Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"

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This article provides a personal account and review of the intersections and divergences in the critiques of legal education offered by critical legal studies[1] and feminist theory. Both schools of thought focus on the hierarchy, passivity, depersonalization, and decontextualization of present-day legal education. Both see limitations in the way rules and roles serve to create a lawyer *persona* that prevents us—both from a political and interpersonal perspective—from seeing the world in its non–role-differentiated complexity. Both lines of critique deplore domination and oppression and seek to explore new ways of imagining less oppressive forms in consciousness, in belief systems and in actual practice in law, in legal education and in the larger society. The role of law in this endeavor is a subject of some controversy for both schools.

The main difference between the two ways of looking at the world is that the feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins—and, some would argue, remains—in a male-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced. The CLS critique of legal education is a powerful, ideal, and conceptual critique.[2] In my view, however, the feminist critique, which begins by asking that the previously devalued be revalued in legal education and elsewhere, offers greater promise for the task of reconstruction because it originates not only in conceptual constructs but in experience—in *being* dominated, not just in thinking about domination.[3] All law professors were at one time students, but women law

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1. "Critical legal studies" is lowercased in order to avoid privileging it over feminism.
2. Many individual men, including "white male heavies," in CLS have experienced oppression and domination, as unwanted radicals, as minorities of various sorts, as working class members, as children, etc., but collectively the CLS movement is dominated by white males with a fair amount of privilege within the institutions of legal education. See Duncan Kennedy, Psycho-Social CLS: A Comment on the Cardozo Symposium, 6 Cardozo L. Rev. 1013 (1985).
3. See Virginia Held, Feminism and Epistemology: Recent Work on the Connection

professors remain women. For them, the personal really *is* political.

A few caveats before we begin. This piece employs a feminist method—that of a personal narrative. Other participants in the story will undoubtedly have different ways of seeing the issues, but for the purpose of beginning the conversation, one person's account is as good a place to begin as any other. I apologize in advance for any names, articles, or activities I have left out. In the hope of introducing some of the history and sources to those interested in both critical legal studies and legal feminism I have named many names, places, and events, but there are undoubtedly omissions. My purpose is to review where we are in order to help assess where we might go from here. Finally, I fear I may have fallen into the very trap I criticize others for—that of setting up false dichotomies—male/female, bad/good, CLS/feminists, feminine/feminist, lecture/experiential learning, domination/oppression, rational/emotive. Although much of my work as a law teacher and scholar has attempted to reduce this either/or, on/off way of thinking, when I slip, the power of dichotomous thinking reveals itself. The issues are more porous, complex, continuous, and problematic than one can express. My goal is to increase the diversity of teaching processes and methods in legal education, not to substitute one form for another. Feminist teaching itself takes many forms, as does legal education as currently practiced. Perhaps a constructive exploration of alternative ways of conceiving of and practicing legal education, informed by feminist and critical legal theories, can expand and broaden our collective repertoires.

I. Social History

The rebirth of the dormant feminist movement in the United States in the 1960s was in part a response to male-radical insistence on using male-dominated hierarchical forms of political organization to accomplish important revolutionary ends.[4] While men ran the meetings and formulated policy, women were relegated to "nurturing" (making coffee) and "arts and crafts" (painting placards and posters). Women, angered by this structure, formed women's consciousness-raising groups and, ultimately, political action groups that joined with other social protest movements of the time. Simultaneously, less radical but politically visible forms of feminism emerged in the writings and organizing of such "liberal" feminists as Betty Friedan and Gloria Steinem.[5]

Many of these women, as well as their male comrades, went to law school, committed to the use of law to bring about social change. Some of

Between Gender and Knowledge, 14 Phil. & Pub. Aff. 296 (1985) for a thoughtful discussion of how our experience has affected our ways of knowing as feminists.

4. My own experience is rooted in the radical student movement of the 1960s, specifically at Columbia University where the male-dominated SDS contributed to the founding of Columbia Women's Liberation. See also Todd Gitlin, The Whole World is Watching: Mass Media in the Making and Unmaking of the New Left (Berkeley, 1980); Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left (New York, 1980).
5. Betty Friedan, The Feminine Mystique (New York, 1983); Gloria Steinem, Outrageous Acts and Everyday Rebellions (New York, 1983).

the men were instrumental in the formation of the conference on critical legal studies.[6] So were some of the women, but that story has not yet been told. Many of the women subscribed to the early themes, principles, or approaches of the CLS critique of law and legal education,[7] such as the basic critique of the inherent logic of the law, the indeterminacy and manipulability of doctrine, the role of law in legitimating particular social relations, the illegitimate hierarchies created by law and legal institutions, in short "the politics of law."[8] But year after year the women at CLS conferences were relegated to their own ghettoized session (usually labeled "Feminist Theory and the Law" and seldom attended by the men). Both Schlegel's and Gordon's intellectual and social histories of critical legal studies mention feminism, but mainly in footnotes or in passing references, suggesting that the feminist focus on a "heavy rights agenda"[9] would confront CLS theory that challenges the efficacy of rights analysis in advancing progressive social change.

As a self-conscious effort to pull feminism out of its marginal position, the organizers of the 1983 conference on critical legal studies, held at Rutgers-Camden, arranged for a segment of the conference that would focus solely on feminism. Ann Freedman's plan called for all participants to attend one of four simultaneous sessions on feminist theory and the issues feminism brought to any critical theory of law, legal process, and legal education. The feminists who had planned the conference sessions found the planning and debriefing sessions scheduled immediately after the feminist sessions highly stimulating and rewarding. In contrast, the feminists found that the sessions themselves elicited male sexist responses, especially painful among fellow radicals. Differences among the women emerged as well. Women responded to the experience by forming at least two ongoing groups. On each coast a group of women lawyers and law teachers began meeting to deal with the issues that feminism and critical legal studies brought together—sometimes in agreement and often in dramatic tension.

As in the early days of the women's movement in the 1960s, these groups began in reaction to a radical and mostly, but not exclusively, male vision of an alternative conception of society, or in this case, of the legal system. Unlike the movement of the 1960s, however, the new movement of "fem-crits" had already begun to develop theories about law and subordination and the role of law in eliminating or aggravating inequalities. Their theories were based on feminist legal work and on the larger feminist challenges to knowledge offered by women's studies scholarship.[10] On

6. See Robert Gordon, New Developments in Legal Theory, *in* The Politics of Law: A Progressive Critique, ed. David Kairys, 281 (New York, 1982); John Schlegel, Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 Stan. L. Rev. 391 (1984).
7. Some of the women involved in the very early days—indeed in the formation—of CLS were Jeanne Charn, Nancy Gertner, and Ann Freedman.
8. Kairys, *supra* note 6.
9. Schlegel, *supra* note 5, at 410.
10. The "new movement" had more feminist theory and legal theory in place at its time of formation than the earlier movement in the 1960s, which had to create theory out of

many subjects and in many ways feminist critiques of law and legal institutions were similar to, consistent with, or derivative of critical legal studies approaches, e.g., MacKinnon's brilliant comparison of sexism to classism and feminism to Marxism,[11] Olsen's analysis of the reciprocal and reinforcing relationship between family and market;[12] Taub and Schneider's legal analysis of the divisions between the public and private spheres;[13] Freedman's, Williams', and others'[14] deconstruction and critique of the Supreme Court's illogical and largely manipulable treatment of sex discrimination issues; and Rifkin's and Polan's analysis of law as systematic oppression in its creation and support of patriarchy.[15]

At the same time, however, a new group of feminist theorists,[16] staking out a field called "feminist jurisprudence," began speaking and writing about a critique of law and legal institutions that sometimes overlaps with critical legal theory but often sets its own ground. These theorists are as often influenced by schools outside critical legal theory as inside—the French feminists (Cornell),[17] feminist philosophy (Littleton, West,

experience. For representative writings and issues in feminist theory generally, see A Feminist Perspective in the Academy: The Difference It Makes, ed. Elizabeth Langland & Walter Gove (Chicago, 1981); Ellen DuBois, Gail Paradise Kelly, Elizabeth Lapovsky Kennedy, Carolyn W. Korsmeyer & Lillian S. Robinson, Feminist Scholarship, Kindling in the Groves of Academe (Urbana, Ill., 1985) [hereinafter Feminist Scholarship]; Josephine Donovan, Feminist Theory, The Intellectual Traditions of American Feminism (New York, 1985); Sandra Harding, The Science Question in Feminism (Ithaca, 1986); bell hooks, Ain't I A Woman: Black Women and Feminism (Boston, 1981); Alison Jaggar, Feminist Politics and Human Nature (Totowa, N.J., 1983). For representative writings in feminist legal theory, see Lucinda Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118 (1986); Ann Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913 (1983); Mary Joe Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. Rev. 55 (1979); Nancy Gertner, Bakke on Affirmative Action for Women: Pedestal or Cage? 14 Harv. C.R.-C.L. L. Rev. 173 (1979); Sylvia Law, Women, Work, Welfare and the Preservation of Patriarchy, 131 U. Pa. L. Rev. 1249 (1983); Chris Littleton, Reconstructing Sexual Equality, 75 Calif. L. Rev. 1267 (1987); Catharine MacKinnon, Feminism, Marxism and the State: An Agenda for Theory, 7 Signs 515 (1982), and Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983); Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387 (1984); Ann Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373 (1986); Nadine Taub & Elizabeth Schneider, Perspectives on Women's Subordination and the Role of Law, *in* Kairys, *supra* note 6, at 117; Stephanie Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984); Wendy Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 Women's Rts. L. Rptr. 175 (1982).

