THIS BOOK OPENS with an introductory Part exposing the reader to central ideas of feminist legal theory. The first essay, by Nadine Taub and Elizabeth Schneider, "Perspectives on Women's Subordination and the Role of Law," explores the public–private distinction. The dichotomy between the public and private is central to feminist writing in general and to feminist legal theory as well. In fact, one author has suggested that this dichotomy is "what the feminist movement is about."[1]

Historically, only men had access to the public sphere of work, politics, and civil society. Women were relegated to the private sphere of home and family with its lack of potential for achievement in the public world. The public–private dichotomy is instilled in the public consciousness and informs our visions for the future. Although today women have legal access to the public realm, they remain subordinate to men in society. A prominent theme in feminist literature is the analysis of the public–private distinction to explore why, despite gains in formal equality, women are still denied full participation in society.[2]

Taub and Schneider examine the manner in which law explicitly has excluded women from the public sphere of politics and the economy. They point to the role of law, which by its absence and unwillingness to regulate the domestic sphere, implicitly has ensured constraints that have relegated women to the private sphere. In this manner law plays a powerful role in shaping and maintaining women's subordination.

After exploring these roles of the law, the authors next examine the manner in which law has legitimated sex discrimination by the articulation of ideologies of sexual inequality that justify differential treatment. They trace the development of these ideologies from, first, the early separate spheres doctrine (that women occupied a separate sphere of home and family) of Bradwell v. Illinois,[3] to Muller v. Oregon[4] (grounding the separate spheres ideology in physical fact), to the new ideological approach of the "unequal" equal protection doctrine that permits differential treatment when men and women are not similarly situated. Since pregnancy and socially imposed differences will always prevent women from being

similarly situated to men, this approach legitimizes discrimination through the language of equality.

Taub and Schneider conclude by pointing to some progress in the changes in ideological approaches to sexual inequality. Yet they warn of the emergence of a more subtle view of differences that, while holding out "the promise of liberation," in fact "is more dangerous precisely because it appears so reasonable."

Heather Wishik, "To Question Everything," picks up from Taub and Schneider the kinds of challenges women pose to law when asking the "woman question," a methodological technique of exploring feminist concerns. In her essay, Wishik explores the development and scope of feminist jurisprudential inquiry and raises its methodological implications. Wishik begins by describing feminist jurisprudential inquiry as a process of "seeking, describing, and analyzing the 'harms' of patriarchal law." Nevertheless, she emphasizes that feminist legal theory is a form of political practice as well as theory making, and as such it must go beyond mere description to strategize for creation of a nonpatriarchal legal system.

After a brief mention of the links of feminist legal theory to other strands of legal scholarship (which links are explored in more detail by authors in this and subsequent chapters), Wishik traces and criticizes the development of feminist legal inquiry as a form of legal scholarship. The early approach of the field, similar to that of other early feminist scholars, she points out, was the "add and stir" approach that highlights the omission of women. The next step adds a missing dimension by exploring underlying patriarchal assumptions of the law. The third step seeks to solicit critical information on the woman's perspective with an eye toward the addition of this perspective. The final step, moving on to another dimension, conceptualizes a feminist method with which to understand and examine law.

In the conceptualization of feminist method, Wishik frames essential inquiries feminists must pose about the relationship between law and society. Four of these inquiries she identifies and terms "fairly universal" in current feminist jurisprudence. She then reiterates her point that feminist legal theory must envision new alternatives. In an especially provocative part of her article, she questions how we get there from here. She urges constantly keeping an eye toward the kind of world we are trying to create and questioning everything so that we can better create the future we want.

Clare Dalton's "Where We Stand: Observations on the Situation of Feminist Legal Thought" shares several similar observations on feminist legal theory. Like Wishik, Dalton points out aspects of feminist legal theory that are true of feminism in general: its descriptive aspect exploring the nature and extent of women's subordination, analytic aspect (how women continue to be subordinated), and reformative aspect dedicated to change. She also points to the salient feature of feminist legal theory of the interconnection of theory and practice. Dalton then traces the development of feminist legal theory from its roots in the women's

movement. She explores its origins in the context of legal education in the late 1970s.

