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INTRODUCING FEMINIST JURISPRUDENCE: AN ANALYSIS OF OKLAHOMA'S SEDUCTION STATUTE

Linda J. Lacey*

It wasn't God who made honky-tonk angels
As you said in the words of your song
Too many married men think that they're still single
That has caused many a good girl to go wrong.¹

I. INTRODUCTION

It is a crime in Oklahoma for a man to seduce a woman of "chaste character" with false promises of marriage.² When I first discovered this statute eight years ago, I planned to write a law review article arguing

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1. This song, written and sung by Kitty Wells, the first prominent woman in country-western music, was a response to a popular song *God Must Have Made Honky-Tonk Angels*, a bitter and misogynist denunciation of women in general. Wells' reply contains a central insight of feminist jurisprudence: that men, through their "songs," characterize women in a way that suits their own purposes and is drawn from their own experiences, yet purports to be universal.

Most traditional country-western music continues to be sexist (a classic example is Paul Anka's *She's Having My Baby*), but there are a few exceptions like Loretta Lynn's *Now I've Got the Pill* in which the singer describes her husband as a strutting rooster and tells him "you've lost yourself a brooder hen, cause now I've got the pill" and Bobby Bare's *Ten*, a classic put-down in which a macho type approaches a woman who he begins to describe as a "nine" and is met with her numerical analysis of his own physical attributes.

2. OKLA. STAT. tit. 21, § 1120 (1983):

Every person who, under promise of marriage, seduces and has illicit connection with any unmarried female of previous chaste character, is punishable by imprisonment in the penitentiary not exceeding five (5) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine not exceeding One Thousand Dollars (\$1,000.00) or by both such fine and imprisonment. R.L. 1910, § 2423.

Id.

OKLA. STAT. tit. 21, § 1121 (1983) allows a defense for the crime: subsequent marriage, but

that the law is antiquated and unconstitutional. As my readings in legal literature grew more sophisticated, I dismissed the topic as too obvious, not the type of subject which would impress my colleagues with my originality and brilliance. Furthermore, I could no longer write an article discussing with great seriousness constitutional doctrines that I have come to regard as a sham.³ Yet, for reasons I could not completely articulate, I continued to find the statute interesting. When a *Tulsa Law Journal* editor suggested that I write an article for this symposium which would help explain feminist jurisprudence to readers unfamiliar with the genre, I decided to use the statute as a focus for my discussion. In this Article, once I have given a broad description of feminist jurisprudence and its three major schools of thought,⁴ I will attempt a feminist analysis of the Oklahoma law, looking at the statute as writers in each school might view it.

II. WHAT IS FEMINIST JURISPRUDENCE ANYWAY?

Before we can define "feminist jurisprudence," we need to define "feminist." There are a number of misconceptions about what it means to be a feminist, and as a result the word arouses a great deal of hostility. As Leslie Bender writes:

Feminists are portrayed as bra-burners, man-haters, sexists, and castrators We are characterized as bitchy, demanding, aggressive, confrontational, and uncooperative, as well as overly sensitive and humorless. No wonder many women, particularly many career women,

OKLA. STAT. tit. 21, § 1122 (1983) provides for penalties if the wife married under these conditions is abandoned within two years.

Although the law appears to be seldom, if ever, enforced today, as recently as 1951 a man was fined \$550 under the statute. *Holland v. State*, 93 Okla. Crim. 413, 229 P.2d 215 (1951). In sustaining his conviction, the appellate judge stated that the defendant "appeared to be very arrogant and boastful with a brazen disregard for all decency." *Id.* at 422, 229 P.2d at 220.

In *Butts v. State*, 12 Okla. Crim. 391, 157 P. 704 (1916) the Court stated that the burden of proof regarding the woman's chastity was on the prosecution. In contrast to criminal law, the tort of seduction has been abolished. OKLA. STAT. tit. 76, § 8.1 (1976).

3. This attitude is mainly Mark Tushnet's fault, *see, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE (1988); Mark Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980), but I seriously doubt if anyone who cares about minority rights, even those not as influenced as I am by critical legal studies, could continue to have any respect for the current Supreme Court's manipulation of constitutional doctrines after reading its blatantly homophobic decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). For a particularly perceptive feminist discussion of this case, see Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1638-49 (1987).

4. *See infra* notes 36-89 and accompanying text. The footnotes of this Article should also serve as a bibliography for readers who want to know more about feminist jurisprudence.

struggle to distance themselves from the opprobrium appended to the label. 'I am not a feminist; I'm safe; I'm ok, is the message they seek to convey. And for every woman that cowers from the word, even more men recoil and raise defenses that cloud their vision and deafen their ears.⁵

The truth about feminism is far less threatening than most men believe. Although there are many types of feminists,⁶ nearly every person who is a feminist believes in two basic propositions:

1. Our society today is patriarchal, in the sense that it has been shaped by, and continues to be dominated by, white men. As a result of this patriarchal structure, women do not have as much power as men, are not treated in the same way as men, do not enjoy the same degree of control over their lives as men, and in general are relegated to a subordinate status.

2. Women's current subordination in our society is not desirable. Women should have as much power as men and enjoy equal opportunities in every aspect of their lives.

As should be clear from the above description, feminists can hold a wide variety of views on other political subjects. Feminists can be either men or women,⁷ Republicans or Democrats, capitalists or socialists. While all feminists basically agree with the general propositions I have articulated, there are many different opinions about corollary propositions. Feminists disagree as to exactly what laws, practices, etc., constitute examples of illegitimate patriarchy, and what methods should be used to establish "equality" for women. For example, many prominent feminists, most importantly Catharine MacKinnon, support laws restricting pornography; others strongly oppose these laws.⁸ There is even dissension about whether formal "equality" is the proper goal of feminism.⁹

Opposition to feminism is also not unilateral. Opponents of feminism fall into two broad camps, each of which disagrees with one, but

5. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

6. For example, there are libertarian feminists, socialist feminists, metaphysical feminists, etc. See *id.* at 5.

7. Although most of the people writing about feminist jurisprudence are women, a few men like Kenneth Karst in *Woman's Constitution*, 1984 DUKE L.J. 447, and Cass Sunstein in *Feminism and Legal Theory* (Book Review), 101 HARV. L. REV. 826 (1988), have made important contributions to the genre.

8. See *infra* notes 84-86 and accompanying text.

9. See *infra* notes 61-62 and accompanying text.

not both, of these propositions. The "traditional woman" advocates essentially acknowledge that women are not treated the same as men in today's society, but try to refute the assertion that this disparity is undesirable. To them, women properly belong in a "separate sphere,"¹⁰ not necessarily inferior to men's sphere, but decidedly different. They argue that women are happiest and are fulfilling the role for which they are best equipped when they do not work outside the home, but devote their time to full-time housekeeping and/or child-raising. They also assert that women are naturally submissive to men and prefer to take orders from their husbands. Many supporters of the "traditional woman" approach are also members of the religious right.¹¹ They believe that their concept of a separate sphere for women is part of God's plan, citing biblical passages like this:

Wives, submit yourselves unto your own husbands, as unto the Lord.
For the husband is the head of the wife, even as Christ is the head of
the Church¹²

To these advocates, who belong to organizations like Concerned Women for America,¹³ feminists are "moral perverts, godless humanists and enemies of every decent society."¹⁴

The "ideological non-feminists" purport to agree with proposition two, that women should enjoy equal opportunities with men, but deny the continuing existence of a patriarchy. They assert that while women

10. For a comprehensive discussion of the historical relegation of women to a separate sphere, see Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-1501 (1983). See also Nadine Taub & Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117 (David Kairys, ed. 1982). The classic example of the legal system's view of women's separate sphere is the much-quoted language from *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139-141 (1872) (Bradley, J., concurring). Rejecting a claim that the state could not ban women from the practice of law, Bradley stated:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother.