11. MacKinnon, *supra* note 10.
12. Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983).
13. Taub & Schneider, *supra* note 10.
14. Williams, *supra* note 10; Freedman, *supra* note 10.
15. Janet Rifkin, Toward A Theory of Law and Patriarchy, 3 Harv. Women's L.J. 83 (1980); Diane Polan, Toward A Theory of Law and Patriarchy, *in* Kairys, *supra* note 6, at 294.
16. This group includes many of the scholars listed *supra* note 10 and also includes a new group of scholars including Ruth Colker, Robin West, and others cited herein.
17. Drucilla Cornell & Adam Thurschwell, Feminism, Negativity and Intersubjectivity, *in* Feminism as Critique, ed. Seyla Benhabib & Drucilla Cornell (Minneapolis, Minn., 1987).

Colker),[18] feminist psychology and sociology (Menkel-Meadow),[19] literary theory (Dalton, Frug),[20] and social history (Minow).[21]

In 1985 the theorists concerned with feminist jurisprudence joined with many others, using regional collectives,[22] to plan and sponsor a feminist-CLS conference. The format, issues, and dialogue were different from previous CLS conferences. Coordinated by four Boston-area "fem-crits" (Clare Dalton, Mary Joe Frug, Judi Greenberg, and Martha Minow) groups in other parts of the country helped plan the Boston meeting for at least a year before it took place. The planning process led to a more participatory sense, at least for a larger number of conference participants (and their children!), than at previous meetings, which had been planned almost exclusively by one local planning group. "Facilitators" of small groups met before the meeting to read texts and discuss methodology. The conference opened with nonlegal material—a film of the short story, "A Jury of Her Peers"[23]—in order to provide a cultural text and common experience for all participants. All participants then discussed the film in small groups, with facilitators who had been part of the year-long planning process around the country. During the rest of the conference there were panels on, among other things, practice and racism, led by women and people of color. One session, devoted to presentations of works-in-process, encouraged both participation and choice in creating the conference.

The conference took place at a residential site and included meals, informal socializing, and cultural events. Most participants reacted positively to the conference. Some male critical theorists, however, felt the conference had been a "diversion" from the critical legal studies agenda, and that now that the women had been given a chance to "do their own thing," we should return to "critical" work. In addition, some of the women felt that rage had been suppressed in order to provide a safe environment, and that other issues of domination and oppression had been ignored, e.g., homophobia. The "fem-crits" had begun to develop theories and methods of confronting law and legal institutions that diverged from CLS. Their methods and processes were different (more inclusive, participatory, nurturing, experience-based) because method and process are essential aspects of the feminist critique.[24] The 1987 CLS conference on racism attempted to

18. Littleton, *supra* note 10; Robin West, Gender and Jurisprudence, U. Chi. L. Rev. (forthcoming); Ruth Colker, Toward An Authentic Female Sexuality, B.U.L. Rev. (forthcoming).
19. Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 Berkeley Women's L. J. 39 (1985) [hereinafter Portia], and Women as Law Teachers: Toward the Feminization of Legal Education, *in* Essays on the Application of Humanistic Education to Legal Education 33 (New York, 1981).
20. Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997 (1985); Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 Am. U.L. Rev. 1065 (1985).
21. Martha Minow, "Forming Underneath Everything That Grows": Toward a New History of Family Law, 1985 Wisc. L. Rev. 819.
22. There were planning groups in Boston, New York, Washington, D.C., and Los Angeles (including participants from Northern California).
23. Susan K. Glaspell, A Jury of Her Peers, *in* The Best Short Stories of 1917, ed. Edward O'Brien (Boston, 1918).
24. See Learning Our Way: Essays in Feminist Education, ed. Charlotte Bunch & Sandra

continue this more participatory mode and explored some of the similarities (and differences) of minority perspectives on legal institutions with feminist perspectives (e.g., the critique of the critique of rights).[25]

Since my own part in these developments has been largely devoted to issues of process and method in legal education and lawyering,[26] this article reviews the "fem-crit" contribution to critiques and reconstructions of legal education and related issues of lawyering process. I will leave to another day or to other people a more comprehensive review of the contributions of feminist jurisprudence to critical theory more generally. Elizabeth Schneider, Robin West, and Fran Olsen have begun that important task.[27] I begin with an exploration of the convergence of CLS and feminist critiques of legal education.

II. Critical Legal Studies and Legal Education

The principal spokesperson for critical views of legal education has been Duncan Kennedy, whose *Legal Education and the Reproduction of Hierarchy*[28] has been distributed widely in law schools and reprinted in shorter forms that make it accessible to law teachers and students alike. The CLS critique of legal education is roughly as follows. First, while others (and Duncan Kennedy himself) explore the themes of critical theory for an understanding of law and its role in society, we must also look at the process by which law and the myths surrounding it are justified, rationalized, and legitimated to the future makers and practitioners of that law. Thus, we must understand the process of teaching and learning law at the same time that we deconstruct particular doctrines, entire subjects of the law, or the relationship of legal institutions to the larger society. Second, and in response to the "what are you doing about social change in your own backyard" critique, the interest in legal education is motivated by a desire to

Pollack (Trumansburg, N.Y., 1983); Gendered Subjects: The Dynamics of Feminist Teaching, ed. Margo Culley & Catharine Portuges (Boston, 1985) for descriptions of "feminist process" both inside and outside of the classroom.

25. Minority Critiques of the Critical Legal Studies Movement, 22 Harv. C.R.-C.L. L. Rev. (1987) [hereinafter Minority Critiques] containing published articles based on presentations at 1987 CLS Conference on Racism and the Law by Richard Delgado, Jose Bracamonte, Mari Matsuda, Patricia Williams, and Harlon Dalton.
26. Menkel-Meadow, *supra* note 19; Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 49 (1985) [hereinafter Feminist Discourse] (remarks of Carrie Menkel-Meadow).
27. Elizabeth Schneider, The Dialectic of Rights and Politics: Perspectives From the Women's Movement, 61 N.Y.U. L. Rev. 589 (1986); West, *supra* note 18; Frances Olsen, The Sex of Law (unpublished manuscript on file with the author). Mark Kelman's recent book, A Guide to Critical Legal Studies 59–61, 227, 271–3, 276, 285, 342 (Cambridge, Mass., 1987) discusses the contributions of some feminist critics within critical legal studies frameworks.
28. Duncan Kennedy, Legal Education and the Reproduction of Hierarchy—A Polemic Against the System (Cambridge, Mass., 1983); Duncan Kennedy, Legal Education As Training for Hierarchy, *in* Kairys, *supra* note 6, at 40; Duncan Kennedy, Legal Education and the Reproduction of Hierarchy, 32 J. Legal Educ. 591 (1982); see also Karl Klare, The Law-School Curriculum in the 1980's: What's Left? 32 J. of Legal Educ. 336 (1982).

apply critical legal theory honestly to one's own workplace.[29] For Duncan Kennedy and others associated with critical legal studies,[30] critical legal theory is not merely an elegant academic exercise, it is theory about how to restructure the way we live. What better place to start than the world most legal theorists currently inhabit?