Dalton goes beyond Wishik's concern with feminist methods of inquiry by the introduction of a conceptualization of feminist as "a post-modern project." By this she means that the discipline is one of multiplying challenges to ideas of the Enlightenment—that knowledge can be objective, for example, or that certain ahistorical universal human needs can be identified that justify social and political structures. She then points to positive and negative "obligation" stemming from this conceptualization. She cautions feminist theory against attempting to replace or displace grand male theories by excluding the perspectives of minority or other disadvantaged groups. Another important obligation she discusses concerns feminist legal theory's challenge to essentialism—the idea that there are universal and ahistorical truths about the nature of woman (a point that is taken up in considerably more detail in Part 4). She points to the risks and dangers of this challenge—that in reaction against essentialism, we risk creating new essentialism, that is, asserting new oppressive truths about woman's nature.

Dalton notes difficulties with the term "feminist jurisprudence" as a contradiction in terms. Specifically, she stresses that feminist epistemology is at odds with underlying premises of the Enlightenment and traditional jurisprudence. She urges that we go "beyond" feminist jurisprudence in our challenge to legal institutions and the structure of legal thought and create new scholarship and new visions and mirror new relationships.

Another introduction to feminist legal theory is provided by Leslie Bender in "A Lawyer's Primer on Feminist Theory and Tort." In this "primer" Bender also presents an overview to some of the major components of feminism—its integration of practice and theory and its efforts to describe and expose patriarchy in hopes of constructing a world in which every individual is empowered. Bender's discussion of feminism mentions that there are many feminisms—"[f]eminists do not all think the same way or even about the same kinds of problems." She thereby points to the diversity of viewpoints inherent in feminism in general and feminist legal theory in particular.

Bender, similar to the preceding scholars, recognizes that law is a potent force in perpetuating patriarchy. She urges that feminism and its method of consciousness raising design a legal system that emphasizes legal concerns. Unlike the preceding authors, however, she offers concrete suggestions for the accomplishment of this objective. Specifically, she inquires how tort analysis serves to perpetuate existing power hierarchies and offers suggestions as to how tort law might be improved.[3] In her analysis, Bender emphasizes the "different voice" approach of Carol Gilligan. Gilligan's work has tremendous importance for feminist legal theory and is cited frequently in feminist legal theorists' work. Bender first explains Gilligan's contribution to feminist scholarship with its suggestion that women's moral development reflects a focus on responsibility, contextuality, and caring, as opposed to men's, which relies more on rights and abstract justice. Then, Bender

applies Gilligan's theory in her analysis of tort law—specifically the use of the standard of care of "the reasonable man" and the no-duty-to-rescue (a stranger) cases. She concludes by emphasizing that a feminist focus on caring, context, and interconnectedness are central to a new vision of the legal system.

Ann Scales, "The Emergence of Feminist Jurisprudence: An Essay," provides an example of the "epistemological critique" strand of feminist jurisprudence. Her point of departure is a conceptualization of feminism as a critique of objectivity in epistemological, psychological, social, and legal terms. The underlying problem, according to Scales, is the objectification of women—the "tyranny of objectivity." Feminism is premised on the principle that objective reality is a myth and patriarchal myths are projections of the male psyche.

Scales criticizes the Supreme Court's equal protection approach to sex discrimination as a representative of "abstract universality" that makes maleness the norm of what is human—all in the name of neutrality. She then turns to the task of restructuring the legal system. Similar to Bender, Scales also points to the importance of Gilligan's work, although Scales focuses more on the dangers of generalizations drawn from Gilligan's work. Scales is quite critical of the view that a "care-based" and "rights-based" view can be blended. Those who advocate a legal system incorporating rights, rules, relationships, and equity (what Scales terms the "incorporationist" view) suffer from a lack of vision, she chastises, in presuming that inequality is a legal mistake that can be repaired by bringing to light examples of irrationality. "The injustice of sexism is not irrationality; it is domination." Therefore, she concludes the law must embrace a version of equality that focuses on "real" issues, in particular domination, disadvantage, and disempowerment, instead of on issues of differences between the sexes.