Id. at 141.

11. See generally POLITICS OF WOMEN'S SPIRITUALITY (1982) [hereinafter SPIRITUALITY]; Amy Underwood, unpublished University of Tulsa College of Law seminar paper.

12. *Ephesians* 5:22-23.

13. This group, founded in 1979, now boasts over 1,800 local Prayer/Action chapters, and allied itself with Phyllis Schaffly's Eagle Action Forum to defeat a proposed Vermont ERA amendment in 1986.

14. SPIRITUALITY, *supra* note 11, at 470. In her book, RIGHT WING WOMEN (1983), Andrea Dworkin provides an illuminating explanation of why women choose to believe in the "traditional woman approach."

may have been discriminated against in the past, laws and attitudes have changed, and today women can, and do, successfully compete with men. Thus feminism is either antiquated and unnecessary or feminists are "special interest" lobbyists who seek to give women unfair advantages over men through mechanisms such as affirmative action.¹⁵ Many women law students who have never personally experienced discrimination share this attitude.¹⁶

Just as it is inaccurate to generalize about "what feminists think" beyond some basic propositions, it is also inaccurate to generalize about feminist jurisprudence.¹⁷ However, although feminist jurisprudence can

15. A classic example of this viewpoint is expressed eloquently in Richard Posner's recent article, Richard Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191. Posner begins by acknowledging the perspective that conservatives reject feminism. He admits that "[s]ome brands of conservatism do; many social and religious conservatives believe that a woman's place is in the home." *Id.* at 191. But he argues that "conservatives in the classic liberal tradition," such as John Stuart Mill, who he describes as a "distinguished feminist," are highly supportive of the movement, because they oppose government action which restricts women's choices. *Id.* at 191. Posner describes conservative feminism as "the idea that women are entitled to political, legal, social, and economic equality to men, in the framework of a lightly regulated market economy." *Id.* at 191-92.

Posner's article is a fascinating discussion of feminist issues, which deserves a far more extensive analysis than I am able to give in this limited space. I will note, however, one rather obvious inconsistency in Posner's remarks. After describing himself as a libertarian and devoting a great deal of time to the argument that government activism is not desirable in issues affecting women (rejecting among other things government-financed day care centers, *id.* at 201-02, and comparable worth, *id.* at 202-03), Posner completely fudges on the issue of abortion, stating that "as the moral issue both depends critically on the status to be assigned the fetus and is central to the controversy . . . economic or libertarian analysis will not resolve the controversy." *Id.* at 208-09.

The conclusion that economic analysis cannot resolve the difficult issues that abortion raises is, of course, true. But it is striking that Posner does not exhibit this totally uncharacteristic modesty regarding economic analysis in other morally complex areas of the law, such as rape, adoption, defendant's rights, the death penalty, freedom of religion, and the establishment of religion.

16. They may be in for a rude awakening when they enter law practice in Oklahoma. A 1980 University of Tulsa College of Law graduate describes herself as initially sharing the attitude of many women law students: "I thought even if there was sexism, I could overcome it. I was going to be such a good lawyer that I wouldn't have any problems." Two years later, after being told, among other things, that she couldn't practice labor law because she was a woman, she left Oklahoma private practice in disgust. Letter from L.F. (June 14, 1989).

17. Many women authors who discuss feminist theory are troubled by the term "feminist jurisprudence." For example, Robin West states that "the phrase 'feminist jurisprudence' is a conceptual anomaly," but concludes that this does not mean that feminist jurisprudence does not exist. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988). Regardless of its nomenclature, feminist jurisprudence is considered one of the most important movements in legal scholarship today. It is increasingly prominent in major law reviews, many of which have devoted or are devoting symposium issues to the subject. See, e.g., *Feminism in the Law: Theory, Practice, and Criticism*, 1989 U. CHI. LEGAL F.; *Voices of Experience: New Responses to Gender Discourse*, 24 HARV. C.R.-C.L. L. REV. 1 (1989). It has been the subject of a number of panels at the annual meeting of the Association of American Law Schools. See Lucinda Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified* (Book Review), 82 Nw. U.L. REV. 352 n.1 (1988).

There is no doubt that the genre has attracted a great deal of attention today, but this attention is not an unmixed blessing. Deborah Rhode graphically describes a situation many women in

be subdivided into at least three different "schools," which I shall describe in detail later,¹⁸ there is a general consensus that feminist jurisprudence is centered around an analysis of women's position in a patriarchal society and the methods of eliminating patriarchy.¹⁹ Lucinda Finley explains: "[t]he purpose and the practice of feminist theory is to name, expose, and eliminate the unequal position of women in society."²⁰ In a similar vein, Leslie Bender states: "[t]he primary task of feminist scholars is to awaken women and men to the insidious ways in which patriarchy distorts all of our lives."²¹ Robin West has described two aspects

academia face—an encounter with a "colleague" who "would like a five-minute summary over lunch. The subtle or not so subtle implication is that he has heard 'you girls think differently,' and he is interested in knowing a little about why. And a little is what he has in mind. Bibliographic suggestions will not suffice." Deborah Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39, 45 (1988). Rhode's comments also illustrate the potential dangers of cultural feminism. See *infra* notes 36-56 and accompanying text.

Additionally, as Martha Minow observes, the genre has not yet been seriously criticized in the law review literature. Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116-17. She is concerned by this silence because she believes that "[feminism] deserves the minimum degree of respect that is registered by serious criticism." *Id.* at 117.

18. There have been a number of attempts to identify types of feminist thought, and no single author is in exact agreement as to names or descriptions of their categories. Cass Sunstein, *supra* note 7, at 827, states that there are three principal "strands" of feminist legal theory, which he identifies as "difference," "different voice" and "dominance" approach. My three categories—liberal feminism, cultural feminism, and radical feminism roughly correspond to his three categories, although my description of "liberal feminists" varies somewhat from his description of "difference" feminists. Robin West, *supra* note 17, identifies two schools, cultural feminists and radical feminists. I have adopted these names and my description of those two groups is similar to hers. As Joan Williams notes in *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 n.2 (1989), West has implicitly dismissed liberal or "sameness" feminists, as Williams calls them, from her description of feminist thought.

19. Any sophisticated description of feminist jurisprudence must also include a discussion of the relationship between feminist jurisprudence and critical legal studies (CLS), since the two are often incorrectly lumped together. Both feminist jurisprudence and CLS challenge the illegitimate hierarchy of the status quo. References to patriarchy as an illegitimate hierarchy are common in CLS literature. However, for critical legal scholars, patriarchy, like racism, is just one of many evils in the status quo and the majority of CLS jurisprudence has not focused primarily on patriarchy. Many, although by no means all, feminists in legal academia, such as Frances Olsen and Mary Joe Frug, share other principles of CLS. These scholars describe themselves as "Fem-Crits." See generally Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988). But, as I discuss in the text, *infra* notes 57-65 and accompanying text, some feminist authors like Wendy Williams and Sylvia Law are also liberals and do not accept the CLS critique of liberalism. Other feminists like Robin West do not accept the rejection of rights analysis which is central to CLS theory, West, *supra* note 17, at 55. Feminist scholars who are also women of color, like Kimberlé Crenshaw, in *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) criticize both CLS and feminist jurisprudence as not reflecting the experience of persons of color. (See *infra* note 25 for a more extensive discussion of critiques of feminist jurisprudence from the perspective of women of color.) For a comprehensive examination of the relationship of critical legal studies and feminist jurisprudence, see Robin West, *Deconstructing the CLS-Fem Split*, 2 WIS. WOMEN'S L.J. 85 (1985).