The main argument of the CLS critique of legal education is that law schools train students for hierarchy—first in school, then for the profession and practice of law. In law school the student enters a world ordered in top-to-bottom ways that seem grossly ironic in a discipline whose mottos include "Equality Under the Law." In amphitheater-style classrooms one professor teaches as many as 150 students. Unlike other disciplines, the teacher does not lecture but uses a "Socratic" teaching method[31] in which deductive questions about appellate cases are asked of unwilling students in order to explore the "underlying logic" of the cases. The process, in its classic form, is intended to expose the inherent hierarchy of the logic of the law—what "rules" are general enough to govern similar cases and what "rules" are specific enough to override more general propositions because they take account of the particular facts in an individual case. The student experiences the process as a shell game, for no matter what the level of particularity of the rule selected, the teacher (who knows all the answers to the questions) can point to either lower or higher levels of abstraction that better fit the situation.

In addition, unlike a true "Socratic dialogue," in which a teacher and a few students explore questions of philosophic importance to which all are seeking answers, the law school form of Socratic dialogue occurs in so large a group that little reciprocity, genuine communication, or exploration is possible. Students are often glad that someone else is "on the hook," and, while "out there," each student feels alone, unsupported, alienated, fearful, and grows increasingly apathetic. Thus, the metamessages of such classes are that teachers know it all, that students must guess at what is temporarily "right," and that learning is highly individualized and most often proceeds in a humiliating forum.

The rationale often used to justify this form of education is that it proceeds deductively to teach the student to "think like a lawyer"—to discern the relevant from the irrelevant, the correct rule (as a matter of logic), or the correct policy (as a matter of largely undisciplined, nonempirical speculation about the long term effects of imposing the correct rule on

29. See Duncan Kennedy, Dissent to Michaelman Committee Report on the Harvard Curriculum (Cambridge, Mass., 1983).
30. See, e.g., Karl Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265 (1978); Peter Gabel, The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves, 62 Tex. L. Rev. 1563 (1984); Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982–4); Roberto Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561 (1985); Joseph Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984).
31. In its "purest" form there is no lecturing in the law school version of Socratic dialogue. In actual practice many law school classes now consist of brief lectures with a "Socratic" tag question occasionally punctuating a paragraph of lecture.

lots of other people in similar but potentially different situations). "Thinking like a lawyer" thus occurs at a particular level of abstraction, with a particular text, that of the appellate case, which exists in a hierarchy of its own within the ordering of courts from the U.S. Supreme Court to state trial court. The point of view of the typical classroom analysis teaches the law student that for purposes of learning she is like a judge, or better yet, like a professor who determines whether the case is "properly" decided from the limited perspective of the logic of rules or largely unsubstantiated (from a rigorous empirical perspective) policy assumptions. Thus, the student in this process feels superior to the actors in the case—the litigants (parties and lawyers), the judges, other students who answered "incorrectly," and those potentially affected by the rules—but inferior to the all-knowing teacher or the student who gives a better answer.

This existential state of status uncertainty is hardly a healthy place for learning or questioning. Many law students become passive and do not question and, further, lack an in-depth intellectual curiosity about their discipline. In addition, law students must confront another hierarchy—their teachers have rejected the world of practice and have chosen instead a life that is open to very few. The student can almost feel contempt for the practicing lawyer oozing from every pore of the professor. Work in the real world is a lower form of occupation, and time with the soon-to-practice student is the price the professor pays to do his scholarship—liberal, radical, or conservative critiques of the direction of lawmaking.

The dominant form of midlevel discourse in law school (what is the "correct" rule and what are the three or four competing policy considerations, e.g., efficiency, predictability, flexibility, fairness) devalues other possible levels of discussion.[32] At the "lower," more human levels, discussion about the actual parties or the effects of the legal case on the litigants seldom occurs. At the "higher" levels, social theory, philosophy, and politics are seldom used to explain the larger structures or patterns of the rules, except in specialized courses on jurisprudence or particular subject matters. The hierarchy of value within the law school often treats the teacher who engages in the "higher" or "lower" levels of discussion as less worthy than the "rigorous" purveyor of rules. This midlevel discussion of rules separates theory from practice and in the end teaches neither. Knowing rules does not teach students when and how they are to be used in concrete situations. Failing to pay serious attention to the theory behind the rules (beyond "buzz-word" policy analysis) treats the rules as given, static, and almost immutable and does not prepare either the social reformer who wants to change the rules or even the traditional lawyer who must anticipate for clients possible changes in the direction of rules. This form of education overlooks completely areas in which rules are ignored and custom controls behavior[33] or in which there are few legal "rules" at all (e.g., transactions,

32. For my argument that legal education represents an unhappy compromise between vocational training and theory, see Carrie Menkel-Meadow, Too Little Theory, Too Little Practice? Steven's *Law School*, 1985 Am. B. Found Res. J. 675.

33. See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963).

not litigation). By the end of the first year the rules seem clear and certain, the very "core" of what law school is all about. Discussions about other things move to the fringe: "Real lawyers don't talk sociology."

Students who excel at rule differentiation get high grades and are invited to join the law review, for which they decide what scholarship will be published, write notes as "philosopher-judges" about incorrectly decided cases, and, most importantly, compete with others just like themselves for jobs with elite corporate law firms. They learn that work in law is hierarchical—the best students work at the "best" firms (because they attract the students with the highest grades, pay the most money, and provide legal services for the rich and powerful). Certain kinds of practice are valued over others (corporate over family law, for example), and federal court is more prestigious than state court if one litigates (but these days the transaction planner is valued more highly than the litigator).

Similarly, teachers are stratified in complex reputational ladders of elite, national, regional, and local schools,[34] and by subject matter, reflecting some of the stratification of law practice.[35] Appointments to law faculties depend on the rank of the law school attended, grade performance in law school, and the level of court clerkship, rather than teaching ability or scholarly promise or achievement (unless it can be assessed by reading student law-review work). Until recently, hiring was carried out almost exclusively through an "old boy network" in which distinguished Harvard and Yale graduates were recommended by their teachers to professor friends at other schools or by judges in the most prestigious courts. And, until quite recently, law teachers were almost exclusively white, middle-class males, so that authority, intelligence, and correctness were coextensive with white, middle-class maleness.[36] Students looking for mentors or models in teachers who looked demographically like themselves would get the message that they did not belong unless they were white and male.

Kennedy's critique of training for hierarchy focuses on the very structure of the law school—the domination and inequalities in pay and status between law professors and secretaries and janitors.[37] The lesson this teaches students is that one day they, too, after paying the price of submission, will be able to dominate others. Their role as lawyers not only provides the conceptual map for solving all problems within the limited framework of the law, but provides a safe, social home by allowing the role to justify the hierarchy it creates over others who play less valued roles.

What has been the critical response to this picture of legal education? Some, like Duncan Kennedy, urge a radical restructuring of the legal curriculum—a sort of law school Cultural Revolution. Teaching would consist of a few limited legal skills—rule learning, case categorization—and

34. John Heinz & Edward Laumann, Chicago Lawyers: The Social Structure of the Bar (New York, 1982).
35. Stratification systems may not be the same for students and teachers. Scholars regard highly jurisprudence and other theory courses; students value "practical" courses and bar subjects.
36. See Cynthia Fuchs Epstein, Women's Place: Options and Limits in Professional Careers (Berkeley, 1970).
37. Kennedy, *supra* note 28, at 54–55.

clinical, practical skills, with larger social theory and political analysis of particular systems, such as the welfare and housing systems. Law schools would be reorganized by rotating all employees through all jobs and randomly assigning students and teachers to law schools in place of the current "meritocractic" allocation. There would be further democratization of legal education work by paying equal salaries to all, without distinctions based on tenure.[38]

Others suggest reforms related more to content than to form. They urge "trashing"[39] entire bodies of doctrine in class in order to demonstrate the indeterminacy and manipulability[40] of rules, undercut the legitimacy of the legal system, and thereby "destabilize" the study of law. Some choose to make explicit in the classroom the current debates in critical legal theory, e.g., the futility of legal "rights" analysis (do rights lead to empowerment or merely recreate the problem of individualism in the modern welfare state without improving the lot of real people and collectivities?). Does law subtly legitimize itself, lulling teachers and students into accepting it as real (and "reified"), so that they fail to explore the more significant relations between law as a control or power mechanism over the passive populace? Still others, through clinical education, explore a form of education based in the real world that links the study and use of law with real problems in the hope that law can be mobilized to help people, and that the institutions that limit change can be studied in greater sociological and political depth.[41]

Yet except for these radical—and as yet unenacted—proposals and some change in the content of some classes taught by critical legal studies teachers,[42] the inexorable march toward Socratic dialogue *cum* lecture continues at most law schools. Although critical legal studies has supplied us with a cogent critique of legal education by focusing on the limitations of its intellectual content and the hierarchy of its form, not that much has changed. As the annual CLS conferences preserve much that is traditional in the gathering of leftist academics (didactic lectures, panels of "experts," plenaries, a perceived hierarchical membership structure,[43] and criticism–self-criticism sessions at the end), legal education continues pretty much as it was.

