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Feminist Legal Studies

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Scholars usually date the inception of feminist legal studies—variably called feminist legal theory or feminist jurisprudence—to the early 1970s, when [p. 581 ↓] women's rights advocates first mounted an organized campaign in the courts against sex discrimination. Linked to the increasing number of women professors in U.S. law schools, the field developed rapidly and established close links with allied intellectual movements, most notably critical race theory and gay and lesbian studies. Feminist legal theory shares an interdisciplinary focus with women's studies, but concentrates on understanding and critiquing the law's treatment of women and the role of law in constructing the meaning of gender in the larger culture.

Equality or Liberal Feminism

In its early stages, during the 1970s, legal feminists emphasized women's similarity to men. In this Equality Stage of legal feminism, practitioners and scholars directed their efforts toward dismantling the intricate system of sex-based legal distinctions that had confined women to the private sphere of home and family. Women's rights advocates, such as Ruth Bader Ginsburg, later serving on the U.S. Supreme Court, argued that because women were the same as men in all relevant respects, they should have equal access to all public institutions, benefits, and opportunities on the same basis as men. These advocates succeeded in convincing courts to reject virtually all explicit gender lines in the law, even though they were ultimately unsuccessful in achieving ratification of the Equal Rights Amendment to the U.S. Constitution.

The equality orientation of 1970s-style legal feminists is most often associated with “liberal feminism,” characterized by its commitment to individual autonomy and choice. Its central message is that gender is irrelevant and that one should treat persons as individuals, not as members of a class. Liberal feminist arguments were often moderate in tone: they tended not to challenge rules or structures themselves, but focused on attaining equal access within existing cultural frameworks. The major 1970s initiatives addressed “bread and butter” issues of equal pay, entry into nontraditional lines of work, equal admissions to elite universities, and equal rights of married women to control marital property. Liberal feminist arguments also extended new rights to men, particularly within the “female” domain of the family. During this period, courts granted

men equal rights to alimony, child custody, and spousal benefits under programs such as workers' compensation and social security.

The most important judicial ruling in the 1970s was *Roe v. Wade* (410 U.S. 113, 1973), which gave women a constitutional right to choose to have an abortion during the early stages of pregnancy. *Roe's* constitutional right to privacy fit well with the liberal feminist emphasis on individual choice and autonomy and remains the biggest single victory for feminists in the courts. Granting abortion rights permitted greater numbers of women to control their fertility and enabled them to gain a larger and more sustained presence in the workplace and public life generally.

Difference Feminism

Feminist legal scholarship in the 1980s was largely a reaction to the limitations on the gains made during the Equality Stage. In contrast to the 1970s emphasis on sameness, feminist legal theorists in the 1980s turned to difference. The enthusiasm for legal reform along equality lines gave way to a realization that such efforts would not cure the substantive inequality that beset most women's lives. Phenomena such as the feminization of poverty, the gender gap in politics, and the “glass ceiling” made it clear that gender still mattered in the real world, and legal feminists questioned the ideal of a gender-blind society.

An important project of 1980s legal feminism involved revising the concept of “equality” to mean something other than “identical treatment” of men and women. Feminists theorized that if men and women did not start from the same position, identical treatment of the sexes would not produce meaningful equality. Some argued that for treatment as equals, women, whose lives differed from those of men, paradoxically needed different treatment. A major theme of this Difference Stage in feminist theory was that male norms in law and society must be changed to accommodate and reflect women's distinctive needs.

The 1980s emphasis on difference inspired feminists to confront discrimination against women in such areas as pregnancy and sexual violence, including rape, [p. 582 ↓] sexual harassment, domestic violence, and pornography. The most influential feminist

legal theorist of this period was Catharine MacKinnon, who sought to demonstrate how the legal system was fundamentally opposed to women's interests and designed principally to perpetuate male dominance. MacKinnon offers a critique of liberal feminism that argues that well-established liberal concepts such as privacy, objectivity, and individual rights operated to legitimate the status quo. In MacKinnon's brand of radical feminism, also called dominance feminism, what passed for women's sexuality was not an authentic expression of women's desire, but a product of male domination. She argued that the criminal law tolerated a high incidence of forced sex and that the legal concept of "consent" in rape law derived from a male point of view that accepted force as normal male behavior.

MacKinnon's most successful campaign was to gain recognition of sexual harassment as a form of sex discrimination under the civil rights law. She maintained that sexual harassment was a central mechanism in perpetuating women's inferior status in the workplace, and courts and federal agencies later embraced her theories to provide the basic doctrine for organizing litigation. In the realm of constitutional law, MacKinnon argued for a new antisubordination approach to equal protection that focused on differences in power between men and women in society. The central inquiry under such an approach was whether the law perpetuated the second-class status of women.

