# What Is Feminist Legal Theory and Why Should Gender Studies Care about It?

Frances Olsen

Feminist legal theory is a specialized field of study that has been developed and established in the United States as well as in a number of other countries, including, for example, Canada, England, Australia, the Netherlands, Norway (under the term "women's law"), and recently Germany and Austria. It involves the critical, systematic examination of law from a feminist perspective. Because most laws have been created by men and most legal literature has been written by men for a male audience, it is not surprising that law generally reflects a masculine view of the world. Nor is it particularly surprising that a feminist analysis reveals multiple layer of bias against women embedded in much legal doctrine. For legal reform to be effective, it is important to examine and expose the subtle as well as the obvious assumptions and consequences of legal doctrine. As important, or perhaps more important, feminist legal theory yields useful insights about the causes and consequences of the subordination of women and can contribute to the development of feminist theory in general.

The risk of specialized feminist legal theory courses, like the risk of women's studies or gender studies courses in general, is that their existence as separate courses may create a segregated field of study. In this way, such courses may reinforce the belief that the concerns of women and the contributions of feminists can and should be contained and limited to a single course or set of courses, while the rest of the curriculum can be freed from any obligation to teach such materials, and other courses can be insulated from possible feminist "infection." As one legal theorist warned a decade ago, "[l]ike segregation in the workplace, this separation out of 'women's work' in legal theory probably contributes to its devaluation, which serves in turn as a further safeguard against the possibility that its influence might spread."[1]

Yet, the influence of feminist legal theory has spread. Most major law schools in the United States offer specialized courses on feminist legal theory, and ideas from the field have found their way into a wide variety of other law subjects.[2] A growing number of courses on legal theory or jurisprudence devote significant segments to feminist legal theory, and in many fields across the American law curriculum miscellaneous courses are taught integrating feminist materials into the more conventional syllabus.[3] At least one textbook in family law uses feminist legal theory as a central organizing principle,[4] and it seems likely that over the next few years additional textbooks drawing strongly upon feminist theory will appear in other fields of law as well. It is difficult to believe that there would be more feminist analysis present in other law courses had the specialized courses not developed.

Moreover, the creation of the specialized field of feminist legal theory shares the benefits of other specialized fields in women's studies and gender studies. In the short span of their existence, these courses have already assembled a wealth of valuable information about women and their lives that was previously either ignored or suppressed. They have also generated new ways of looking at topics, often redefining disciplinary boundaries, creating new frames of inquiry, and developing fruitful new theories. It is correct

to say that "the negative effects of segregation have to be measured against the advantages of obtaining a cloistered space within which to work—the intellectural equivalent of 'A Room of One's Own.'"[5] Among these advantages has been the opportunity to develop a broader and more sophisticated view of law than that generally held.

It is common among lawyers and non-lawyers alike to think of law in terms of its actual immediate effect upon people. Laws that seem to be good for women are seen as beneficial to the women's movement, while laws that seem harmful to women are seen as subjects for agitation and legal reform. While there is of course much to say for this view of law, one should not overlook the more subtle effects that law has on the way that we think about issues and the way that a society defines what it recognizes to be a problem as well as what it is willing to consider as possible solutions to the problem. These more subtle views of law may be especially relevant to a country like Japan which is generally taken to be a much less "legalized" society than the United States.

## Ⅰ. The Evolution of Feminist Legal Theory

For the most part, feminist legal theory grew out of the American women's movement. During the late 1960s increasing numbers of women began attending law school in the United States. These women students provided the impetus for developing feminist law. As more and more of the women in law school identified themselves with the women's movement, they began to complain about the paucity of material in their classes related to the legal struggles of women. Lectures and seminars generally ignored the issue of sex discrimination, dealt insensitively with the crime of rape, and generally constructed syllabi that related to the needs and inerests of men, not of everyone. Arguing that they intended to establish law practices focusing on women's rights and that law school was not teaching them what they needed to learn, students devised and finally convinced the law schools to approve courses on "women and law."