"Fem-crits" have taken opportunities such as the Boston conference to attempt to alter the internal forms of critical legal studies, but feminist theory, although it builds on the CLS critique of legal education, also diverges from it. Like CLS critiques of legal education, the feminist-critical critique has both a content and a form dimension; and, like critical legal theory, no one "theory" unites all "fem-crits." This is a time of exciting

38. *Id.*
39. Mark Kelman, Trashing, 36 Stan. L. Rev. 293 (1984).
40. See Clare Dalton, Book Review, The Politics of Law, 6 Harv. Women's L.J. 229 (1983).
41. Klare, *supra* note 28; Edward Sparer, Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 Stan. L. Rev. 509 (1984); Gabel & Harris, *supra* note 30.
42. Gary Bellow and Jeanne Charn at the Legal Services Institute, Jamaica Plain, Mass.; Carrie Menkel-Meadow, Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education, 4 Antioch L.J. 287–299 (1986).
43. Schlegel, *supra* note 6, at 402.

intellectual and emotional exploration as both intellectual schools formulate new questions to debate and teachers look for new forms to test new theories.

III. Feminist Theory and Legal Education

While critical legal theorists see law and legal education as hierarchical, feminist critical theorists have explored dimensions of law and legal education that derive specifically from the feminist experience. Feminists observe, for example, that specific hierarchies in the law and legal education develop out of pairs of false dichotomies (rational-irrational, soft-hard, intellectual-emotional)[44] in which what is tied to the "female" is usually viewed as inferior to or subordinated to that which is labeled "male."[45] The devaluing of what is "other" in the male-dominated world of legal education and lawyering has provoked critiques and reconstruction projects that may go further than the CLS critique to change legal education. This is due in part to the relatively well-articulated and practiced modes of feminist education in other contexts, both within the academy and without.[46] Thus, feminist critical theory has developed its critique and alternatives to conventional legal education more fully than CLS, although its impact has not yet been felt as fully in legal education as in women's studies courses and other areas of the mainstream academic process.

Theory

To understand the context of the feminist critique of legal education, it is important to understand the theoretical underpinnings of feminist analysis of law and legal institutions. What follows is a brief and necessarily incomplete review of some of the strands of current feminist legal theory.[47]

Feminist legal theory began within the limitations of laws and theoretical constructs created by men. Early feminist approaches to law and legal reform were derived from the civil rights movement and race relations. Women sought equality and "equal protection" under the Fourteenth Amendment. Through Supreme Court interpretations, however, "equality" did not always result in equal treatment of women.[48] The failure to treat pregnancy as a sex discrimination problem is a flagrant example. In a pair of cases (one under the equal protection clause, the other under equal employment opportunity laws), the Supreme Court defined the relevant classes as "pregnant persons" and "nonpregnant persons." Since the latter class includes both women and men, any denial of benefits to those who were pregnant could not logically be based on sex. The

44. Olsen, *supra* note 10; Menkel-Meadow, *supra* note 19.
45. MacKinnon, *supra* note 10, and Feminist Discourse, *supra* note 26, at 20 (remarks of Catharine MacKinnon). See also, Alice Jardine, Prelude: The Future of Difference, *in* The Future of Difference, ed. Hester Eisenstein & Alice Jardine, xxv (New Brunswick, N.J., 1985).
46. See Bunch & Pollack, *supra* note 24; Culley & Portuges, *supra* note 24.
47. See sources cited *supra* note 10.
48. See Freedman, *supra* note 10; Wildman, *supra* note 10, Sylvia Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984).

conditions shared by both sexes were covered equally by a disability policy; there was no room for the Court to question disadvantageous treatment of a condition that was not shared, i.e., pregnancy.[49] Out of this case and others like it came the realization that "equality" could be formal (that is, men and women could be treated alike) but hollow (because they were not equal in fact, or substantively equal).[50] Similarly, a closer analysis of the model of "equality" reveals that the standard women were supposed to equal was a "male" one.[51] Thus, if women performed as men in the workplace,[52] they were entitled to equal treatment, but if they apparently could not perform as men (e.g., their effectiveness as prison guards might be jeopardized by the risk of rape),[53] they were not entitled to equal treatment and need not be hired.

In reaction to these doctrinal issues, an important tension in feminist theory emerged, often referred to as "equal treatment vs. special treatment."[54] Should women urge a model of equality and treatment based on an assumption of "sameness" between the sexes? Or should "differences," biological or cultural,[55] be taken into account ("accommodated" or "accepted" as Chris Littleton puts it)[56] in order to achieve real or substantive equality? This tension came to the fore recently when legal feminists appeared on both sides of a case involving California's provision of a limited leave without pay for pregnant workers.[57] It was argued that the provision benefitted women specially, since male employees had no equivalent benefit. The Court upheld the state law against an argument that it violated federal law—a law that, although it declares discrimination on the basis of pregnancy to be sex discrimination, has been interpreted to treat pregnancy as no better or worse than other "disabilities." The Court held that the

49. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).
50. Elizabeth Wolgast, Equality and the Rights of Women (Ithaca, 1980); Littleton, *supra* note 10. The terms of "special" or "equal" treatment are themselves problematic. "Special" is still based on a male referent in which "special" connotes "different from" (with the difference "from men" often suppressed). See MacKinnon, *supra* note 45. The same can be said of "equal," which suggests "the same as" (men). All of the present constructions of language on this issue invariably invoke the male norm as the definitional standard.
51. Littleton, *supra* note 10, at 1267.
52. Diaz v. Pan Am, 442 F.2d 385 (5th Cir. 1971) *cert. denied*, 404 U.S. 950 (1971); Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).
53. Dothard v. Richardson, 433 U.S. 321 (1977). Women were excluded from employment as prison guards on the possibility that they might be raped. There was neither factual evidence of an actual rape nor did the court take note of the widespread incidence of rapes of men in prisons.
54. Finley, *supra* note 10; Littleton, *supra* note 10; Williams, *supra* note 10; Nadine Taub & Wendy Williams, Will Equality Require More Than Assimilation, Accommodation or Separation From the Existing Social Structure? 37 Rutgers L. Rev. 825 (1985); Wendy Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate 13 N.Y.U. Rev. L. & Soc. Change 325 (1984–5).
55. The source of "differences" continues to be a controversial debate. See, e.g., Freedman, *supra* note 10; Ruth Bleier, Science and Gender: A Critique of Biology and Its Theories on Women (New York, 1984).
56. Littleton, *supra* note 10.
57. California Federal Bank vs. Guerra, 107 S. Ct. 683 (1987).

federal law acted as a floor, not a ceiling, on pregnancy-leave provisions. The opposing views raise questions that go well beyond asking what legal strategies feminists should use.

First, the "substantive equality" school resonates, at least in part, with the critical legal theory view of "rights analysis" as problematic. In this context, "equal" rights are dangerous because they are defined politically by those who sit on the bench (usually men) and apply standards based on their partial conception of the world, which to them may appear neutral, objective, and complete—such judges after all, have the power to make the rules in their own image.[58] Especially in the context of "equal" rights, equality has come to mean the right of individuals to be equal to like individuals. Equality is not measured in terms of collective or group (i.e., women's) characteristics or needs. A demand to be treated "equally" subjects claimers to the definition of "equality" (male and individualistic) of those already in power; it has not often permitted outsiders to enter into the conversation that helps define what equality is. Furthermore, directing our attention to achieving formal legal equality prevents us from seeing whether actual material conditions have moved any closer to "real" or substantive equality, measured in empirical terms such as income or desegregation of employment, schools, and other institutions.[59]

Related to this tension in equality theory is a powerful attack on legal institutions from a feminist perspective that echoes the critical legal theory project of uncovering "ideological tilts" within supposedly "neutral" institutions.[60] Janet Rifkin describes law and the legal institutions it creates as both sources and perpetuators of patriarchy, a social system of male dominance legitimated by neutral rules of law, a system in which, until relatively recently in human history, "neutral" principles of property treated women as chattel.[61] For Catharine MacKinnon the question of gender is a question of power and powerlessness[62]—those with power (men) have constructed law and its legal institutions to permit the dominance of men over women. Such legal concepts as the definition of rape in criminal law[63] are constructed and maintained to constrict the sphere of male activity that will be called unlawful. For example, rape law that disallows anything short of penetration and that allows consent, broadly defined, as a defense, as well as the victim's lack of chastity, sustains the position of women as objects of domination.

