December 1989

The F Word: Mainstreaming and Marginalizing Feminism

Mary C. Dunlap

Follow this and additional works at: https://scholarship.law.berkeley.edu/bglj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38W87X

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Gender, Law & Justice by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The "F" Word: 
Mainstreaming and Marginalizing Feminism

Mary C. Dunlap†

Feminism is widely perceived as a "dirty" word, reduced to its first initial rather than spelled out. Underlying the marginalization of feminism is the marginalization of causes central to women, including abortion choice, sexual violence, lesbian rights, sexual speech, sex education, and related issues that have been the focus of feminist litigation, scholarship and activism over the past couple of decades. These concerns are considered "dirty" by far too many people. Consequently, even in this era of increasing numbers of women in law and of increasing consciousness about the primacy of these concerns to human well-being, to call oneself a feminist continues to be a brave act.¹

The resistance of the U.S. legal system to the feminist priority of female empowerment is certainly well-documented by now.² Whether one accepts the position that law is so embedded in patriarchy that it is inherently sexist, or the more modest notion that law is simply a locus of societal inertia and reaction, it can hardly be surprising that feminism has not been welcomed by this legal system.

My view that feminism is a good word is partly based on the power of this word to challenge and provoke change. Feminist concerns have drawn great numbers of women, and smaller but not unimportant numbers of men, to conferences such as this Twentieth National Conference on Women and the Law for some years. It is my belief that the negative

† Ms. Dunlap received her B.A. in 1968 and her J.D. in 1971 from the University of California at Berkeley. She was a co-founder of and staff attorney with Equal Rights Advocates, Inc., from 1973-78, has been chiefly in solo civil rights practice since 1980, and is a member of the adjunct law faculties of Golden Gate University and Stanford University.

¹ This essay was completed shortly before fourteen Canadian women engineers were physically segregated and slain in a classroom at the University of Montreal by a man who called them "a bunch of feminists" and blamed them for all of his troubles. Fourteen Women Are Slain by Montreal Gunman, N.Y. Times, Dec. 7, 1989, at A1, col. 1. The courage to call oneself a feminist continues to be needed, whatever our enemies do.

connotations of the word "feminist" derive from refusal to accept the substantive and rather well-developed commitment of feminists, in all of our differences, to empower women. As an unhesitating feminist, I have made it my mission in this forum to identify the real "F" words.

As a litigator who has twice been before the U.S. Supreme Court and who has feminist friends who have also been there, I would offer that one of the real “F” words in my life is five-four opinions. My personal choice of the worst five-four is the “Gay Olympics” decision. In that case, the Supreme Court upheld the United States Olympic Committee’s trademark-based claim of right to prohibit “Gay Olympic Games” sponsors from using the term “Olympic.” As counsel of record for the “Gay Olympics” founders from 1981 through 1987, I dedicated enormous amounts of time and energy to this case and elected to litigate in an openly gay/lesbian manner; after the heartfelt commitment I made to the case, the five-four loss in the U.S. Supreme Court was particularly sore.

As a feminist, I would nominate the five-four decision of Frontiero v. Richardson. There we had four full votes for the proposition that sex, like race, is a suspect category for purposes of triggering strict scrutiny of any sex-based legal line, under the equal protection guarantee. In Frontiero, for a flickering moment in history, four Supreme Court Justices understood that sex, like race, ought to be a suspect category. Gender, like race, has been used historically as a division to oppress people. And, like race, it is a basis for political disempowerment. One can go right down the list of criteria of suspect categories—immutability of the characteristic, historical oppression, political powerlessness, lack of relatedness between the characteristic and the governmental line being drawn—and cannot help but find that sex meets each one. I am left with the impression that what is suspect in this process is the reasoning of the five hold-outs in Frontiero.

But five-four is as close as we have ever gotten to true equality in the U.S. Supreme Court. A few years after Frontiero, we lost the bid to ratify the federal Equal Rights Amendment, which plainly would have mandated a new regime for women and the U.S. Constitution. Those who

---

3 San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) (holding, inter alia, that U.S.O.C. was not engaging in “state action,” despite constitutional claims that term was being used in conjunction with protected speech and association, and that others, e.g., Police Olympics, Special Olympics and several dozen other groups, were not being prohibited from use of term).

4 As trademark expert Peter Weiss of New York City observed, “It’s preposterous—a genuine howler of an error.” Weiss, New Yorker, Aug. 24, 1987, at 19. Losing Dr. Tom Waddell, a founder of the “Gay Olympic Games,” to AIDS in July, 1987, two weeks after the Supreme Court narrowly rebuffed our constitutional assertions, was all the more painful.


7 The proposed ERA provided, in pertinent part, that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). The ERA formally
know the Court far better than I do would tell us that we are certainly not closer to five votes for sex as a suspect category today. Another "F" word emerges: we are further away from constitutional equality of the sexes than we were in 1973, when *Frontiero* was decided.