The proliferation of these courses helped increase the pressure on law schools to hire women professors, and the increasing number of women professors, in turn, further developed the field from doctrinal courses on women and law to more ambitious and theoretically interesting feminist legal theory courses examining the nature of law itself. In addition, these women professors also taught other courses, often from an overtly feminist perspective. Over time, many male professors have also tried to include feminist perspectives within their courses. As with women's studies and gender studies, the field of feminist legal theory created an increased demand for professors with a feminist or gendered perspective, which in turn led to a more gendered teaching of other courses.

Feminist legal theory is both an intellectual project and a political project. The proliferation of courses tends to legitimate the field and to create its own demand. The relative prominence of the field in the United States can help to legitimate it as a field in other countries.[6] Feminists working in international and comparative law are beginning to have a significant influence on the fields and both fields are becoming more intellectually interesting and sophisticated.[7] In international law, feminist legal theorists have contributed to the expansion of human rights law to include issues of rape and other abuses that women typically experience much more than men and which were traditionally excluded as customary or "private" abuse instead of a violation of human rights. Feminists working in comparative law have fostered an international perspective, which is in turn potentially very helpful for broadening the range of issues

addressed and deepening the analysis of feminists in every country.

Two examples may help to show some of the ways feminist legal theory has developed and how it might be useful beyond the confines of law. While feminist legal theorists generally begin from a critique of the effects individual laws have on women or gender relations, the analysis can also expand to critique law in general, rather than just specific laws, and offer insights into the causes of women's subordination and how to evaluate legal and non-legal efforts at social change.

## Example 1: The Public-Private Dichotomy

Although it is common for feminists and other reformers to think of law as a means of promoting social change, one of the most significant effects law has on society in the United States, as in other countries, is to legitimate the status quo. Certainly law has played a part in improving the role and status of women, but it also serves in a variety of ways to make the continued subordination of women seem tolerable if not inevitable.

One of the ways that law legitimates the unequal status quo is through drawing a distinction between the public sphere, in which the state treats citizens equally, and the private sphere, in which inequality is treated as a cultural matter, based on the choice or consent of the participants, and not the responsibility of the government. The common attitude that the state should not "intervene" in the privacy of the family is an illustration of the functioning of this public-private distinction as a support for the status quo.

In the United States, it has been popular among non-feminists to argue that liberals and conservatives take opposite positions on the state's obligations regarding the family (and other private or intimate relationships) and its obligations regarding the economy and public controls on property ownership. In short, liberals favor state intervention in the market but oppose it in the family, while conservatives favor state intervention in the family but oppose it in the market.

Liberals, it is said, support state intervention in the market—they are in favor of government monitoring of the economy, supporting minimum wage and other labor legislation that limits the prerogatives of employers. To liberals, it is not appropriate simply to allow property owners, employers and employees to make their own individual choices, because the welfare of society is at stake. Conservatives, however, oppose such state intervention in the market—they are in favor of giving individuals the freedom to make their own economic choices.

Conservatives are in favor of state intervention in the private sphere of intimate relations—they frequently support legislation limiting divorce, restricting access to contraception and abortion, criminalizing adultery and fornication, and especially outlawing homosexuality and other behavior they deem immoral. Here, conservatives say individuals should not have the freedom to make their own choices because the welfare of society is at stake. Meanwhile, liberals are said to oppose such state intervention into private intimate relations—here they judge it appropriate to allow individuals to make their own choices and deny that the welfare of society demands such regulation of morals.

Feminists have shattered, or at least complicated, much of this analysis by looking beyond simple claims of privacy and choice and promoting policies to criminalize marital rape and to stop domestic battery. Moreover, feminist legal theorists have challenged the implicit assertion that the state ordinarily does not "intervene" in the family. Just as laissez-faire economics is a misnomer, as well as bad policy, so too is a laissez-faire family policy both a misnomer and bad policy.[8]

In every country, the state is involved to one extent or another in regulating or intervening in the family. It is the state which empowers husbands and parents through a variety of legal provisions that often go unnoticed and certainly are not understood as intervention. Tax laws in Japan and various other countries often provide a financial incentive for wives to do unpaid work within the home.

Perhaps the clearest examples, however, involve children. Parental supervision of children involves a substantial amount of behavior that would be regarded as false imprisonment and perhaps battery if it took place outside the family context. Further, child labor laws, however beneficial in general, also have the effect of disempowering children and making them economically dependent upon their parents by disabling them from earning money.