In a recent effort to link feminist theory with critical theory and bridge

58. Martha Minow, The Supreme Court 1986 Term—Foreward: Justice Engendered, 101 Harv. L. Rev. 10 (1987).
59. See Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1 (1984).
60. Other appellations for the different schools in critical legal studies include the "irrationalist" or "indeterminacy" school vs. the "rationalist" and "programmatic" school. See Dalton, *supra* note 40; Jamie Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Pa. L. Rev. 685 (1985). Also, the "southern" school is set against the "northern" school. The "northern" school still sees a certain determinism in the law, if not in strictly Marxist terms, then still with a strong association between economics or class and particular legal changes. See Morton Horwitz, The Transformation of American Law: 1780–1860 (Cambridge, Mass., 1977).
61. Rifkin, *supra* note 15.
62. Catharine MacKinnon, Feminism Unmodified (Cambridge, Mass., 1987).
63. Susan Estrich, Real Rape (Cambridge, Mass., 1987).

some of the diverging streams in feminist theory, Fran Olsen has suggested that prevailing notions of gender relations simultaneously sexualize (I prefer "genderize") *and* hierarchize by labeling qualities and characteristics as either male or female (rational/irrational, active/passive, thinking/feeling, abstract/contextualized, objective/subjective, principled/personalized), and then valuing more highly the supposedly male side of these dualisms.[64] As Olsen sees it, the situation allows three specific and potentially separate feminist and critical strategies. One strategy rejects sexualization by accepting a model of equality that assumes that men and women are the same and that qualities and institutions cannot be genderized. Olsen finds, however, that hierarchization still functions because "male" qualities are still valued more highly, whether displayed by women or men. A second strategy rejects hierarchization while accepting sexualization by claiming that, although there are gender differences, female qualities and institutions (e.g., motherhood) are equal to male qualities and institutions (e.g., soldierhood) in importance. This strategy conforms to the "special treatment" or "substantive equality" model outlined above by urging such specific reforms as treating pregnancy as either valuable and worthy of compensation or at least as not punishable by loss of job security.

In Olsen's view both the sexualization and hierarchization of the dualisms can be transcended by looking toward an androgyny in which people and institutions will be free to express all aspects of the dualisms without being undervalued, and by recognizing, for example, that sometimes it is rational to be emotional, and that "objective" claims are inevitably subjective.[65] By this route we will come to realize some of the critical legal studies "truths"—law is not objective, rational, abstract, and universal, and therefore law, abstracted from its politicized context, cannot be the only key to feminist strategies for social change. Law and legal institutions, according to Olsen, are not inherently male; rather, historically they have been constructed by males. Both law and legal institutions (including legal education) could be different if women and traits traditionally associated with women are included in the definitions, descriptions, and constructions of law and the legal system. Note that in aspiring to this form of critical androgyny women's contributions, previously devalued, must be acknowledged and valued before their origin as "female" can be rendered irrelevant in an androgynous world. Just how to achieve this goal is more a source of disagreement within feminism than the goal itself.[66]

To summarize, the equal-treatment school urges that women be treated the same as men in the law in order to avoid the repercussions and exclusions that past recognitions of "differences" have legitimated.[67] The

64. Olsen, *supra* note 27.
65. See Harding, *supra* note 10.
66. There are, however, competing visions of what an undominated, degenderized world would be like. See, e.g., Richard Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. Rev. 581 (1977). Feminists debate whether gender would be totally irrelevant in a nonsexist utopia by imagining many different forms of androgyny.
67. As demonstrated by the difficult history of protective labor legislation, see Barbara Babcock, Ann Freedman, Eleanor Holmes Norton & Susan Ross, Sex Discrimination

substantive-equality school urges recognition and acceptance of differences, in part by means of rendering differences "costless."[68] Although some affirm the value of difference in itself, others suggest that the difference/sameness debate is really two sides of the same coin and that the real issue is power. Difference can be measured only as the relation between one thing and another, and the power to define sameness and difference controls its significance in the legal world, as elsewhere.[69] In addition, there is the danger that "differences" will essentialize, generalize, and universalize the variations within groups as well as between them.[70] Here the question is, Who is doing the defining and specifying of difference and why does it matter? The political or critical school suggests that until domination of women by men is ended in all institutions we cannot know what undominated, degenderized forms will emerge with which to construct a critical form of androgyny.[71] The strategies of the different schools vary. Some continue to pursue equal rights by means of a law-reform rights strategy[72] that aligns many feminists with the minority critique of the CLS critique of rights;[73] others seek redefinition of those rights (pursuing comparable-worth reforms, for instance) and the use of equity rather than equality as a model);[74] still others construct or explicate theory (as the critical legal theorists do) in the hope of informing real-world activity and giving it intellectual moorings.[75]

As some theorists attempt to reconstruct the law school according to critical legal precepts, others are attempting to reconstruct aspects of legal education and law practice according to the provocative and sometimes conflicting precepts of feminist theory. Thus, in their attempt to remake or, at the very least, influence legal education, fem-crits who aim to develop alternative teaching methodologies are informed by their work in critical legal theory, feminist theory, and feminist jurisprudence. I count myself as one of those who labors to apply these theories in fields of practice (both as a legal educator and as a lawyer).[76]

247 (Boston, 1975). See Williams, *supra* note 52, for an eloquent defense of the equality model for this reason.

68. Littleton, *supra* note 10.
69. Minow, *supra* note 58; MacKinnon, *supra* note 62.
70. Mary Joe Frug, The Role of Difference Models in the Study of Women in Law (unpublished manuscript on file with the author).
71. Catharine MacKinnon's proposed legal strategy here is expressly political—one should support those laws which empower women and oppose laws which subordinate women. Catharine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven, 1979). See also Catharine MacKinnon, Not a Moral Issue, 2 Yale L. & Pol'y Rev. 321 (1984). This analysis is somewhat analogous to affirmative action in civil rights law.
72. See Schneider, *supra* note 27.
73. See *supra* note 25.
74. See Littleton, *supra* note 10; Finley, *supra* note 10.
75. The desire to create theory to inform actual practice motivates much of the work of such feminist legal theorists as MacKinnon, Williams, Littleton, and others mentioned in these pages.
76. Menkel-Meadow, *supra* note 19, and Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. Miami L. Rev. 29 (1987).

Praxis: Feminist Theory and Legal Education and Practice

The critique of legal education that derives from feminist theory is based on women's experience of powerlessness in a traditionally male world. It builds on the CLS hierarchy critique but is also rooted in the particular experiences of women as outsiders that permit them not only to critique legal education but also to create alternative models out of that experience.[77] One school of feminist pedagogy or "gynagogy,"[78] closely aligned with the "substantive equality" and "differences" approach to feminist legal theory, asserts that a unique contribution can be made by women because of their particular ways of learning and knowing.[79] That is, if women were the same as men, one would simply demand that discrimination cease and that women be represented proportionately in law teaching.[80] This is not my claim.