20. Finley, *supra* note 17, at 353.

21. Bender, *supra* note 5, at 8.

of feminist jurisprudence:

The first project is the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory, or, put differently, the uncovering of what we might call 'patriarchal jurisprudence' from under the protective covering of 'jurisprudence'. . . . The second project in which feminist legal theorists engage might be called 'reconstructive jurisprudence.' The last twenty years have seen a substantial amount of feminist law reform, primarily in the areas of rape, sexual harassment, reproductive freedom, and pregnancy rights in the workplace.²²

A secondary theme in many works of feminist jurisprudence is the rejection of abstract universalities²³ and "objective" standards.²⁴ Feminists recognize that abstract statements about human nature inevitably ignore differences and ultimately are insensitive to those outside of the experience of the person making the generalizations.²⁵ We also reject

22. West, *supra* note 17, at 60-61.

23. One of the most powerful criticisms of abstraction occurs in Mari Matsuda's discussion of JOHN RAWLS, *A THEORY OF JUSTICE* (1971), in which she argues that his methodology ultimately results in his failure to present a meaningful theory of justice. Mari Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986).

24. See, e.g., Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Bender, *supra* note 5; Matsuda, *supra* note 23. This theme is particularly prominent among the work of cultural feminists, see *infra* notes 36-56 and accompanying text, but is also important to radical feminists, see *infra* notes 66-89 and accompanying text. Many liberal feminists accept its validity. See *infra* notes 57-65 and accompanying text. In a provocative article, Joan Williams, *supra* note 18, at 805-08, criticizes the tendency of cultural feminists to implicitly assume that they originated the concept of rejection of universalities and objectivity. She characterizes this theory as a "new epistemology" which centers around "rejection of an absolute truth accessible through rigorous, logical manipulation of abstractions," *id.* at 805, and states this epistemology has been developed primarily by men such as Martin Heidegger and Ludwig Wittgenstein. *Id.* at 806.

25. Obviously, this insensitivity has the potential to exclude the experiences of both women and racial minorities. Feminist jurisprudence attempts to avoid these concerns, but it certainly does not always succeed. Although there are important feminist authors in legal academia who are also women of color, including, but certainly not limited to Taunya Banks, *infra* note 28; Crenshaw, *supra* note 19; Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. REV. 9 (1989); Matsuda, *supra* note 23; and Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989), the majority of feminist authors are white and middle class, and inevitably their writings are subject to justified criticism of being racist and class-based. Kimberlé Crenshaw uses the experience of Black women to demonstrate how both feminist jurisprudence and anti-discrimination law "treat race and gender as mutually exclusive categories of experience and analysis." Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. In her chapter titled, *Racism and Feminism: The Issue of Accountability*, bell hooks gives a scathing indictment of the women's movement's failure to include the concerns of black women and its refusal to address issues of class. B. HOOKS, *AIN'T I A WOMAN* 119-58 (1981). She concludes:

[w]omen's liberationists, white and black, will always be at odds with one another as long as our idea of liberation is based on having the power white men have Resolution of the conflict between black and white women cannot begin until all women acknowledge

"objective" standards because we understand that what is called objectivity actually only reflects the viewpoint of the persons who always have control over language and laws—middle-class white males. This truth is particularly evident when "objectivity" appears in the form of the mythical The Average Reasonable Person (TARP). Feminists recognize that despite surface attempts at gender neutrality, the "new" 20th century TARP is really just the "old" 19th century Average Reasonable Man.²⁶

Instead of false objectivity, feminists offer the slogan, "the personal is the political."²⁷ This statement has different meanings to different people, but I see it as a response by women who have tried to rely upon their own feelings about things that have actually happened to them—how it feels to be whistled at, or ignored in law school classrooms,²⁸ for example—to make statements about political, social, or legal topics, only to be told, "that's not relevant, that's just your personal experience."²⁹ We

that a feminist movement which is both racist and classist is a mere sham, a cover-up for women's continued bondage to materialist patriarchal principles, and passive acceptance of the status quo.

Id. at 156-57. See also ADRIENNE RICH, *Disloyal to Civilization; Feminism, Racism, Gynophobia, in ON LIES, SECRETS AND SILENCE* (1979). Additionally, Patricia Cain has accused feminist jurisprudence of excluding the experience of lesbians. See Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L. J. 191 (1990).

26. And like the "new" and "old" Nixon, he's unpalatable in any form. Leslie Bender, *supra* note 5, provides examples of the gender bias of TARP in tort law. See also Peter Bell, *Analyzing Tort Law: The Flawed Practice of Neocontract*, 44 U. MIAMI L. REV. (forthcoming 1990); Carl Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 GOLDEN GATE U.L. REV. 495 (1988). Mary Joe Frug examines gender bias in a contracts casebook. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985). See also Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). In criminal law, the difference between TARP and women's experience is particularly obvious in the area of self-defense, especially for battered women. See Dolores Donovan & Stephanie Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981). Richard Posner blithely ignores this criticism, stating for example that Bender's analysis of tort law "misunderstands the significance of the 'reasonable man' (or as it is now more often and more appropriately referred to, the 'reasonable person') rule in tort law." Posner, *supra* note 15, at 213.

27. See generally Scales, *supra* note 24; Karst, *supra* note 7; Matsuda, *supra* note 23 for discussions of this slogan.

28. For a study of the law school classroom's effect on women, see Taunya Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988). Banks states:

many women students still perceive the law school environment as hostile to women. Because the agenda is set by and run by white middle-class males, women, like racial minorities, often feel alienated in the classroom. As a result, they become silent in class. They remain silent because they believe that their views carry no weight. They are silent because they believe that women are largely ignored or invisible in law school classrooms.

Id. at 138-39 (citations omitted). See also Stephanie Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988).