"State intervention" is treated as though it were an analytical concept, when in fact it is only an ideological concept. For example, suppose a 12-year-old runs away from home to go live with her aunt, and her parents want to reclaim the child. Would it be intervening into the family for the state to inquire into the child's reason for leaving before assisting the parents, or would it be intervening into the (extended) family for the court to side with the parents against the aunt (and child)? While some people consider it intervention in the family if husbands are prosecuted if they beat or rape their wife, an equally or more compelling case can be made that to exempt husbands from criminal assault and rape laws constitutes state intervention in the family, encouraging male sexual domination.

Feminists examining the laws relating to family find repeated instances of the state empowering men over women, both explicitly in gender-based manners and through provisions that may be gender neutral on a formal level but have a clear disparate impact on women. The Japanese provision that allows a couple to choose whether to adopt the husband's or the wife's family name upon marriage, but requires that one name or the other be adopted by both members of the couple,[9] is gender neutral on a formal level. Yet, in practice it means that the vast majority of women must give up their names and adopt the family name of their husband's family. The Japanese government can claim that these women should not blame anyone but themselves if they regret the choice they made, but it is the law that made them choose between unsatisfactory alternatives.[10]

One result of the feminist analysis of family law is a deeper and more critical understanding of the public-private distinction and how it functions to undermine the power of women and to legitimate the subordination of women. Many of the major loci of the oppression of women are defined as part of the private sphere. Even the sexual harassment of women at work has sometimes been classified private, because the man who harassed her could claim he was trying to form an intimate relationship with the woman.[11]

## Example 2: The Gender of Law

In American culture, law is coded as masculine. The traits associated with law and especially the traits for which law is praised are many of the same traits that are culturally assigned to men: law is supposed to be rational, objective, abstract and principled. I have traced out elsewhere[12] a number of the ramifications of this association of law with masculinity and the variety of strategies women have adopted to deal with the problems it causes.

The unequal division of the world between masculine and feminine—the assignment to women and the devaluation of one set of traits, and the assignment to men and the valorization of another set of traits, generally seen as the opposites—can be opposed in a variety of ways. Sometimes, women claim for

themselves the traits coded as masculine. Women claim to be rational human beings capable of independent thought and creative activity. Sometimes, women even claim to be aggressive and militaristic, brutal and cruel, as when they are seeking to obtain employment said to be unsuited to women because it requires such traits.

A contrasting strategy is for women to dispute the devaluation of the traits that are associated with femininity. For example, Carol Gilligan has elegantly defended the processes of moral reasoning that she discovered when she conducted studies of the moral reasoning of female subjects[13] and labeled it an "ethic of care." Previous studies had used only male subjects and created a scale for judging the level of sophistication of a person's moral reasoning.[14] Before Gilligan, those applying this scale to female subjects found girls less sophisticated in their moral reasoning than boys of a similar age.[15] Gilligan characterized the moral approach judged to be more sophisticated by this scale an "ethic of rights" and contrasted it to the "ethic of care" she had found in females.

The first strategy, claiming for women the traits coded as masculine, may inadvertently or intentionally support the valorization of these traits. The second strategy, revaluing the traits coded as feminine, may inadvertently or intentionally support the assumption or assertion that women in fact display these traits more than men do. The first strategy is more associated with working women struggling to be accepted into a man's world; the second is more associated with housewives struggling to achieve recognition for the value of the unpaid work they do. The first strategy is the strategy of many liberal feminists, the second of many cultural feminists.

Although women are often politically divided exactly along these lines, there are a number of ways to minimize these divisions. Both strategies intend to attack the same ideology of male dominance. It is possible to criticize both the skewed evaluation of the traits and the gendered assignment of the traits at the same time, and it is especially possible to try to minimize the extent to which either of the two main strategies reinforces the half of ideology that it is not directly attacking. In fact, it may be argued that women's movements are usually most successful when they have been able to do exactly that — simultaneously attack the genderization and the hierarchy of the dualisms.