I have asked, What difference shall women make in the legal profession, both as teachers and as lawyers?[81]—a question that assumes that there are some differences. The claim is complex because it raises issues about the sources of those differences, sources that I see as socially constructed, but that others may deem more "intrinsic" or biological, further reifying gender difference. In addition, although I will describe a variety of feminist teaching methodologies, many derived from women's studies teaching, the question of whether there is currently a recognizably "feminist" or "feminine"[82] teaching method in law teaching remains open for me, despite my having viewed many law teachers in my school and others. Critical legal studies has been accused of replicating the traditional by focusing on

77. See Renate Klein, The Dynamics of the Women's Studies Classroom: A Review Essay of the Teaching Practice of Women's Studies in Higher Education, 10 Women's Stud. Int'l F. 187 (1987), Bunch & Pollack, *supra* note 24; Culley & Portuges, *supra* note 24.
78. Klein, *id.* at 187.
79. See the argument elaborated in Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger & Jill Mattuck Tarule, Women's Ways of Knowing: The Development of Self, Voice and Mind (New York, 1986) that women come to know and learn in different ways from men. The authors, building on the work of William Perry in Forms of Intellectual and Ethical Development in the College Years (New York, 1970) and Carol Gilligan in In A Different Voice: Psychological Theory and Women's Development (Cambridge, Mass., 1982), suggest that women's epistemology may be different from men's. Different life experiences join with academic learning to produce several different forms of knowledge—received knowledge, subjective knowledge, procedural knowledge, and constructed knowledge. Constructed knowledge, which "lets the inside out and the outside in," is just the sort of combination of cognitive and interpersonal knowing that women may be more likely to bring to legal education.
80. See Cynthia Fuchs Epstein, Women in Law (New York, 1981); Donna Fossum, Women Law Professors, 1980 Am. B. Found Res. J. 906; Donna Fossum, Women in Law School Teaching: Problems and Progress, 30 J. Legal Educ. 226 (1979); Elyce H. Zenoff & Kathryn V. Lorio, What We Know, What We Think We Know, and What We Don't Know about Women Law Professors, 25 Ariz. L. Rev. 869 (1983); Barbara Curran, The Lawyer's Statistical Survey (Chicago, 1985).
81. Menkel-Meadow, *supra* note 19, and Women in Law? 1983 Am. B. Found. Res. J. 189.
82. Suzanna Sherry has distinguished a "feminine" voice, which expresses women's values and sensitivities to community and collectivity, from a "feminist" one, which partakes of a specific political program. Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986). Feminine qualities may be those attributed to women as opposites to masculine qualities. See Simone deBeauvior, The Second Sex (New York, 1974). Feminist voices, on the other hand, seek to involve women in choices of what they are and choose to be.

doctrine.[83] Perhaps out of a need to survive, many women law professors also follow traditional legal educational patterns in their teaching. The power of traditional legal education culture seems depressingly strong. Although the feminist critique may be based on a "feminine" method of teaching and practice that is derived from years of submission and subservience to the dominant culture, there is much of value in the feminist critique of legal education and much that could help transform legal education into a more enriching process for both teachers and students.

The Classroom

The feminist critique of the classroom includes both a processual and substantive dimension. The process critique begins, like that of critical legal studies, with the "Socratic" method (or what passes for it today), i.e., a hierarchical notion that the teacher knows all but refuses to share it. Instead of genuine dialogue, the student's thinking is probed, pushed, and (I have heard it said) "penetrated" by the pointed questions asked by the knowing inquisitor. The "dialogue" depends upon what law students call "hiding the ball" (the teacher hides it, the student seeks it). The seeking presumably teaches one how to think like a lawyer. Statistical evidence now confirms what many of us knew experientially to be true, that women tend to speak less in class.[84] The classic Socratic questioner is not only intimidating. If the questioner is male, he is also not as likely to "hear" female responses; indeed, he may ask different questions of women students.[85] From the teacher's perspective, the traditional model of teaching is even more troublesome. Notions that rigor cannot coexist with warmth, nurturance, and supportive inquiry abound in law teaching and offer support for Olsen's notion that the dualisms are both reified and ordered.[86] Rigor and warmth are mutually exclusive, and rigor in the law classroom is valued over warmth. Thus, to continue the syllogism, those who are warm cannot be rigorous, and therefore cannot be effective. Law teachers are urged to dress formally, speak formally, and keep their distance from students, modeling, as it were, what relations might be like with senior partners in law firms.

Classroom process, modeled on other feminist forms, such as consciousness-raising groups or nonhierarchical women's studies classes,[87] might partake of more participatory, truly inquiring forms of learning, with

83. Frank Munger & Carroll Seron, Critical Legal Studies versus Critical Legal Theory: A Comment on Method, 6 Law & Pol'y Q. 257 (1984).
84. Roberta Hall & Bernice Sandler, The Classroom Climate: A Chilly One for Women (Washington, D.C., 1982); Helene Schwartz, Lawyering (New York, 1976); Yale Law School, Women's Silence in the Classroom (manuscript on file with the author, prepared by Yale Law Students, 1984); Catharine Weiss & Louise Melling, The Legal Education of Twenty Women, Stan. L. Rev. (forthcoming); Society of American Law Teachers Program on Racism, Sexism and Homophobia in the Classroom, AALS Annual Meeting, New Orleans, 1986.
85. Hall & Sandler, *supra* note 85; K. C. Worden, Overshooting The Target: A Feminist Deconstruction of Legal Education, 34 Am. U.L. Rev. 1141 (1985).
86. Olsen, *supra* note 27.
87. Adrienne Rich, Toward A Women-Centered University, *in* On Lies, Secrets and Silence: Selected Prose 1966–78, at 125 (New York, 1979); Culley & Portuges, *supra* note 24.

expertise assuring only a hearing, rather than hierarchical authority. Thus, at the feminist-CLS conference in Boston, the participants shared the experience of watching a film, "A Jury of Her Peers,"[88] and then discussing the film in small groups led by "facilitators" (not "experts") who assisted in structuring discussion around the shared experience of the film. Reactions on the "feeling" level are as important in the feminist process of teaching and learning as reactions on the "thinking" level, a difference that many participants in the conference identified as gender related. Women tended to empathize with the women in the film as people whose deductive processes were not taken very seriously by the men in the film. The story, which concerns the aftermath of a wife's murder of her emotionally brutal husband, prompted men to discuss murder rates and whether self-defense could be used as a legal justification. Women attempted to reconstruct what it must have been like to have suffered for so many years in a marriage with little emotional reciprocity.[89] Similarly, in the traditional classroom, expressions of feeling for the parties, the lawyers, or the difficulties facing the judge are devalued or, in some cases, banished completely from the classroom in favor of a more disembodied discussion of whether the "act" could be justified as self-defense. The constant emphasis on the cognitive over the emotional and behavioral dimension of learning is a common source of complaint for women in legal education.

As I have argued elsewhere,[90] Carol Gilligan's work on moral reasoning,[91] which indicates that men and women may approach moral and legal problems differently, also suggests that women teachers and students may broaden the quality and the type of responses to legal problems. Gilligan uses the "Heinz dilemma,"[92] a moral reasoning problem that asks whether Heinz should steal a drug to save the life of his dying wife when the druggist refuses to sell it at a price Heinz can afford, to demonstrate the possibility of a multiplicity of responses. Amy, one of the respondents to the study, "fights the hypothetical" quality of the problem by wanting to know more facts, wanting the parties to talk more directly to each other, and trying to meet the needs of all the parties simultaneously through a credit transaction so Heinz's wife has the drug, the druggist has his payment, and Heinz's wife has her husband (he is not in jail for stealing). Gilligan calls this solving the problem with an "ethic of care." Jake, a male respondent, instead treats the problem as an algebraic equation—life is worth more than property, so Heinz should steal the drug. Gilligan labels Jake's response an "ethic of rights" that partakes of the balancing of rights, which is the conventional legal reasoning found in most law school classrooms. The issues or questions asked in order to solve the "Heinz dilemma" will be different (and more numerous) if we include in the classroom more voices and methods for problem solving—not just Jake's "ethic of justice" but also

88. *Supra* note 23.
89. I do not mean to suggest there were uniform gendered responses to the film. Some men responded emotionally and some women legalistically and there were differences within genders, but the different responses to the film were noticeably gender related.
90. Menkel-Meadow, Portia, *supra* note 19.
91. Gilligan, *supra* note 79.
92. *Id.* at 25–32.

Amy's "ethic of care." If women were free to express their concern for process and relationship in the law school classroom, both the nature of the discussion and the substantive solutions to legal problems might change. Discourse might be more direct, as in Amy's desire to get the "litigants" (the druggist and Jake) to talk directly to each other; it might include a more experiential focus, as in feminist consciousness-raising sessions ("if I were in this situation," rather than "if I were outside this situation and judging it"). It might reject or at least question the guided discovery of one "correct" answer. If Amy and Jake reason differently, it may be that there are at least two equally valid answers. Amy's and Jake's answers might inform all questions asked in law school and serve to illustrate the perspectives of a rights analysis and a relationship-and-responsibilities analysis.[93] Equality theory would be explored with equity theory. Ways of looking at a problem formerly considered "negative," such as focusing on relationship issues rather than simply on the "rules" designed to protect us in our Hobbesian separation from each other, might become "another" and equally legitimate way of looking at the problem. Experiential learning, collaborative teaching,[94] and a greater range of voices in the classroom might lead the educational enterprise into more mutual exchange and learning than top-down Socratic or pseudo-Socratic dialogue provides.[95] Rather than feeling alienated in the classroom, students might feel connected both to each other in the learning process[96] and to the parties in the cases.