Robin West, "Jurisprudence and Gender," constitutes an important piece of scholarship in terms of her analysis of modern legal theory. Her scholarship effectuates a "paradigm shift" in terms of enabling the reader to view fundamental beliefs from a new perspective.[8] Her thesis is that the theoretical underpinning of modern legal theory (in which she includes both liberal legalism and critical legal theory), that human beings are definitionally distinct from one another, is inapplicable to women because it is a masculine conceptualization. In fact, instead of being separate from other human beings, she argues that women are connected to human beings in terms of, for example, their life experiences of pregnancy and breast feeding. She contrasts the idea of the human being as constructed by (nonlegal) feminist theory with the idea of the human being constructed by (masculine) jurisprudence. She then proceeds to explain how this conceptualization presents obstacles for the development of feminist legal theory. She argues that the gap between legal theory's description of human nature and women's true nature presents not only a conceptual obstacle to the emergence of feminist legal theory but also serves as an obstacle to the abolition of patriarchy.

Richard Posner's "Conservative Feminism" presents a viewpoint that is certain to fuel the debates that characterize feminism. His point of departure is that,

normally, conservatism is thought to imply a rejection of feminism. Posner admits this to be true; however, he argues that this viewpoint is not true of all conservatives. He describes a branch of feminism that he defines as "conservative feminism"—those who adhere to "the idea that women are entitled to political, legal, social, and economic equality to men, in the framework of a lightly regulated market economy." He argues that this approach, which he favors, has implications for many areas of the law and proceeds to suggest several controversial applications (e.g., in the areas of taxing housewives' imputed earnings, comparable worth, surrogacy, rape, and pornography).[7]

To take one example, Posner's suggestion that housewives' imputed earnings should be taxed is highly debatable. Despite the (in one sense) absurdity of his conclusion, his proposal has roots in the Marxist feminist debate concerning arguments for waged housework. That is, some Marxist feminists argue that women's domestic work is productive work for which the state should pay wages to housewives because capital ultimately profits from women's exploitation.[8] In contrast, other Marxist feminists reason that the provision of wages for housework is neither feasible nor desirable as a liberatory strategy for women.[9] If the former view were adopted and the state were to pay wages for housework, then Posner's radical view has at least some logical basis.

In the course of explicating his thesis, Posner questions the idea of differences between men's and women's thought processes. He also critiques the views of other contributors to Part 1 (Bender and West, for example). He concludes by urging that conservative feminism deserves greater attention for its highlighting of possible indirect effects of policies that ostensibly favor women. Posner's essay appropriately closes this introductory part and provides a transition to the remainder of the collection because it illuminates some of the many controversial issues that currently define feminist legal theory.

Notes

1. C. Pateman, Feminist Critique of the Public/Private Dichotomy, in A. Phillips, ed., Feminism and Equality 103–26 (New York University Press, 1987), at 103.

2. See generally J. Elshtain, Public Man, Private Woman: Women in Social and Political Thought (Princeton University Press, 1981); Z. Eisenstein, The Radical Future of Liberal Feminism (Longman, 1981); Elshtain, Moral Woman and Immoral Man: An Examination of the Public–Private Split and Its Political Ramifications, 4 Politics and Society (1974); Pateman, Feminist Critique of Public/Private Dichotomy, *supra* note 1; Olsen, The Family and the Market: A Study of Ideology and Reform, 96 Harv. L. Rev. 1497 (1983).

3. 83 U.S. (16 Wall.) 130 (1873).

4. 208 U.S. 412 (1908).

5. See also her subsequent work: Bender, Changing the Values in Tort Law, 25 Tulsa L.J. 759 (1990).

6. The term was made famous by T. Kuhn, The Structure of Scientific Revolutions (University of Chicago Press, 1970).

7. See Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute, 25 Tulsa L.J. 775, 779 n. 15 (1990) for an interesting discussion of Posner's inconsistency in regard to his treatment of issues affecting women, specifically his difficulty in characterizing economic analysis as resolving the issue of abortion compared to his willingness to view such analysis as capable of resolving other issues in the law.

8. M. Dalla Costa & S. James, Women and the Subversion of the Community, in M. Dalla Costa & S. James, The Power of Women and the Subversion of Community (Falling Wall Press, 1972).

9. See, for example, B. Bergmann, The Economic Emergence of Women (Basic Books, 1986). See also R. Tong, Feminist Thought: A Comprehensive introduction (Westview Press, 1989), especially chap. 2, "Marxist Feminism," for a discussion of the wages-for-housework debate.