In the field of law, many of the divisions among women can be seen as related to the same kind of problem. Law is coded masculine. One common approach is to accept the normative claim that law should be rational, objective, and principled and seek reform by identifying the laws that harm women as irrational, subjective, and unprincipled. Of course, even within this strategy there may be differences among women regarding what aspects of laws should be condemned as irrational, subjective or unprincipled. Someone supporting formal equality may try to suggest that hers is the only principled position, while someone in favor of substantive equality could make the same kind of claim.

A contrasting strategy rejects law as alienating and legalistic, criticizing it for these same traits, rationality, objectivity, abstraction and depersonalization. It is better, some argue, to resolve disputes in a more human-centered way, with concern for the values, emotions and personal feelings of the parties.

The first strategy reinforces the valuation that law should be rational, objective, abstract and principled, while it attacks the assertion that laws, or at least those being criticized, actually are such. The second strategy reinforces the assertion that law is rational, objective, abstract and principled, while it attacks the valuation that law should be such.

This dilemma, which is neatly presented in law, of women seemingly having to choose between challenging

the characterization of law as male or criticizing its maleness, when they would be wise to criticize both, is a dilemma faced by women dealing with any male-dominated field of study, or indeed when they wish to attack any gendered institution. It is possible that feminist legal theory can thus shed some light on the options available to women in this situation and the advantages and disadvantages that can be anticipated from whichever approach women take.

An interesting variation on this situation has been identified by some women in Japan. Chizuko Ueno has observed that "[w]henever one raises the question of gender" in Japan, one is "inevitably trapped" in a "mode of reverse Orientalism."[16] As Ayako Kano characterizes the argument of male literary critic Kojin Karatani, "it is dangerous to critique patriarchy in Japan as Japanese feminists have done: when feminists critique patriarchy, they end up valorizing matrilineality, and since matrilineality is the basis of the emperor system, a feminist critique of patriarchy leads to valorization of the emperor system."[17] While the underlying thesis that the emperor system was based on matrilineality can be and has been criticized,[18] a further complexity arises because Japan has been defined (and implicitly criticized) as female by the Orientalism of the West. If feminists criticize patriarchy or male dominance in Japan, they may be accused of reinforcing or trying to reinforce the Orientalist identification of Japan with femininity.

The Meiji reformers are widely credited with perceiving the imperialist threat to Japan from the West and with effectively countering that threat through social changes to produce a strong, independent country capable of carrying out rapid industrialization. Thus, rather than direct imperialist colonialization, Japan suffered indirect domination from the West, for example, through the process Edward Said termed "Orientalism." Orientalism defined the Orient in opposition to the Occident, in many of the same ways that women are defined in opposition to men. As Said points out, "[w]omen are usually the creatures of male power-fantasy. They express unlimited sensuality, they are more or less stupid, and above all they are willing."[19] To the West, the Orient suggested "not only fecundity but sexual promise (and threat), untiring sensuality, unlimited desire, deep generative energies."[20] Orientalism feminizes the Orient, emphasizing "its eccentricity, its backwardness, its silent indifference, its feminine penetrability, its supine malleability."[21]

Even today, Japanese culture is seen by many Westerners and by some Japanese as a less masculinist culture than that of, say, Germany or the United States. There is a danger that any effort to claim various aspects of Japanese culture as feminine and positive will wind up reinforcing an Orientalist devaluation of the culture instead of a revaluation of the traits associated with women.[22]

## Ⅱ. Legal Studies and the Proliferation of Feminisms

Another reason gender studies might care about feminist legal theory is the role it has played and may continue to play in identifying strengths and weaknesses of the various approaches taken by different feminists. As the focus on feminism has been increasingly replaced with a focus on feminisms, it has become fashionable to divide the field into this kind of feminism and that kind of feminism, and to fit individual theorists into these various divisions. While some writers seem to fit comfortably into one category or another, many appear to aspire to come up with their own new strand of feminism. While I tend to think such classification has become too much of an obsession and that it obscures perhaps as much as it illuminates, for present purposes I will use the five categories liberal feminism, radical feminism, socialist feminism, cultural feminism and postmodern feminism. I do so with some hesitation, though, and would

emphasize that I intend to be classifying ideas, not people. Of course, some writers draw on more than one strand of feminism.