29. For a discussion of a law school class which emphasized, rather than denigrated, personal stories, see Patricia Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165 (1988).

have come to reject the concept that what happens to us is “just” personal and useless for building larger theories. As Mari Matsuda concludes, “what happens in the daily lives of real people has political content in the same way as does what we normally think of as politics—the structure of economic systems and governments.”³⁰ Moreover, by telling our “merely personal” stories, women can recognize both our differences and our commonality. This emphasis on personal insights and experiences is a crucial part of the methodology of feminist jurisprudence.³¹ It can be far more effective than traditional abstract methodology; Susan Estrich opens her article on rape in a way no one who reads it can ever forget:

Eleven years ago, a man held an ice pick to my throat and said: “Push over, shut up, or I’ll kill you.” I did what he said, but couldn’t stop crying. A hundred years later, I jumped out of my car as he drove away.³²

Much of feminist jurisprudence is also communitarian, emphasizing ideals of cooperation and connection instead of competition and autonomy. It can be highly idealistic—my favorite description is Mari Matsuda’s:

The feminist utopia looks something like this: it is a place without hierarchy, where children are nourished and told they are special, where gardens grow wheat and roses too, where the desire to excel at the expense of another is thought odd, where love is possible, and where the ordinary tragedies of human life are cushioned by the care

30. Matsuda, *supra* note 23, at 618.

31. See generally Scales, *supra* note 24, for an extensive discussion of feminist methodology. Credit must be given to other scholars who began to use “stories” before most feminist writers. Derrick Bell’s use of a story-like format in his chronicles, Derrick Bell, *The Supreme Court, 1984 Term—Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) and DERRICK BELL, AND WE ARE NOT SAVED (1987), remains one of the most important and best uses of the genre. The telling of “stories” has become so important that the *Michigan Law Review* has devoted an entire law review issue to the subject, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). The symposium idea was initiated by a letter from Richard Delgado who described the importance of stories to minorities. *Id.* at 2075. In the symposium, Delgado elaborates upon this theme:

Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

32. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1982). Contrast Estrich’s words to Richard Posner’s incredible description of rape as “a coerced taking in a setting of low transaction costs.” Posner, *supra* note 15, at 206.

and concern of others.³³

Feminists also reject conventional stylistic devices of traditional jurisprudence. We call ourselves "I" instead of "the author," a perfectly natural way of writing that remains *verboten* in most traditional patriarchal jurisprudence, which clings to the absurd legal fiction that law review articles are written by detached neutral authors instead of real human beings.³⁴ We refuse to reify other writers by pompously referring to them as "Professor." Robin West has even managed to write an entire law review article with extremely sparse footnotes, a feat accomplished by very few scholars.³⁵

III. THREE SCHOOLS OF FEMINIST THOUGHT

At the current time, the most popular school of feminist thought in legal academia is centered around Carol Gilligan's *In A Different Voice*.³⁶ This school of thought, which has been described as "different voice"

33. Matsuda, *supra* note 23, at 622. The emphasis on communitarian ideals appears most often in works of cultural feminists like Suzannah Sherry, *infra* note 49, and may be rejected by some radical feminists or liberal feminists. For a provocative discussion of communitarian ideals and feminism, see Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 ETHICS 275.

34. The highly informal, personal style I used in the introduction to this Article, in contrast to the ritualized formal introduction of most traditional law review articles, is an example. To be fair, critical legal scholars like Duncan Kennedy pioneered the use of the word "I" instead of "the author" long before feminist jurisprudence rose to prominence. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For a general discussion of the law review stylistic innovations of critical legal scholars, see Jeffrey Harrison & Amy Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924, 1937-38 (1989).

35. West, *supra* note 17. The article actually contains 76 footnotes, but each one is simply a cite to a law review article or book, with no descriptive material or discussion. The other prominent example is Roberto Unger's tour de force, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1985), which has only one footnote. I am not suggesting that feminist authors necessarily believe that footnotes serve no useful purpose. As you can see, I have used extensive footnotes in this Article, partially to give the reader a bibliography of feminist work and partially to discuss secondary themes that I felt were important, but that did not fit into the context of the text. What I (and I believe other feminists) do object to is the artificial use of footnotes to lend or remove authority and the inflexibility of rules such as the accepted standard that every article, regardless of context, must have twice as many pages of footnotes as text. Additionally, some feminists object to the method of identifying articles authors by an initial and a last name and student notes with no author credit at all as being hierarchal and patriarchal. As Katharine Bartlett argues "[f]irst names have been one dignified way in which women could distinguish themselves from their fathers and their husbands." Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). Bartlett herself was not permitted to depart from Bluebook style; however, the editors of the *Tulsa Law Journal* have allowed the authors in the symposium to use first names when we believe they are appropriate. They are to be commended for their courage in departing from the rigidity of their Harvard counterparts.

36. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Gilligan's work has attracted widespread attention in disciplines other than law. See, e.g., KATHY FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 159-60 (1984) (social theory); N. NODDINGS, *CARING* (1984) (ethical theory); SHARON O'BRIEN, *WILLA CATHER* (1987) (literary criticism). The work of Nancy Chodorow

theory,³⁷ “relational feminism,”³⁸ and “cultural feminism,”³⁹ begins with the premise that women *are* different from men in a number of significant ways and that these differences deserve to be celebrated and encouraged, not obliterated. Gilligan’s psychological study of the contrasts in men and women’s thought which has had an incredibly powerful influence on feminist writing⁴⁰ argues that studies of children’s development focus solely on men’s method of reasoning and ignore the counter-story of women’s method of reasoning.⁴¹ Her central example is the study of two eleven-year-olds, Amy and Jake.⁴² Both children are given a hypothetical situation in which a man’s wife is dying, but can be saved by an expensive drug which the man cannot afford. They are asked whether he should steal the drug to save his wife’s life. For Jake, the answer is immediately clear. He creates a hierarchy of values, declaring that “a human life is worth more than money,” and that the man should steal the drug, but take the consequences “the judge . . . ‘should give [the husband] the lightest possible sentence.’”⁴³ Amy’s reaction is far more equivocal, considering the problem in a context far broader than the question of steal or not steal:

If he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn’t get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money.⁴⁴

Traditional psychologists believe that Jake’s answer indicates a

whose works influenced Gilligan’s theories is also centered around the psychological theory of gender difference. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

37. Sunstein, *supra* note 7, at 827-29.

38. J. Williams, *supra* note 18, at 807, citing Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 *SIGNS* 119, 135 (1988).

39. West, *supra* note 17, at 3. I believe West’s terminology is the best description of this school of thought and I have adopted it.

40. Almost every article on feminist jurisprudence in the last five years contains at least a reference to Gilligan, and most spend a great deal of time discussing her works. Indeed, Banks, *supra* note 28, at 137 n.1, ironically refers to an “obligatory reference” to Gilligan. Joan Williams quotes a women’s law review editor who tells her that she had never seen an article disagreeing with Gilligan, J. Williams, *supra* note 18, at 804 n.17.

41. C. GILLIGAN, *supra* note 36, at 6-23. She states that psychologists have “[i]mplicitly adopt[ed] the male life as the norm, they have tried to fashion women out of a masculine cloth.” C. GILLIGAN, *supra* note 36, at 6. She notes that Freud centered his entire theory of psychological development around male norms, such as the Oedipus complex. C. GILLIGAN, *supra* note 36, at 6.

42. C. GILLIGAN, *supra* note 36, at 25-39.

43. C. GILLIGAN, *supra* note 36, at 26.

44. C. GILLIGAN, *supra* note 36, at 28.

higher stage of moral development than Amy's.⁴⁵ Gilligan, in contrast, views the two responses as simply different, with one not necessarily "better" than the other. Jake's typically masculine⁴⁶ statement is hierarchal, like a ladder,⁴⁷ placing one value above another. Amy's response is web-like, emphasizing context and connection.⁴⁸

Cultural feminists draw upon Gilligan's work to describe women's "voice" in legal analysis as well as life experiences.⁴⁹ Women's voices, they assert, emphasize positive values such as caring, nurturing, and empathy instead of competition, aggressiveness, and selfishness. Women intuitively seek connection and relationships, while men struggle for autonomous individualism.⁵⁰ In more concrete terms, cultural feminists advocate a recognition of women's contributions to society, such as child-raising or care-giving. A great deal of their work emphasizes the need for laws such as mandatory child-raising leaves which will encourage these activities.⁵¹

Critics of the difference theory, who include both traditional liberal feminists⁵² and radical feminists,⁵³ charge that it reinforces stereotypes of

45. C. GILLIGAN, *supra* note 36, at 31-32.

46. Gilligan emphasizes that her different voice "is characterized not by gender but theme." C. GILLIGAN, *supra* note 36, at 2. She states that her different voice does appear primarily through women's voices, but that the "association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex." C. GILLIGAN, *supra* note 36, at 2. Despite this disclaimer, her work is used by most cultural feminists to characterize women's experience.