Thus, feminist critics of the law school classroom seek to, in the words of Jane Martin, "reclaim a conversation" about education.[97] Good education for women, based on women's particular experiences (and all the differences and varieties of those experiences), requires changes in educational process. Feminist educators seek to question traditional notions of authority

93. Recent critiques of Gilligan have begun to explore how rights and responsibilities may be interdependent, or in some cases conflicting. Important philosophical work is now exploring how these issues in moral reasoning can be reconciled. See Joan Tronto, Beyond Gender Difference to a Theory of Care, 12 Signs 644 (1987); Owen Flanagan & Kathryn Jackson, Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited 97 Ethics 622 (1987); Annette Baier, What Do Women Want in a Moral Theory? 19 Nous 53 (1985). See also On In a Different Voice: An Interdisciplinary Forum, 11 Signs 304 (1986); Women and Morality, 50 Soc. Res. No. 3 (1983).
94. Team teaching, of course, is not new to the law school, but truly collaborative or multiple teacher formats are rare. Several years ago five members of the UCLA Law Faculty jointly prepared and taught an undergraduate course entitled "The Jurisprudence of Sexual Equality," in which students did five different projects. The instructors were Grace Blumberg, Carole Goldberg-Ambrose, Chris Littleton, Carrie Menkel-Meadow, and Fran Olsen. A syllabus is available from Chris Littleton.
95. In my experience Socratic dialogue rarely takes the pure form of engagement by the professor of one student for a series of questions. It is now more common for the teacher to shift from one student to another, with perhaps the humane intention of not keeping one student on the spot for too long. To the extent that the Socratic method has pedagogical value (and I think it does), this "watering down" may serve little purpose, since it may frighten all students but fail to probe rigorously the thinking of any one.
96. For examples of experiments in more collaborative and inventive teaching, see Karl Johnson & Ann Scales, An Absolutely Positively True Story: Seven Reasons Why We Sing, 16 N.M. L. Rev. (1986); Toni Pickard, Experience as Teacher: Discovering the Politics of Law Teaching, 33 U. Toronto L.J. 1.
97. Jane R. Martin, Reclaiming A Conversation: The Ideal of the Educated Woman (New Haven, 1985).

in the classroom[98] by sharing leadership in the classroom, replacing competition with an atmosphere of trust and cooperation, integrating affective and intellectual learning, and by using personal experience as a valid source of knowledge.[99]

On the content of classroom instruction, feminist critique has been most eloquent about the monotonous and largely abstracted use of the appellate case as the only text worth parsing. Feminist legal teachers have worked hard to demystify the power of the appellate case. It is not uncommon for feminist law teachers to make real the actual human condition of the parties in the cases. I have had litigants describe their pyrrhic victories with the law when they have "won" a case by achieving an important reform without enforcing a "landmark" victory. A woman who had "won" the right to collect, in lieu of alimony, education expenses from her ex-husband as a "reciprocity of investment" (she had put her husband through school) movingly told my class that although newspapers and lawyers were interested in the important legal principle she established, her ex-husband, a Wall Street lawyer, refused to pay, and she was forced to spend years in family court on contempt motions.[100] Catharine MacKinnon has had victims of pornography describe their ordeals in their own voices in order to make real and concrete their actual experience, rather than limiting the classroom experience to a purely academic and abstract discussion of First Amendment restrictions on pornography regulation or of the "speech/act" distinction.[101] Thus, learning the law from a feminist perspective includes a real, concretized, contextualized, and experiential dimension.

From a similar perspective, such feminist teachers as Elizabeth Schneider, Nadine Taub, Rhonda Copelon, Jeanne Charn, Betsy Bartholet, Ann Shalleck, Sylvia Law, and Patricia Williams teach cases they have worked on as practitioners. It is no accident that the voice of the practitioner in critical legal studies has come disproportionately from women (Nancy Gertner, Jeanne Charn, Nadine Taub, Diane Polan, Louise Trubek, and Lucie White, to name a few).[102] For feminists working in law, teaching and learning about the law occurs in concrete and particularized historical and legal struggles.[103] Much of feminist theory on education is drawn from praxis.

Thus, struggles over legal theory are taught as case studies of larger social and political struggles. The *Roe v. Wade*[104] decision (a women's right to abortion is between her and her doctor) came about because of the practical necessity of assimilating new "rights" to already recognized ones

98. Cf. Susan Stanford Friedman, Authority in the Feminist Classroom: A Contradiction in Terms? *in* Culley & Portuges, Gendered Subjects, *supra* note 24, at 203.
99. Nancy Schniedewind, Feminist Values: Guidelines for Teaching Methodology in Women's Studies, *in* Bunch & Pollack, *supra* note 24, at 261; Klein, *supra* note 77.
100. The case was Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (N.Y. Sup. Ct. 1975), *modified*, 52 A.D.2d 804, 383 N.Y.S.2d 343 (1976).
101. See Catharine MacKinnon, Brief for Amicus Curiae Linda Lovelace, Am. Booksellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).
102. There have also been important male voices here—Gary Bellow, David Rudovsky, Peter Gabel, Paul Harris, and David Kairys to name a few.
103. See Schneider, *supra* note 27.
104. 410 U.S. 113 (1973).

(e.g., privacy)[105] and of forging political coalitions with those whose voices would be heard in the Supreme Court (e.g., physicians).[106] The feminist teaching of such a case is not an abstract discussion of the autonomous logical development of the constitutional right of privacy, but a specific sociopolitical and human story that affects real women.

Thus, the "context" of the case is as important a text as the case text itself. One of the leading textbooks on sex discrimination is an example of how feminist consciousness about political and social context has changed what is studied in law school classrooms. *Sex Discrimination* includes data, manifestos, legal documents, histories, legislative reports, and a host of other materials to explicate its legal analyses of sex discrimination and legal rights.[107] The authors go well beyond the usually skimpy "materials" accompanying cases in post-Realist casebooks. In another mode of feminist analysis, Mary Joe Frug has deconstructed and offered several feminist readings of a traditional contracts text.[108]

Indeed, feminist teaching methods and content have a totally different purpose from conventional legal education, which teaches analysis (breaking down), or even critical legal education, which teaches deconstruction or trashing (also breaking down). Feminist models which depend on teaching for empowerment (building up by conversations[109] and sharing experiences, rather than by attack/defense) and foster a more open and flexible understanding of the many ways problems can be solved. Building trust, collaboration, engagement, and empowerment would be the pedagogical goals, rather than reinforcing the competition, individual achievement, alienation, passivity, and lack of confidence that now so pervade the classroom.

Lawyers use and abuse their power and are widely criticized for it. In law school the disempowered, alienated feelings students develop are coupled with the promise of eventual power over others. Much, though certainly not all, that is wrong with lawyers—the abuse of other lawyers, clients, and family members—may stem from the conflicting messages of our present legal education system. Unless we can radically alter legal education, we will not be able to reconstruct our legal system or our society. While the crits seek to alter belief systems and conceptual frameworks, at least some fem-crits are concerned with the reconstruction of human souls through educational processes. Without the people the ideas will not a revolution make.

Relationships Within the Law School

The fem-crits are every bit as critical as the crits on issues of hierarchy

105. Griswold v. Conn. 381 U.S. 479 (1965).
106. See Bob Woodward & Scott Armstrong, The Brethren 169 (New York, 1979) (discussion of the importance to some Supreme Court justices of the abortion right's being focused on the professional rights of doctors, rather than on the rights of women to control their bodies).
107. Babcock, Freedman, Norton & Ross, *supra* note 67, at 1.
108. Frug, *supra* note 20.
109. See the effort to transform a typical academic event—an honorary lecture—to a female form—a conversation, in Feminist Discourse, *supra* note 26.

within the law school. They may, however, be more sensitive to hierarchy because many once worked as secretaries and can readily identify with the law school's "underclass," women working on the clerical or cleaning staff. Not so long ago, women in law school, including secretaries, students, and professors, had to join together to accomplish such herculean tasks as obtaining more women's bathrooms in the law school. Now more and more women students seek mentors from the still relatively small pool of women teachers. The continued token representation of women on most law faculties places women law teachers, like minority law teachers, in closer relation to that other underclass, students. Cross-class relationships break down some of the elitism and hierarchy of the law school environment, and they are more likely to occur when the gender relation is still experienced as a shared feeling of being dominated. Thus, while many of the white male crits should (and do) cringe at charges of intellectual and social elitism,[110] many women can actually feel the injustices and inequalities the crits rail against because for them, as for minorities,[111] it is too often a recent memory or current reality, rather than a laudable but abstract projection of what life must be like on the bottom of the hierarchy.