## Liberal Feminism

Initially in the United States, feminist legal theory was closely tied to the women's movement and the movement's efforts at legal reform. Twenty years ago, American courses and journal articles primarily addressed the legal doctrine developed around issues of sex discrimination and efforts to use the legal system to improve the role and status of women. Following the strategy generally associated with liberal feminism, these courses accepted, at least for the sake of argument, the general normative and descriptive claims of the virtue of law — its neutrality and objectivity, the appeal to abstract notions of equality and the claim the law did or should apply universal norms to citizens naturally deserving of being treated by their government with equal concern and respect. Much of the thrust of the work involved showing the ways individual laws failed, either in their conception or in their application, to live up to these claims.

This strategy was an useful starting point, and it achieved a number of valuable results. It addressed the exclustion of women from law, politics and commercial activities, including many forms of employment. As some of the legal and social barriers to women's equality were removed, those women who could meet or exceed the norms established by and for men began to be treated more fairly than they had been. The general improvement in the formal legal position of women made it easier for women to see more clearly the limitations of the liberal equality strategy. These limitations, identified and developed in terms of law and legal reform, also relate to the general notion of liberal feminism. The strengths and weaknesses of a legal strategy based on liberal feminism illuminate some of the strengths and weaknesses of liberal feminism overall.

## Radical Feminism

It was the radical feminists who first began to question narrow concepts of formal equality, noting that a woman generally could state a claim for relief only if she could find a comparable man treated differently and better than she, on the basis of sex. Thus, the base line or norm is masculine. Women are to be treated the same as men when they are not actually different from men in any significant way. Another way of identifying the problem is to say that there is an unstated male referent, passing itself off as a neutral standard. This limited approach to equality simply requires that legal rules track present reality—that they not irrationally treat women differently from men in those instances in which women are not different from men. Such an approach, however, generally fails to deal adequately with any situation in which women are seen as significantly different from men, such as when women are pregnant. The radical critique goes substantially deeper:

> [I]f one enters a world in which the standard is already constructed according to an implicit but suppressed male referent, you have a marketplace structured according to a male biography, a male-based series of social expectations, wherein only those women who are the most like [men] have a right to be treated equally by this definition of equality. There is no critique of the standard itself as gender based. Only women who are most <u>like</u> the male norm are advanced or advantaged by this notion of equality . . . .[23]

Theoretical legal equality does not do much to help those women whose actual, material reality makes them unable to meet the standard set and defined by men, most of whom, because of the benefits they get from women and from the organization of domestic life and the rest of society, have a very different actual, material reality to their lives.

> The equality model proposed, for strategic purposes, that what women wanted was access to a world already constituted; it stopped short of proposing that the workplace, or the university, or the professions, or the welfare system, or the family, should be re-envisioned or reconstructed by and with women's participation, to reflect women's reality.[24]

One of the most intersting developments of this insight by radical feminists is sometimes referred to as the "dominance theory." It has been asserted that it is not gender differences that result in inequality between men and women, but rather the inequality between men and women that results in gender differences.[25] Thus the focus should be not on abstract equality but on the domination of women by men, and the goal should be to end that domination.[26]

Many, though not all, radical feminists concentrate particular attention on the sexual exploitation of women. They note especially the failure of criminal laws to protect women from violence, force and fraud in those cases in which the goal of the violence, force or fraud appears to be male sexual access. Rape law's peculiar requirement that women resist sexual aggression, even to the point of serious danger to health or life, to establish non-consent, and the marital exception to rape laws are two examples that have recurred in country after country throughout much of history. Misrepresentations and deceptions that would be actionable as fraud if they were perpetrated to obtain money or property are fully tolerated by many or most laws if they are used to obtain men's sexual access to women. The analysis of these laws by lawyers and scholars engaged in feminist legal theory has contributed insights for radical feminism in general. In the United States, women are so frequently victims of random street violence that most restrict their activities, especially their nighttime activities; in various Arab countries, judicial toleration of "honor crimes" exposes all women to violence from their male relatives and severely limits their sexual choices; in Japan, the law permits sexualized depictions of violence against women which have become common in everyday pornography openly read on subways and busses.