47. Gilligan herself characterizes Jake's thought process as "hierarchal." C. GILLIGAN, *supra* note 36, at 32. Kenneth Karst uses the metaphor of a "ladder" to describe the structure of Jake's thought, Karst, *supra* note 7, at 462, a metaphor which has been picked up by other authors, e.g., Paul Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

48. C. GILLIGAN, *supra* note 36, at 32.

49. Among the most important works of feminist jurisprudence influenced by Gilligan are Martha Minow, *The Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELY WOMEN'S L.J. 39, 41-42 (1985); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21, 24 n.14; Henderson, *supra* note 3; West, *supra* note 17; Bender, *supra* note 5; Karst, *supra* note 7; Scales, *supra* note 24.

50. Robin West describes the liberal emphasis on autonomous individualism as the "official story" of masculine jurisprudence, which is opposed by the "unofficial story" of male critical legal scholars. West, *supra* note 17, at 5-12.

51. Christine Littleton advocates a system in which difference is "costless"—for example the government could be required to pay mothers the same wages and benefits as soldiers. Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1323-32 (1987).

52. See, e.g., Wendy Williams, *Notes From a First Generation*, 1989 U. CHI. LEGAL F. 99. Although Joan Williams cannot be described as a liberal feminist, she uses liberal methodology in her attack on cultural feminism. J. Williams, *supra* note 18. Joan Williams provides an extensive discussion of the way cultural feminism was used against women in Equal Employment Opportunity

women that women have struggled for years to escape. Wendy Williams warns that:

Amy has been important to me; I embrace her, but I am suspicious of her. I suspect she might be middle class, Protestant and white, a socially acceptable girl/woman in traditional terms. I know her well enough to know that part of who she is derives from what subordinates and oppresses her. She, with her considerable virtues, is without doubt the woman dominant gender ideology wants us to be.⁵⁴

This is a criticism that certainly has a great deal of validity. In some of their statements about the joys of child-raising, cultural feminists do sound very much like the anti-feminist "traditional women." But cultural feminists are not traditional women in many ways.⁵⁵ They have, from their perspective at least, chosen to recapture the positive aspects of the traditional woman's role but repudiate the negative aspects. Thus, no cultural feminist would include passivity and submission to one's husband in her list of virtues.

Critics of cultural feminism fail to understand the immediate sense

Comm'n v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Plaintiff asserted that Sears discriminated against women in allocating its high-paying commission sales positions. Sears argued successfully that women weren't interested in commission sales, because they were more interested in personal relationships and preferred jobs which didn't involve long hours and travel. One of Sears' expert witnesses relied upon Gilligan and similar authors to support the statement that women and men have different interests and needs regarding workplace conditions. J. Williams, *supra* note 18, at 813-21. Joan Williams concludes, "*Sears* thus illustrates how domesticity's gendered critique of possessive individualism functions to marginalize the women who espouse it." J. Williams, *supra* note 18, at 820. Joan Williams' solution to the problems she identifies, however, is not formal equality, the goal of liberal feminism, but challenging the structure of wage labor. J. Williams, *supra* note 18, at 822-36.

53. Catharine MacKinnon, one of the most important radical feminists, attacks the difference theory as reinforcing submissive relationships. See CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32-45 (1987).

54. W. Williams, *supra* note 52, at 107.

55. When I tried to think of an example to illustrate this point, I was reminded of a speech that a prominent woman in legal academia made to a Women in Legal Education conference. She began her speech, "I am the mother of two very special, two very active daughters. I am a professor of law, with all that that entails. I am an associate vice-chancellor . . ." and continued with an incredibly long list of achievements and job responsibilities, and concluded, "I described myself in the order of my priorities. I am a mother first; I am a law professor second; I am an administrator third." This understanding that the people closest to us—our children, partners for life, spouses, relatives, friends—are more important than any other aspect of our lives, including our careers, is shared by both cultural feminists and "traditional women".

Later in the speech, however, the speaker discussed a number of time-saving methods that help her participate in her many activities. On the subject of housework, she began by saying "If the bathroom and the kitchen are clean, the department of health will not close you down." With regard to bed-making, she stated "My philosophy is, beds need to air during the day." These decidedly un-Betty-Crocker-like remarks were greeted with laughter and universal applause by her audience of women law teachers.

of recognition that Gilligan's work produces in many women. A student in my Women in the Law seminar described her reactions eloquently:

I felt for the first time that something I read in law school was talking about me. I *am* different from men, I don't think about things the way they do, and I don't want to have to give that up to be a lawyer.

Cultural feminism offers to many women the promise that they won't have to sacrifice the qualities that they most value about themselves—their capacities for compassion, for forming relationships, for nurturing—to survive in predominantly male professions.⁵⁶

The second group of feminists, liberal or "symmetrical" feminists, are basically traditional liberals who focus their writings on women's issues.⁵⁷ They continue to support the proposition that the central goal of feminism is formal equality—women must be treated exactly the same as men in every way. Therefore, they generally oppose laws which would provide special benefits for pregnant women as continuing an illegitimate disparate treatment for women.⁵⁸ The classic statement of liberal feminism is Wendy Williams': "we can't have it both ways, we need to think carefully about which way we want to have it."⁵⁹ The disagreement between cultural feminists, who support "special" laws for women, like

56. Unfortunately, this may be a false promise. As Joan Williams' discussion of *Sears*, 628 F. Supp. 1264, *supra* note 52, suggests, cultural feminism may be a safe and appealing theory for women in academia and a dangerous one for women in "the real world." I am concerned that the primary advocates of "differences" are academics, because I don't think we adequately take into account the fact that we have little in common with other working women. I can say, with few repercussions, that raising my daughter is my major priority, partially because a significant minority of men in academia also appreciate the importance of human relationships. However, women who try to enter the world of law firms discussing the importance of their children do so at risk. Several highly-qualified class of 1990 University of Tulsa women who had children were repeatedly questioned by firms as to whether they would give the firms their full devotion and attention. Women without children continue to be cross-examined as to their childbearing plans—one woman a few years ago was even asked whether she practiced birth control. See generally Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979).

Another aspect of cultural feminism—the emphasis on the capacity of women to avoid adversarial situations and serve as "peacemakers" also has its ominous side. One recent Tulsa graduate was hired by a firm with a divisive split among its partners. She was told one of the reasons she was hired was because she could "get along with everybody and help bring people together."

57. Christine Littleton uses the terms symmetrists to describe authors who believe the law must be symmetrical, in the sense that it should not specifically recognize sex-based distinctions, and asymmetrists, for those who oppose this view. Littleton, *supra* note 51, at 1252. Wendy Williams states that she believes the term is correct in the sense of being descriptive, but adds that "[t]hese terms do not capture all or even most of what those who fall in either category believe." W. Williams, *supra* note 52, at 100.