A major controversy that caused a split among feminist theorists during this period was the campaign against pornography, led by MacKinnon and Andrea Dworkin. They drafted a model ordinance to provide for a civil rights cause of action against pornography, redefined as the graphic sexually explicit subordination of women. The ordinance was based on MacKinnon's view that pornography was central to the social construction of sexuality and that, through pornography, dominance and inequality were eroticized. She believed that pornography made sexism sexy and that there was a connection between pornographic portrayals of women as sex objects and the prevalence of sexual violence and sex discrimination in society.

Many feminist critics of MacKinnon regarded the antipornography ordinance as a form of censorship and disagreed with its central premise that sexual imagery victimized women. They expressed concern that conservative judges would interpret the ordinance in punitive ways, particularly against lesbians, gay men, and sexual minorities. The legal issue was ultimately resolved in favor of the critics when a federal

court struck down the antipornography ordinance as an unconstitutional violation of free speech. The campaign exposed divisions in feminist thought that went beyond the specific issue of pornography, sometimes expressed as different emphasis on women's victimization versus women's agency. Some criticized dominance theory for emphasizing victimization and leaving too little room for women to describe how they had taken actions to shape their lives and create their own identity.

Cultural Feminism

Another important strand of feminist legal thought that emerged in the 1980s was cultural feminism, sometimes called relational feminism. More than other schools of feminist thought, this group of theorists recognized and celebrated women's differences from men. The scholar most identified with cultural feminism is Carol Gilligan, a developmental psychologist whose book *In a Different Voice* (1982) sparked an unusual volume of interdisciplinary feminist commentary, including legal writings. Cultural feminism articulated the ways in which women tended to approach problems, view the world, and construct their identity. Legal feminists sought to find expression in the law for women's "different voice," with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection. In contrast to liberal feminism's de-emphasis of the mothering role, cultural feminists supported maternal and other traditional activities associated with women. This positive vision of women's culture urged a reevaluation of the activities and attributes commonly associated with women and femininity.

Drawing on Gilligan's work, legal scholars such as Robin West broke with the liberal feminist emphasis [p. 583 ↓] on individuality and autonomy and argued that women were materially connected to others through critical experiences, including pregnancy, childbirth, and heterosexual penetration. As a proponent of the emerging field of law known as alternative dispute resolution, Carrie Menkel-Meadow used cultural feminist theory to suggest how greater emphasis on cooperation, preservation of relationships, context, and process could change and feminize the legal profession. Cultural feminism also laid the foundation for legal reforms, such as maternity leaves and comparable worth, and the movement aimed at raising pay scales in predominantly female jobs.

Critics of cultural feminism soon expressed concern that the portrait of women painted by cultural feminism too closely resembled the nineteenth century stereotype of women as emotional, domestic, and nurturing creatures and amounted to an updated version of separate-spheres mentality. The potential danger of cultural feminism appeared in the mid-1980s in a high-profile employment discrimination case brought against Sears, Roebuck and Company. As part of its successful defense, Sears introduced the testimony of a feminist historian who relied on Gilligan to argue that women preferred low-pressure, predominantly female jobs selling cosmetics and other “soft” articles, even though their compensation was only half that of similar commission sales positions, held mostly by men. For many feminists, *Sears* exemplified how easily one could appropriate cultural feminist claims of gender difference to defend the status quo rather than to challenge the low value assigned to women's activities and feminine traits.

Diversity among Women and Critical Feminism

By the 1990s, feminist preoccupation with comparing the situation of men and women was eclipsed by a new focus on diversity among women. The period saw a flowering of scholarship from women of color, lesbians, and other groups of “outsider” women who claimed a presence in legal circles. The hallmark of the scholarship during the Diversity Stage was the attention paid to differences among women, particularly those of race, class, ethnicity, physical disability, and sexual orientation. Feminist legal scholars turned inward and criticized the dangers of essentialism, the assumption that there is some essential commonality among all women. They generated new theories about the interaction of various kinds of oppression in society and explained how they intersected in multiple ways to create distinctive forms of discrimination against subgroups of women.

Black feminist scholars such as Angela Harris dissected the work of feminist writers to expose how feminist theories possessed the flaw of “false universality,” by taking inadequate account of race and subtly placing white women at the forefront of the discussion. Critical scholars in the 1990s excavated deep-seated habits of thought in

mainstream and feminist writing, which focused on the most privileged subgroups within subordinated groups, such as white women or black men, and led to the invisibility of women of color.