A gendered analysis of laws relating to sexuality contributes to an American radical feminist theory that sees sexuality itself as a kind of linchpin to women's inequality.[27] Rather than just a natural drive or human condition, sexuality is socially constructed and for centuries it has been constructed to the benefit of men and the detriment of women. Structurally, men exploit women and appropriate their sexuality. Economic domination is one consequence of this sexual exploitation, in part because the way sexuality is constructed devalues women and gives men an incentive to keep women economically dependent. As long as women are viewed as sexual objects, they will be underpaid in the workplace and efforts to end sexual harassment are endless "holding operations" like sandbagging in flood conditions.[28]

## Socialist Feminism

A major factor distinguishing socialist feminism from radical feminism is an insistence on a nearly opposite causal relationship between the economic and sexual exploitation of women. Socialist feminists regard the economic inequality of women and women's consequent economic dependency on men as the chief

cause of women's sexual exploitation. Noting that poorer women are generally subjected to greater sexual exploitation than wealthier women, socialist feminists expect increased economic power to enable women to end sexual exploitation. Under socialism, some argue, women would be able to form healthy, satisfying relationships with men free of economic, social and sexual domination.

Like socialists in general, socialist feminists tend to be less positively inclined toward law as an institution, usually seeing it as secondary to economic determinants or as "superstructural." Nevertheless, one of the areas in which feminist legal thought has contributed to socialist feminism is in the analysis of employment discrimination, especially of part-time workers and issues of comparable worth.

Legal efforts to ameliorate the disparate pay and employment conditions of men and women have highlighted some of the assertions promoted by socialist feminists. The particular conditions of part-time workers, disproportionately women, would seem to reinforce the socialist feminist notion of women as a reserve army of workers. Decisions from the European Union's European Court of Justice, sitting in Luxembourg, encouraged investigation of the economics of part-time work. In *Jenkins v. Kingsgate,*[29] for example, the Court suggested that paying part-time workers a lower hourly pay rate than full-time workers might constitute indirect discrimination against women unless the employer could show that it was justified on some other basis. Similarly, in *Bilka-Kaufhaus v. Weber von Hartz,*[30] the Court ruled that an occupational pension scheme that discriminated against part-time workers must be shown to be economically justifiable or else be ruled a form of indirect discrimination against women.[31]

The European Union also applies notions of comparable worth. Under the European Court's interpretation of the European Union's equal pay provision, equal pay must be given for work of comparable worth. American lawyers have generally been unsuccessful in their efforts to get equality provisions interpreted so broadly, and legal reformers have been similarly unable to enact further legislation. From the vehemence of the arguments made against comparable worth in the United States, one might think that to enact such an antidiscrimination provision would lead directly to socialism. That has not, however, been the experience in the European Union, though some women have received somewhat improved wages.

## Cultural Feminism

Cultural feminists have taken the radical feminist insight about the sameness requirement of equality doctrine and developed a quite different view of the significance of the differences of women from men. Frequently drawing on the work of Carol Gilligan and applying it to law, cultural feminist legal writers insist that the differences of women from men should be recognized by the law. Instead of trying to make women fit into a male model, the law should adopt an alternative, female model, which it should apply to and for women. The problem with such an approach in practice is that it tends to degenerate into a simple reliance on a concept of difference just about as based on a male model as the sameness concept was. This risk, identified in legal writing, is applicable to cultural feminism in general.

Some writers argue from a cultural feminist position that a feminist approach to legal disputes should focus more on mediation and other efforts to get the parties to work out their own solutions. They point out that law can be alienating and legalistic, based on the ethic of rights more than the ethic of care. It is better some argue, to resolve disputes in a more human-centered way, with concern for the values, emotions and personal feelings of the parties. The cultural coding of law as masculine—valorizing objectivity, abstraction and depersonalization—means that women may be especially disserved by legal, win-lose solutions.

Feminist critics of mediation, however, have demonstrated many ways in which mediation also often disserves the interests of women and simply reinforces the unequal position of the parties. Mediation is often a device for courts to channel away disputes it considers less legal and less important—such as, conflicts involving women and the so-called private sphere. Here the feminist critique of the public-private distinction, raised above, suggests further disadvantages to women of privatization. Again, the insights developed in the legal critique may have broader applicability to cultural feminist theory in areas outside law as well.