58. E.g., Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); but see Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (advocating equal treatment in all areas except pregnancy).

59. Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*,

pregnancy benefits, and liberal feminists is commonly described as the "sameness/difference debate."⁶⁰

Critics of liberal feminism, who include both cultural and radical feminists, are concerned that liberal feminists accept men's experience as the norm and expect women to conform to it. They characterize this approach as an "assimilation model"—women, in order to enjoy full equality, must become just like men.⁶¹ These critics argue that by accepting the rhetoric and reasoning of patriarchal jurisprudence, liberal feminists have given up any chance of real change in the status of women; in the powerful words of Audre Lorde, "the master's tools will never dismantle the master's house."⁶²

Even if the criticisms of liberal feminism are valid, as I personally believe they are, they do conveniently ignore one significant aspect of liberal feminism: to a limited extent, it works. Liberal feminists who talk about "rights" and "equality" are speaking in the language that the legal system understands best. If nothing else, liberal feminism cannot be completely discounted as a litigation strategy. Wendy Williams, in a recent defense of symmetrical feminism, makes an important point: that to some extent the ideas that feminists find most appealing depend on when they entered the feminist movement.⁶³ Thus, women awakened to feminist thought in the early 1970s encountered a number of laws explicitly relegating women and men to separate spheres and restricting women's opportunities for growth. For them, removal of these laws was their first priority. In contrast, women entering the feminist movement after 1978 saw a series of facially "neutral" laws which continued to disadvantage women and concluded that "neutrality" alone would not eliminate women's lack of power.⁶⁴

Another advantage of liberal theory is that it is most easily understood by men and women who do not consider themselves feminists and may help draw these people into the movement. Christine Littleton accurately notes that liberal analysis appeals to "liberal men to whom it

7 WOMEN'S RTS. L. REP. 175, 196 (1982). Littleton, *supra* note 51, at 1292, characterizes this method of thinking as a symmetrical approach to sexual equality.

60. See, e.g., Jean Scott, *Deconstructing Equality-Versus-Difference: Or the Uses of Post structuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1985); Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); J. Williams, *supra* note 18, at 798 n.2.

61. See, e.g., Littleton, *supra* note 51, at 1292.

62. AUDRE LORDE, *The Master's Tools Will Never Dismantle The Master's House* in SISTER OUTSIDER 110 (1984).

63. W. Williams, *supra* note 52, at 110-11.

64. W. Williams, *supra* note 52, at 111.

appears to offer a share in the feminist enterprise."⁶⁵

Radical feminism, which has also been called "dominance theory,"⁶⁶ focuses on the power relationship between men and women. Most radical feminists write about sexual issues like rape,⁶⁷ pornography,⁶⁸ sexual harassment,⁶⁹ reproductive freedom,⁷⁰ and "voluntary" sexual intercourse.⁷¹ Their basic thesis is that because all of these sexual practices have been controlled by men, they all contribute to the subordination of women. Rape is viewed as an inevitable result of the subordination of women and radical feminists depart from the currently accepted concept that rape is a crime of violence, not sex.⁷² They say that rape is both—that it is caused by the hatred and sexual tension most men feel toward women.⁷³

Perhaps the most controversial theory of radical feminism is the argument that pornography violates the civil rights of women.⁷⁴ Catharine MacKinnon, who also developed the now accepted idea that sexual harassment is a form of sex discrimination,⁷⁵ argues forcefully that pornography is a type of gender violence. By presenting women as objects, it dehumanizes and silences them.⁷⁶ She sees a direct causal relationship between pornography and crimes against women:

65. Littleton, *supra* note 51, at 1294.

66. Sunstein, *supra* note 7, at 827-29.

67. *E.g.*, C. MACKINNON, *supra* note 53.

68. *E.g.*, C. MACKINNON, *supra* note 53; Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

69. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

70. C. MACKINNON, *supra* note 53.

71. ANDREA DWORKIN, *INTERCOURSE* (1987).

72. The most important book advocating this view is SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 14-15 (1975).

73. C. MACKINNON, *supra* note 53, at 88. For an excellent summary of MacKinnon's views, see Frances Olsen, *Feminist Theory in Grand Style*, (Book Review) 89 COLUM. L. REV. 1147, 1156-58 (1989).

74. C. MACKINNON, *supra* note 53, at 148-49; and *supra* note 69.

75. C. MACKINNON, *supra* note 53, at 69. MacKinnon's work influenced a number of authors writing about the subject, *e.g.*, Mary Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1257, 1266 (1986); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C.L. REV. 709, 731 n.139 (1986); Jan Slater, *Hostile Environment—Sexual Harassment in the Workplace: An Employer's Guide to Prevention* (Apr. 18, 1989) (unpublished University of Tulsa College of Law seminar paper).

76. Catharine MacKinnon graphically explains:

Pornography codes how to look at women, so you know what you can do with one when you see one A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself.

C. MACKINNON, *supra* note 53, at 173.

In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all.⁷⁷

MacKinnon has been the driving force behind the enactment of statutes which restrain various forms of pornography.⁷⁸

While cultural feminists celebrate connection and relationships, radical feminists fight to be free of intrusive male dominance in all forms. As Robin West puts it, “[f]or radical feminists, that same potential for connection—experienced materially in intercourse and pregnancy, but experienced existentially in all spheres of life—is the source of women’s debasement, powerlessness, subjugation, and misery.”⁷⁹ Radical feminists believe that cultural feminism perpetuates the pattern of women’s subordination by affirming traits that contribute to women’s willing collaboration with their oppressors.⁸⁰ Andrea Dworkin argues that even so-called “voluntary” heterosexual intercourse⁸¹ is not a form of genuinely chosen intimacy, but yet another type of intrusion by men, and that women who do not recognize this are engaging in denial.⁸²

Radical feminism has many critics. It is undoubtedly the form of feminism that men, even sympathetic men, have the greatest difficulty understanding. Lucinda Finley describes their reaction: “[t]hese men are being confronted with an analysis that says that what they have always thought was all right, harmless, clearly consensual, . . . not an abuse of

77. C. MACKINNON, *supra* note 53, at 171.

78. MacKinnon and Dworkin drafted an ordinance for Minneapolis, which was eventually overridden by the mayor. Indianapolis did adopt a version of their ordinance, which was ultimately struck on first amendment grounds, *American Booksellers Ass’n. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff’d.*, 771 F.2d. 323 (7th Cir. 1985), *aff’d.*, 475 U.S. 1001 (1986). For a detailed discussion of the Minneapolis ordinance, see Paul Brest and Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

79. West, *supra* note 17, at 29.

80. C. MACKINNON, *supra* note 53, at 32-45.

81. Adrienne Rich argues persuasively that in our society, heterosexuality is virtually compulsory. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

82. A. DWORKIN, *supra* note 71, at 27. Dworkin sees intercourse as a form of intrusion against women: “Violation is a synonym for intercourse. At the same time, the penetration is taken to be a use, not an abuse; a normal use; it is appropriate to enter her, to push into (“violate”) the boundaries of her body.” A. DWORKIN, *supra* note 71, at 122.

power, is not any of those things."⁸³ Not too surprisingly, men often react with anger and hostility to MacKinnon and Dworkin, accusing them both of "hating men."