Since July 3, 1989, I have added another five-four division on the Supreme Court to the category of real "F" words. In *Webster v. Reproductive Health Services*, a five-four majority of the U.S. Supreme Court upheld a motley array of restrictions on abortion choice, coming as close to overruling *Roe v. Wade* as they could without doing so. However, the right of abortion choice had not been safeguarded vigorously by the Court before *Webster*; since *Roe v. Wade*, the Court has been fiddling with, and frittering away, the right of choice, especially for poor women, sick women and women of color. After *Webster*, no one can take lawful access to abortion choice for granted; the Court has put itself in the *fair-weather-friends* column when it comes to support for female reproductive choice.

Related to the Court's misdoings as to abortion choice, and perhaps causing some of them, we have the "F" words of *fetus fetishism*. After hearing the excellent panel on the history and future of reproductive choice at this conference, I was struck by comments from others that this repetition of the abortion choice struggle is exhausting. It is exhausting, but it also means we are getting more and more experienced in dealing with this recurrent, unresolved and deep issue.


10 See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (Supreme Court upheld funding cut-offs of abortion for women who will die or become critically ill for lack of availability of abortion.) As I have observed elsewhere, this decision represents the Court's willingness to maintain a dual system of equal protection, unequally protecting women at the lesser end of the imbalanced scale. Dunlap, *Essay: Harris v. McRae*, 6 *Women's Rts. L. Rep.* 166 (1980).
11 At the time I gave these remarks, I was proudly and painfully wearing a decade-old button that says, "Defeat the Fetus Fetishists," which was given to me by my dear friend Rhonda Copelon, who litigated for poor women's access to abortion choice in *Harris v. McRae*, supra note 10. Although relatively old, the button has new vitality in the age of so-called Operation Rescue, which I prefer to call by any of its street name equivalents, including Operation Bully, Operation Harass-You, or, simply, Operation Screw.
12 Rhonda Copelon, Sandra Lowe, Helen Rodriguez-Trias and Nancy Stearns, Keynote Address at the Twentieth National Conference on Women and the Law (March 31, 1989). The speakers were very inspiring, particularly in their dedication to the model that feminist jurisprudence is most centrally about women changing the legal system by telling the truth about their lives through their own stories. See also West, *Jurisprudence and Gender*, 55 *U Chi. L. Rev.* 1, 64 (1988). Both the stories from these pro-choice advocates' own lives, and the stories of the women that they retold, who have lost everything from equilibrium and health to life itself in seeking and being denied abortion choices, are vital to changing the legal system in feminist directions. See Stearns, *Roe v. Wade—Our Struggle Continues*, 4 *Berk. Women's L.J.* 4, 5 (1989) (describing the use of women's stories in efforts to change state abortion laws in the early 1970s).
Then, as a scholarly lawyer, I must also include four-four opinions. They can be as ferocious as the five-fours. I offer as my best candidate for feminist atrocity in the four-four category the opinion in Vorchheimer v. School District of Philadelphia. This four-four Supreme Court decision upheld an appellate decision allowing a public high school to exclude a female who wanted to attend the boys’ high school (called “Central High School,” interestingly, just in case you wondered where the power metaphors in high school names stand), although the girl proved that the boys’ high school had superior science educational programs and facilities. The appellate court upheld the trial court’s finding that Ms. Vorchheimer’s desire to attend the boys’ school was based on “personal preference rather than objective evaluation.” I think the judges misunderstood. It was not that Ms. Vorchheimer wanted to go to school with the boys; it was that she wanted to go to school where the resources and education in science were proved to be superior.

Among the most serious recurrent issues in our women’s rights movement, there is the matter of forcible rape. And by forcible I mean any form of misapplied coercion, overreaching or misuse of authority. Date rape is no less rape because it is perpetrated by someone familiar, and sexual harassment resulting in assault is no less assault because it stems from interaction between co-workers, or a boss and a subordinate, or a teacher and a student. Domestic rape is no less rape because the rapist shares a household, name or other attachment with his victim. Forcible rape continues to be the ultimate “F” word and the ultimate “F” deed against women, and apparently much less frequently, but I believe not a bit less seriously, against men and boys. Forcible rape, which is all rape, is the crime that uniformly and systematically demarcates and perpetuates female oppression around the world.

My next contestants for frightful “F” words are the fanatical right, the fascists, Falwell and his sidekicks, the bible-toting Swaggart, the now-felon Jim Bakker, convicted of fraud, with their upright lies and their downright lies and their divided and divisive and closeted, creepy, hypocritical lives, and, beneath their fraudulent footsteps, there is Fundamentalism. By this I sincerely and truly mean no offense to any religious or spiritual outlook or belief. Faith is not an “F” word, as far as I am concerned. The Fundamentalists to whom I am referring are a political phenomenon. They are having fun at my expense and I no longer wish to pay for it.