### Postmodern Feminism

Postmodern feminists also have used the radical feminist insight regarding the sameness requirement of equality doctrine to develop an alternative focus on the relevance of differences to feminist theory. Their focus is as much on differences among women as on the differences between women and men. Applying to law the postmodern questioning of the idea of a single, coherent "self," or of the claim that knowledge can be objective has yielded a number of promising insights. In particular, the social construction of reality and the contingency of these constructions can be illustrated in law. Clare Dalton has tried to demonstrate natural alliances between feminism and postmodernism. Drawing upon the work of Virginia Woolf, she argues also that feminism threatens men with the risk of no longer being flattered by women reflecting them back at twice their actual size.

Mary Joe Frug showed a variety of ways that the law constructed the body of women. She argued that the law terrorized the female body, that it sexualized it, and that it maternalized it.[32] The concreteness of law allows for the development of a postmodern analysis that appears to be more grounded (to the extent that calling a postmodern analysis "grounded" is not a contradiction or an insult) and more understandable than much such analysis.

## Ⅲ. CONCLUSION

The value of feminist legal theory to gender studies does not depend upon the value of law itself to women. Although law can be and occasionally has been an important tool for social change, law's role with respect to the subordination of women has often been disappointing. It may do as much harm as good, both because law makes direct, if often subtle, contributions to the subordination of women and because law frequently serves to "naturalize" men's dominant position and generally to legitimate the status quo.

Yet, if women try simply to ignore law, it may well continue to play most of the negative roles it already plays and those positive benefits if does provide will likely be lessened. It has often been argued that women need to be "legally literate"—that is, to understand their rights and legal liabilities enough to obtain the former and limit the latter. I would add that it is also important for women to know enough about law to be confident in a critical perspective on it. Law should be seen not just as a set of statutes or rules, but rather as a complex social arena in which a variety of struggles take place over values and meanings. It is also an arena for intellectual struggle over ideas.[33]

Moreover, as I have tried to demonstrate, legal theory contributes to the general development of feminist theory. The kinds of basic changes to society and changes in thinking that may be necessary finally to end the subordination of women require us to draw on every skill and knowledge available. Law should be one of those skills.

(Overseas Fellow, Churchill College, Cambridge, England · Prof. of Law, University of California, Los Angeles)