MacKinnon's critique of pornography has been attacked on two fronts. Some feminists disagree with her assertion that pornography is always harmful, saying that she fails to distinguish between violent pornography and erotica which celebrates women's release from the shackles of repressive Victorian mores.⁸⁴ Liberal feminists argue that even if pornography is always harmful, a proposition which some of them do not dispute, it cannot and should not be controlled by restrictions on free speech.⁸⁵ The first amendment, they contend, has been instrumental in the women's movement—and if we weaken it through "censorship," eventually women's speech will also be suppressed. They point to the strange alliance between radical feminists and the religious right on the subject of pornography as convincing evidence of the theory's dangers.⁸⁶

Dworkin's thesis is also criticized by other feminists as being outside their own experience or the experience of other women.⁸⁷ These critics are concerned that women who do not view intercourse in the same way as Dworkin will feel insulted and threatened by feminism in general. In this vein, several women in my seminar expressed great anger at being told by Dworkin that what they experienced as true intimacy was really just false consciousness on their part.

The problem with this criticism is that feminism cannot be expected to be timid or inoffensive. Much of what we now consider "mainstream" feminism was considered radical and shocking when it was new. Frances

83. Finley, *supra* note 17, at 362.

84. See generally HAUNANI-KAY TRASK, *EROS AND POWER* (1986).

85. For a summary of this position, see Brief of Feminist Anti-Censorship Task Force (FACT), *American Bookseller Ass'n. v. Hudnut*, 771 F.2d 373 (7th Cir. 1985). MacKinnon disputes these claims, stating that "liberalism has never understood that the free speech of men silences the free speech of women." C. MACKINNON, *supra* note 53, at 156.

86. See Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681

87. Lucinda Finley raises this concern: "What about women for whom sex involves sharing, giving, being wanted—and enjoying and deriving self-fulfillment in the giving and desiring and being desired? Is seeking liberation and fulfillment through sexual expression something that only men can do?" Finley, *supra* note 17, at 364.

Ruth Colker, in *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217 (1988) argues that women must search for their own authentic sexuality.

Olsen offers a persuasive reply to charges that MacKinnon is too dogmatic and simplistic, because she doesn't recognize "gaps" and "contradiction" in male power or the complexity of historical patterns.⁸⁸ She explains that:

"[i]f MacKinnon stated more of the ambiguity and complexity of sexuality, people might more easily revert to the old ideas of sex being fine, with just a little touching up needed here and there—remove some of the violence, add a bit more caring. She has made a political choice to pursue certain issues and to focus on the ways in which domination has been made sexual MacKinnon's writing is less concerned with stating all sides of an issue than with *creating* a new side and *redefining* the issues."⁸⁹

The works of MacKinnon, Dworkin, and other radical feminists have unquestionably helped many of us reevaluate our comfortable assumptions about sexuality and power relationships. Whether or not we ultimately agree with their conclusions, their arguments are too powerful and important to ignore.

IV. AN ANALYSIS OF OKLAHOMA'S SEDUCTION STATUTE

Now, at last, I'll get to Oklahoma's statute. I'll begin by criticizing an aspect of the statute that all three schools of feminist thought would condemn: its codification of the angel/whore dichotomy.⁹⁰ The dichotomy reflects one of the worst aspects of a patriarchal society—the view that women are either virginal saints who must be protected by men and be put on a pedestal or promiscuous whores who deserve to be treated badly.⁹¹ As early as high school, women are divided into "good girls," the ones the boys will marry, and "bad girls," the ones they will sleep with, but not "respect."⁹² This dichotomy has resulted in a number of

88. Olsen, *supra* note 73, at 1176.

89. Olsen, *supra* note 73, at 1176.

90. Frances Olsen argues that dichotomies, such as the public/private sphere, are a part of traditional jurisprudence that have always operated to oppress women. Olsen, *supra* note 10, at 1498-1501.

91. This statement may only be entirely true for white women in a white person's society. As Kimberlé Crenshaw points out, the presumption of chastity that white women may enjoy in rape cases is not true for black women. She notes that "[h]istorically, there has been absolutely no institutional effort to regulate Black female chastity." Crenshaw, *supra* note 25, at 157. See generally H. R. HAYS, *THE DANGEROUS SEX* (1964); GERMAINE GREER, *THE FEMALE EUNUCH* (1964).

92. See, e.g., RITA MAE BROWN, *RUBYFRUIT JUNGLE* (1973); R.D. MACDOUGALL, *THE CHEERLEADER* (1973); ALIX SHULMAN, *MEMOIRS OF AN EX-PROM QUEEN* (1972) for fictionalized versions of high school women confronting this dichotomy. For a general study of the impact of high school mores on one's entire life, see RALPH KEYES, *IS THERE LIFE AFTER HIGH SCHOOL* (1976).

disturbing legal consequences for women, the most serious being rape laws. As recently as 1982, a leading criminal law treatise stated that it was "a mockery" to speak of raping a prostitute.⁹³ Although there have been some reforms,⁹⁴ in most rape cases the victim continues to be the one on trial—either she was an angel, in which case she has been "really raped" or a whore, in which case she "asked for it."⁹⁵ As a result of this attitude, it is virtually impossible to obtain a conviction in cases of "date rape"—situations where the victim knew her assailant and voluntarily associated with him.⁹⁶

The angel/whore dichotomy also influences our thinking about other areas of the law—including many aspects of family law.⁹⁷ Anti-choice advocates frequently assert that women seeking an abortion have chosen to be promiscuous and therefore do not deserve the right to exercise control over their own bodies. The Oklahoma statute, which criminalizes seduction of only "chaste" women does not seem as serious a manifestation of the dichotomy, but any codification of this highly misogynist view of women should be removed from the lawbooks.

With regard to the statute as a whole, the liberal feminist analysis would be a straightforward, conventional attack on the statute's constitutionality. This statute singles out men for special treatment. Thus it resembles the Oklahoma law which set different beer-drinking ages for men and women and which, when challenged, first established the standard of a "middle level" of scrutiny for laws which discriminate on the basis of gender.⁹⁸ Under this level of review, if this statute is to be upheld, the state must have an important reason for its existence.⁹⁹ Although the

93. ROLLIN MORRIS PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 205 (3rd ed. 1982): "But to speak of sexual intercourse with a prostitute without her consent as 'an outrage to her person and feelings' is in the nature of mockery." For a thorough discussion of the casebook, which was sexist in many other ways, see Mary Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988).

94. See Robin Wiener, *Shifting the Communications Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983).

95. See generally Estrich *supra* note 32. A classic example is a recent Florida case in which a man was acquitted of raping a woman wearing a transparent miniskit because, according to the jury foreman, she was "advertising sex." *Acquitted rape suspect to be tried in Georgia*, United Press International, dateline Atlanta, Ga.

96. See generally Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217 (1989); Kathy Herwig, *Date Rape* (Apr. 20, 1989) (unpublished University of Tulsa College of Law seminar paper). Ms. Herwig interviewed Corporal Dan Brown of the Tulsa police division on sexual offenses, who stated that getting a conviction in date rape cases is extremely difficult.

97. For example, a wife's adultery was considered more serious than a husband's adultery, *see, e.g.*, Judith Areen, *CASES AND MATERIAL ON FAMILY LAW* 245 (2nd ed. 1985).

98. *Craig v. Boren*, 429 U.S. 190 (1976).

99. *E.g.*, *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); *Wengler v. Druggist Mut. Ins. Co.*,

state may have been able to assert such a reason in 1910 when the law was enacted, it is unlikely that it could do so today, and the constitutional challenge should succeed.

