid charges for criminal assault against her husband, for which he was convicted, and left him. He apparently was not an easy man to leave; he attempted to maintain control over his wife and his children despite their separation, went to jail rather than pay child support (he actually spent forty days in jail rather than pay support arrears), and ingratiated himself with his wife's family and friends in order to deprive her of their support and to turn those who meant the most to her against her. Once when she had moved to the other side of Canada to start a new life, he and his mother flew into town,