## Notes

1. Clare Dalton, "Where We Stand: Observations on the Situation of Feminist Legal Thought", *Berkley Women's Law J.* I (1988): 3, rept. in *Frances Olsen, ed., Feminst Legal Theory I* (Aldershot, England: Dartmouth Press, 1995). p. 3.
2. The reasons for the more extensive development of feminist legal theory in the United States may be termed almost accidental. See Frances Olsen, "Amerika hō no henyō niokeru feminizumu hōgaku no yakuwari: Nihon no posutomodanizumuteki rikai ni mukete", *Juristo* 1118 (September 1, 1997) (part 1) : 78−84 and *Juristo* 1119 (September 15, 1997) (part 2) : 113−120.
3. These courses include, among others, constitutional law, contracts, criminal law, international law, legal history, legal practice, and the sociology of law.
4. Frances Olsen, et al. *Cases and Materials on Family Law.* (St. Paul, Minnesota: West Publishing Company, 1994).
5. Dalton, supra, referring to Virginia Woolf's feminist classic, *A Room of One's Own* (New York: Harcourt, Brace and World, 1929).
6. See Frances Olsen, "Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagemnet," *Yale Law Journal* 106 (1997) : 2215−2257; Frances Olsen, "Wie wurde feministische Rechtswissenschaft in den USA zentral fuer das Recht?" *Plaedoyer* 3(May 1994) (Switzerland); Symposium, "Nationalism and Feminism: A Conference on Women in Central and Eastern Europe," *UCLA Women's Law J.* 5 (1995) : 1.
7. For a description of the increasing prominence and interest of comparative law, see Guenter Frankenberg, "Stranger than Paradise: Identity & Politics in Comparative Law," *Utah Law Rev.* (1997) : 259.
8. See Frances Olsen, "The Myth of State Intervention in the Family," *Uuniversity of Michigan Journal of Law Reform* 18 (1985): 835-864; Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Rev.* 96 (1983): 1497−1578.
9. See Civil Code of Japan, Article 750. Efforts to change this provision, to allow a woman to keep her maiden name, have been unsuccessful as of August, 1997.
10. The Japanese law is considerably more restrictive than the German law, which, for example, allows for combining husband's and wife's family names into a hyphenated name. See *Buergerliches Gesetzbuch* (German Civil Code) Section 1355.
11. See, e. g., Corne v. Bausch & Lomb, Inc, 390 F. Supp 161 (D. Ariz. 1975), rev'd 562 F. 2d 55 (9th Cir. 1977); Tomkins v. Public Service Elec. & Gas Co. 422 F. Supp. 553 (D.N.J. 1976), rev'd 568 F. 2d 1044 (3d Cir. 1977). In Japan, the first sexual harassment cases were brought as tort actions, thus part of private law rather than sex discrimination law. It remains to be seen whether this decreases any tendency to trivialize such harassment as private.
12. Frances Olsen, "The Sex of Law," in David Kairys, ed., *The Politics of Law* (2d Ed.) (New York: Pantheon, 1990) pp. 453−467. ; Frances Olsen, "Das Geschlecht des Rechts," *Kritische Justiz* 3 (Germany, 1990): 303−317.
13. Carol Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982).
14. Lawrence Kohlberg, "Continuities and Discontinuities in Childhood and Adult Moral Development Revisited," in *Collected Papers on Moral Development and Moral Education* (Cambridge, Mass.: Moral Education Research Foundation, 1973).
15. See Gilligan, supra.
16. Ueno Chizuko and Nakamura Yujiro, '"Ningen' o Koete: Idō to Chakuchi" (Tokyo: Seidosha, 1989), quoted in Ayako Kano, "Japanese Theater and Imperialism: Romance and Resistance," *U.S.-Japan Women's J.* 12 (1996): 17
17. Kano, supra, at 21.
18. See Kano, supra, and sources cited there.
19. Edward Said, *Orientalism* (London: Routledge & Kegan Paul, 1978). p. 207.
20. Ibid. p. 188. Until about the last 200 years, the Orient "really meant only India and the Bible lands," ibid. p. 4, but since then the use has exapanded to include also the Far East. This broader use has been furthered by the post-World War II expansion of the influence of the United States, where "the Orient" has been associated mainly with China and Japan. See

ibid. p. 1.

21. Ibid. p. 206.
22. Chizuko Ueno is probably the Japanese feminist who has done the most to try to counter this kind of argument.
23. MacKinnon, in Ellen Dubois et al, "Feminist Discourse, Moral Values, and the Law — A Conversation," *Buffalo Law Rev.* 34 (1985): 11, 23.
24. Dalton, supra note 1.
25. See Catharine MacKinnon, *Feminism Unmodified* (Cambrbidge, Mass: Harvard University Press, 1987) p. 32−45.
26. Ibid.
27. See Catharine MacKinnon, "Feminism, Marxism, Method and the State," *Signs* 8 (1983): 635.
28. The most impressive writer on this is Catharine MacKinnon. See Catharine MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979); Catharine MacKinnon, supra note 27; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).
29. Case 96/80, Jenkins v. Kingsgate (Clothing Productions) Ltd, [1981] ECR 911.
30. Case 170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, [1986] ECR 1607.
31. See generally, Frances Olsen, "Legal Responses to Gender Discrimination in Europe and the USA," in *Collected Courses of the Academy of European Law* (Vol. II Book 2) (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1993) p. 199, pp. 262−63.
32. Mary Joe Frug, "A Postmodern Feminist Legal Manifesto" (An Unfinished Draft), *Harverd Law. Rev.* 105 (1992): 1045.
33. Law should not be considered a privileged arena where the most important battles are bound to take place—although lawyers, even women lawyers, sometimes seem to make such a claim. I have known artists and literary critics who believed the same thing about their fields. It may be a common occupational hazard for people to assume that whatever they are doing is important. In addition, some people may choose a field because they consider it the pivotal arena for change. My own view is that law is what I happen to do and to enjoy, not that it is likely to provide the lynchpin for women's equality.