Thus, it seems no accident that the first critical legal studies conference to take seriously the question of racism and the role of women and men of color was the CLS-feminist conference. We feel with and identify with other oppressed groups, even if our experiences are not always the same and analogies are sometimes overdrawn. Feminism has taught us that not all oppressions are the same, and neither are all oppressors the same, even if their white male privilege, particularly in the world of legal education, makes it appear that way. Yet the experience of domination does sensitize one to the pain of others.[112] It was, again, no accident that other forms of discrimination and lack of tolerance, such as homophobia, emerged as topics of discussion at this more "open" forum than at previous CLS conferences.

Practice

At the feminist-CLS conference many women practitioners spoke of their experience as women lawyers and teachers of practicing lawyers. Feminist practitioner-teachers struggle with law practice in ways that inform their teaching. The potentially dominating role of the professional over the client, the struggle to collaborate in legal decision-making[113] and to search for new ways to structure and solve legal problems outside the

110. See, e.g., Duncan Kennedy, Psycho-Social CLS: A Comment on the Cardozo Symposium, 6 Cardozo L. Rev. 1013 (1985) for an attempt to acknowledge the hierarchical privilege within CLS, while at the same time demonstrating exasperatingly traditional male conceptions of hierarchy, mentoring, and male-female relations. See also Robin West, Deconstructing the CLS-Fem Split, 2 Wis. Women's L.J. 85 (1986).
111. See Minority Critiques, *supra* note 23.
112. See Harlon Dalton's acknowledgement of the spiritual and intellectual connections of people of color and fem-crits in Harlon Dalton, The Clouded Prism, 22 Harv. C.R-C.L. L. Rev. 435 (1987).
113. Lucie White, Relationships and Power—Lawyer and Client Relations, remarks at CLS-Feminist Conference, Pine Manor, Mass., June 1, 1985.

limited remedies available in the conventional legal structure,[114] and the relentless contextuality of all legal work[115] are all issues to which they are sensitive. Indeed, Jeanne Charn's practitioner's critique from a feminist perspective challenges critical legal studies by suggesting that it may be impossible to generalize about the strategies that work or the harm that our clients are forced to suffer. The social and political problems of clients, government agencies, private corporations, and courts may be so situation-specific that we may simply have to abandon any notion of a grand theory for using law to effect social change. That does not mean we must abandon the struggle.

The feminist approach to practice is to learn what clients need and want, to analyze the actual social and political situation, and to use the means that will best achieve the goals, while remaining sensitive to the effect of the process. Thus, new forms may emerge, such as mediation. In particular contexts, however, mediation may be dysfunctional for women without enough power to be heard.[116] In a pragmatic way, everything is up for grabs, and with a highly developed sense of clients' struggles and the legal system's limitations, feminist practitioners look at what it *is* to make conventional pleas for justice and remedial action, while at the same time they look both for new theories of action (such as MacKinnon's sexual harassment theory or pornography laws)[117] and other methods for accomplishing results.[118] By letting the personal experience of practicing law affect the teaching of law, fem-crits seem more likely to use their own knowledge of the world to inform their personalized, experiential, contextual, and clinical teaching. In this social history of the fem-crits, I see and hear the strong voices of women using their real-world experience in their teaching (voices such as those of Jeanne Charn, Nancy Gertner, Nadine Taub, Sylvia Law, Liz Schneider, Kitty MacKinnon, Lucie White, Louise Trubek, Wendy Williams, Susan Ross, Sally Burns, Rhonda Copelon, Vanessa Merton, and several others at CUNY Law School who may not identify themselves as "fem-crits," Ann Freedman and myself, to name a few; I know there are others not named here). There are also important men's voices (Gary Bellow, Paul Harris, Peter Gabel, David Kairys, David Rudovsky, Duncan Kennedy, Bill Simon, and Karl Klare), but in this area the women's voices seem stronger, perhaps more creative in the way they use practice while questioning its uses.[119] Feminist practitioners, using their legal work to develop their theory and their teaching, seem to have taken heed of Virginia Woolf's warning that one ought to enter the professions without becoming professionalized.[120] Law and legal education are impor-

114. Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984).
115. Remarks of Jeanne Charn, CLS-Feminist Conference, Pine Manor, Mass., June 1, 1985.
116. Lisa Lerman, Mediation in Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 Harv. Women's L.J. 57 (1984); Janet Rifkin, Mediation From a Feminist Perspective: Promise and Problems, 2 Law & Inequality 21 (1984).
117. MacKinnon, *supra* notes 10, 71, 101.
118. Menkel-Meadow, *supra* note 114.
119. See Priscilla Fox, Good-bye to Gameplaying, 8 Juris Dr. 37 (1978).
120. Virginia Woolf, Three Guineas 83 (New York, 1938).

tant for what they may do to alleviate oppression and domination in our society. To the extent that even practice is molded in male terms, it too may be transformed or used in different ways. The goal, rooted in experience, of achieving a world without domination is what is most important, and in the efforts to accomplish these ends the practice may itself also change. Modes of conflict resolution may become less competitive and adversarial, and conceptions of the appropriate balance of power between lawyer and client may change.[121]

Thus, the "personal is the political" maxim of much feminist theory and activity illustrates that feminist theorists are closely engaged with much of what critical legal studies has presented as theoretically interesting. We know that rights discourse is seriously flawed. We had no "right" to abortion for much of our history—and still do not to the extent that it is dependent on the cooperation of physicians or on how much money we have been able to wrest from the economy—and we may lose it again soon. We know that doctrine is indeterminate. Who can confidently predict whether a particular case of sex discrimination before the Supreme Court will invoke "heightened scrutiny" or, even if "heightened scrutiny" is used as the standard, what the result will be? Who could know better than we (maybe blacks, browns, and other minorities) that what the judge had for breakfast (or who he "had" the night before) may affect the decision, especially when most judges are *he*'s. Who could know better than we that the law is used to perpetuate domination and illegitimate hierarchies, when rape laws prevent the punishment of acts we know are rape, or when we are told we can be paid equally for equal work, and yet equal work is not available to us? In short, women continue to suffer from the effects of a legal system that is flawed in the ways critical legal theorists describe.

While continuing their critique, feminist law teachers have committed themselves to transformative projects beyond the negative critiques of CLS and have actually begun to reconstruct some aspects of legal education. As many of the articles in this issue demonstrate, feminist theory and practice have begun to rework the androcentric fields in which we learn.[122] I do not mean to suggest that all of legal doctrine or legal education will be transformed by feminist thought and practice. Indeed, although recent efforts to categorize and codify feminist thought[123] are extremely useful and stimulating, they raise the concern that our critique of traditional systems may itself come to replicate them. I see some evidence of this in teaching, too, as the increasing number of women teachers causes students to have gender-related expectations of their teachers,[124] expectations that entrap us in conventional models, rather than permitting more flexibility. Dominant cultures are powerful forces, and those of us who have passed into the dominant culture must work hard to preserve our desire to express

121. Epstein, *supra* note 80, at 130; Marlise James, The People's Lawyers (New York, 1973).
122. For evidence of this reworking in other fields, see, e.g., Langland & Gove, *supra* note 10; Feminist Scholarship, *supra* note 10.
123. Mary Joe Frug, The Role of Difference Models in the Study of Women in the Law (unpublished manuscript); Robin West, *supra* note 18.
124. Anne Macke, Laurel Richardson & Judith Cook, Sex-Typed Teaching Styles of University Professors and Student Reactions (Columbus, Ohio, 1980).

other forms and new ideas. Still, I think that the influence of warmer and more nurturing classrooms (with mother images to counter the traditional patriarchs), experiential exercises and the use of personal experience, more participatory teaching and learning methods, greater contextual specificity in the discussion of cases, and more varied sources of material for legal study are all contributions that women have made to legal education.

The influences on my own teaching have come from a variety of sources—clinical methodology, law and social science, humanistic psychology, literary criticism, critical legal studies, and feminism—all of which have attempted to affect and change traditional legal education. The question remains whether feminist teaching methodologies and theories in the law school, as in the rest of the academy, will become integrated into the mainstream or remain separated and oppositional. Yet the combination of the critical traditions of legal education and scholarship with the desire of some feminists to empower and teach in different ways suggests that, when the fem-crits go to law school legal education may never be the same.