Liberal feminists would applaud this result. They would see the statute as an outrageous example of gender stereotyping and a perfect illustration of why "sameness" must prevail over "difference." The idea that women need to be protected from seducers does seem absurd and insulting to women brought up on *Cosmopolitan*. Many women are proud of their control over their sexuality and believe they can take care of themselves where relationships are concerned.

Radical feminists might see the statute in a different way: as an accurate reflection of the powerlessness of women in the late 19th and early 20th century, a powerlessness that is only somewhat alleviated today. The harsh reality was that for most women in that era, marriage was the only option which could provide them with a desirable lifestyle. Because of the angel/whore dichotomy, a woman was expected to be a virgin before marriage. Thus a woman's virginity was her most important asset. If she were seduced, and gave it up because she expected to be married, she could indeed expect a rougher life—as a scorned "old maid" if she had a source of income and were relatively lucky, as a "honky-tonk angel" of some sort if she were not.¹⁰⁰

It is true, of course, that today's women have a much greater variety of choices—there are many attractive alternatives to marriage for most women.¹⁰¹ But, as radical feminists know, the power structure that created "honky-tonk angels" remains intact. It is usually the woman who is

446 U.S. 142 (1980). See generally BARBARA BABCOCK, ANN FREEDMAN, ELEANOR NORTON & SUSAN ROSS, *SEX DISCRIMINATION AND THE LAW* (1975).

100. Of course, for some very poor women, life as a prostitute or call girl would have been an improvement over their destitute condition. Consider Thomas Hardy's ironic "The Ruined Maid," a conversation between a "ruined" woman and an old friend from her village:

"You left us in tatters, without shoes or socks,
Tired of digging potatoes, and spudding up docks;
And now you've gay bracelets and bright feathers three!"—
"Yes: that's how we dress when we're ruined," said she
"I wish I had feathers, a fine sweeping gown,
And a delicate face, and could strut about Town!"
"My dear—a raw country girl, such as you be,
Cannot quite expect that. You ain't ruined," says she.

CHIEF MODERN POETS OF ENGLAND AND AMERICA I-18 (Gerald Sauders, John Nelson & M.L. Rosenthal ed. 1965).

101. The law does continue to discriminate against single people, particularly single women, however, as Jennifer Jaff convincingly demonstrates in Jennifer Jaff, *Wedding Bell Blues*, 30 ARIZ. L. REV. 467 (1988).

harmed when a relationship fails. As Lenore Weitzman has demonstrated, divorced women are worse off financially after a divorce and divorced men are in a better financial position.¹⁰² Studies of office romances have shown that when the couple breaks up, it is generally the woman who is fired, despite her status. If a woman does become romantically involved with a man of a higher status at work, she is immediately labeled as "sleeping her way to the top," a slogan that is attached to an astonishingly high number of successful career women.¹⁰³ Radical feminists would also find another aspect of the statute attractive—the fact that it does not require a showing of coercive behavior on the man's part. They recognize that it is often difficult in inherently unequal power relationships to prove coercion and thus much abusive male behavior goes unpunished.

I think that cultural feminists would agree with the radical feminists that seduction affects women differently than men. However, they would probably not see a rights-based statute as an answer to the problems of powerlessness I have discussed.¹⁰⁴ One of the things that struck me about the students in my Women and the Law seminar, most of whom on the basis of their class discussion I would classify as cultural feminists, was their extraordinary reluctance (for law students) to rely upon the legal system as a solution to any of the problems we discussed. Repeatedly, suggestions were made for alternatives: instead of banning pornography, educate people to its dehumanizing effects; instead of mandating workplace change in areas like maternity leaves, encourage employers to

102. LENORA WEITZMAN, *THE DIVORCE REVOLUTION* (1985). See generally Martha Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Barbara Eden, *Poverty and the Single Mother* (Apr. 20, 1989) (unpublished University of Tulsa College of Law seminar paper).

103. In BETTY HARRAGAN, *GAMES MOTHER NEVER TAUGHT YOU* (1972), an excellent, although disenheartening, description of the tactics women must employ in the corporate world, Betty Harragan categorically states:

any corporate woman employee who engages in intercourse (or attempted intercourse, given the potency problems of many hard-driving business executives) has jeopardized her chances of significant advancement within that particular corporate structure. She is irrevocably labeled 'inferior' and must go elsewhere to move upward with a clear path.

Id. at 293.

In a related area, antinepotism laws, which on their surface appear to be gender-neutral, in practice usually result in the female spouse being the one leaving or not entering the workplace. Joan Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U.L. REV. 75 (1982).

104. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984). It is inaccurate to classify Olsen as a cultural feminist, but her discussion of alternatives to statutory rape laws does parallel a cultural feminist approach.

understand why such changes are in their own best interests. These approaches, which are consistent with Amy's web-like thinking,¹⁰⁵ suggest that cultural feminists would search for ways to make our social structure re-examine the attitudes toward seduction and chastity.

It is also probably invalid to say that a cultural feminist would analyze any statute in a set, predictable way. Instead, if she were given an actual case under the seduction law, she would analyze the situation in context. Why is this particular man being charged? What was his relationship with the seduced woman, etc.? Additionally, they might wish to consider alternatives to a potential jail sentence if the man is found guilty.

V. CONCLUSION

A conclusion in a law review article is usually a tidy summation of what has transpired during the course of the reading. The virtue of a conclusion is that it ties together all the various strands of the article and synthesizes the various parts into a sensible bit of legal wisdom, complete, finished, and, in appearance at least, unassailable. There is something comical about this ritual. For if we are convinced of anything, it is that there are no conclusions, that things go on, and that everything will always be revised.¹⁰⁶

This scathingly accurate description of law review articles did not appear in a work of feminist jurisprudence, but feminist authors should immediately recognize the validity of the writer's words. In fact, having spent most of this Article trying to fit feminist jurisprudence into neat little categories, I want to use my parting shots to repudiate these categories. I realized as I tried to develop my discussion of each "school" in the context of the seduction statute, just how artificial classifications can be.¹⁰⁷ Feminist jurisprudence is just too rich and too diverse to be pigeonholed.¹⁰⁸ It is ironic that feminists like myself, who claim they reject

105. C. GILLIGAN, *supra* note 36, at 32.

106. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 429 (1985).

107. As a perceptive reader can tell, I found the discussion of how cultural feminists would analyze the statute highly problematic.

108. The body of scholarly work by Martha Fineman provides a specific example of the difficulties of fitting feminist scholars into categories. Although Fineman is one of the feminist authors I admire the most, her works didn't seem to lend themselves to my discussion of any given school of feminist thought. In fact, indexes do not categorize Fineman's work as "jurisprudence" at all; many of her articles are listed under a "family law" heading. Of course Fineman's works, which deal with subjects such as divorce and child custody, technically belong under this heading, but I agree with Fineman's statement that to her "family law is feminist jurisprudence." Women in Legal Education Conference, October 1987.

abstractions, devote time to this enterprise when there are so many more important things to do.¹⁰⁹ I suppose we have not been able to shed completely our deeply ingrained training in patriarchal jurisprudence after all.

109. Olsen, *supra* note 73, at 1168-73 discusses the feminist repudiation of theory and concludes that despite valid objections, "theory can be enormously useful, and women as a group make a mistake if they cede the entire field to men as a group." Olsen, *supra* note 73, at 1170.