Kimberlé Crenshaw proposed a theory of “intersectionality,” which explicitly recognized the distinctive harm experienced by women of color and acknowledged the interlocking nature of systems of oppression. Anti-essentialist scholarship of the period also rejected dichotomous thinking that had treated race and sex as mutually exclusive categories (as in the common phrase, “women and minorities”). These scholars insisted that women of color not be forced to split the racial and gender aspects of their identity, instead embracing a “both/and” sense of self to capture the full extent and meaning of their group's experiences.

During the Diversity Stage of feminist legal scholarship, lesbian scholars such as Patricia Cain faulted legal feminists for excluding lesbian experience in constructing their theoretical models. She argued that lesbian intimacy was central to the identity of some women and that feminist accounts were often “heterosexist,” implicitly presuming that all persons were heterosexual. To be inclusive, anti-essentialism required opposition to both sexist and heterosexist cultural practices. This included placing custody rights for lesbian mothers on a par with reproductive rights to abortion and contraceptives.

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In the 1990s, feminist theorists absorbed the anti-essentialist critique and constructed more sophisticated theories that recognized the social construction of difference along several axes. Martha Minow developed a relational conception of difference that sought to dislodge the oppressive meaning of difference as deviance from the norm by challenging the unstated reference point by which scholars defined difference. She continued the critique of objectivity started by MacKinnon, advocating a search for multiple perspectives and multiple truths, which emphasized the importance of the social position of the observer.

The Future

In retrospect, the 1990s themes of anti-essentialism and multiple perspectives were part of a larger intellectual trend known as postmodernism, which questions the existence of universal truth and embraces a new understanding of the self. Liberal theory had depicted the self as an autonomous, rational being who exercises free will and makes choices. In contrast, postmodern scholars view the self as inseparable from social, cultural, and ideological forces and regard identity as unstable, fragmentary, and often contradictory. Postmodern legal scholars such as Patricia Williams used personal narrative and storytelling to illuminate complex identities, such as that of multiracial persons who had to struggle against available categories to describe their personal experience.

In the first few years of the twenty-first century, identity has continued to be a topic of importance for many feminist and critical scholars as postmodern influence over legal scholarship has intensified. The postmodern emphasis on “performing” one's identity has allowed scholars to criticize the demands placed on individuals to assimilate to dominant norms of the institution or community and has led to a deeper understanding of the dynamics of intragroup bias. The performative turn in critical scholarship comes at a time when the demarcation lines between various allied intellectual movements have become increasingly blurred. Many contemporary writers refer to “outsiders” and “outsider scholarship” in an effort to address multiple identities and a diverse range of social groups. Meanwhile, queer theory has started to break away from feminism, as scholars such as Janet Halley have become increasingly hostile to legal regulation of sexual conduct, even forms of abusive conduct such as sexual harassment.

This new century has also witnessed a trend among a group of feminist writers to connect to the growing global feminist movement and to agitate for an expansion of women's rights explicitly linked to human rights. Grounded in the recognition of the dismal material situation of women worldwide, this genre of feminist and critical race feminist scholarship is less theoretical and addresses violence against women on a global basis. At a time when legal feminists in the United States are discouraged by a conservative political climate hostile to feminist perspectives, scholars are looking to international law and international norms to push forward reforms for women at home

and abroad, to raise consciousness, and to continue the effort to harness the power of law to construct gender equality.

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See also

- [Abortion](#)
- [Critical Feminist Theory](#)
- [Critical Race Feminist Theory](#)
- [Discrimination, Sociology of](#)
- [Equality](#)
- [Essentialism](#)
- [Gender](#)
- [Human Rights, International](#)
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- [Inequality, Economic](#)
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- [Pornography](#)
- [Postmodernism](#)
- [Queer Theory](#)
- [Rape and Sexual Offenses](#)
- [Relativism, Cultural](#)
- [Sexual Harassment](#)

Further Readings

Chamallas, Martha. (2003). *Introduction to Feminist Legal Theory*, 2d ed. New York: Aspen.

Gilligan, Carol. (1982). *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.

MacKinnon, Catharine. (1987). *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press.

Wildman, Stephanie M. (1996). *Privilege Revealed: How Invisible Preference Undermines America* . New York: New York University Press.

Wing, Adrien K., Ed. (2003). *Critical Race Feminism: A Reader* , 2d ed. New York: New York University Press.