Along with these folks, I have on my “F” list the short category of national politicians, initially led by “Facts are Stupid” Ronny and now

---

13 430 U.S. 703 (1977), aff’d by an equally divided Court, 532 F.2d 880 (3d Cir. 1976).
15 See S. Estrich, Real Rape (1987); S. Brownmiller, Against Our Will: Men, Women and Rape (1971).
led by "Flag-Waving" George. The 1980s in the United States have brought us a full and fearful ten years of politics from this pair, with their trickle-down theories, their ketchup-is-a-vegetable, their ACLU-baiting and open attacks on civil rights and affirmative action. I find it very hard to tell the eighties from the fifties.16

Fictions make my "F" word list, too. I like novels, and even an occasional fantasy, so don't get me wrong here. What I am referring to is legal fictions. My favorite is the reasonable man, the paramount legal fiction. The reasonable man uses only so much deadly force—now how is any deadly force "reasonable"? Then there is the legal fiction that private property is protected from trespass, selectively enforced against progressive trespassers, yet not against the forces that would violently close abortion clinics.

We also have the legal fiction of "Equal Justice Under Law." This principle, etched in the marble frontpiece of the U.S. Supreme Court has been betrayed from Dred Scott v. Sandford17 and Korematsu v. United States18 to the civil rights disasters of the October 1988 term—Patterson v. McLean Credit Union19 and City of Richmond v. J.A. Croson,20 leading the appallingly long list.21

There's another fiction, both legally sponsored and otherwise advanced, of fate. Fate says that "war is inevitable," that "biology is destiny," and that lawyers simply have to be unethical, because "they're just doing their job." Fate is a fancy form of inertia. There is this fate message, delivered in the Supreme Court decisions and reflected through other, more subtle forms of legal inertia, that we have to have this poor, downtrodden, homeless, shoeless, tired, dirty, huddled mass of people yearning to be free. And we have to have this subpopulation for over two hundred years. The fate of the silencing of feminism in the name of patriotism or patriarchy, (I do have trouble telling these apart), comes to mind; it is not a fate that I will accept with any degree of politeness or even adaptation.

There are "F" phrases too, such as the "for your own good" school of thought.22 I hate the phrase "we are doing this for your own good." Almost anything people have ever done to me for my own good hurt.

17 60 U.S. 393 (1856).
18 323 U.S. 214 (1944), reh'g denied, 324 U.S. 885 (1945).
22 Alice Miller, in her brilliant works on the relationship between child abuse and fascism, has identified this school as being at the crux of human oppression. See A. Miller, For Your Own Good: Hidden Cruelty (1987).
And I think only a very small amount of that pain was necessary. And most of the rest was perfectionist crap, which I must concede does not start with an "F." 23

A number of "F" words go in disguise. I offer, as a good example, the word normalcy. Normalcy is, in so many respects, a nightmare. There's the normalcy of abuse and violence in our lives. 24 There's the normalcy and commonness of the intellectual insult to women. A woman has the idea, raises her hand, articulates it; they listen but do not respond. A man raises his hand and says the same idea: "great idea, Joe." This is normalcy and commonness in that it happens every day, even with people's improving consciousness about sexism. And there is the mockery of women in sport and athletics. 25 There is the torment of women in aesthetics. Too often, that which is normal and common is a crime against women, and a crime against the feminine in everyone.

Surely one of the most stunning plays based on the "For Your Own Good" script in male chauvinist law emerged in the 1970s, where institutions fought in court for the right to tell pregnant employees when, where, how and why to take maternity leave, while maintaining that such leave would be unpaid. See LaFleur v. Cleveland Board of Education, 414 U.S. 632 (1974).

As Jo Carol LaFleur, who became an attorney after her experience as a famous pregnant litigant, put the matter:

How could a male-dominated school system say to me, Even though you're not ill, and pregnancy is a perfectly normal condition, you are unfit to teach... I got a few letters and phone calls from folks who said, How dare you go in front of a class with a big belly? People like you should be shut up in some room! But I got postcards from people all around the country that made up for that. A woman sent me a little medalion—there's a patron saint of pregnant women whose name I don't remember not being Catholic, but it meant a lot.


One devastating corner of this normalcy of abuse and violence in the world, in which I have lived personally, consists of pervasive sexual mistreatment of minors, often referred to in the shorthand term, "incest." "In 1979, a major study revealed that between four and twelve percent of all women in the United States reported sexual experiences with a relative, and one woman in a hundred reported sexual experiences with her father." Brief of Amici Curiae, ACLU of Southern California, The NOW Legal Defense and Education Fund and The Southern California Women's Law Center in Support of Appellant at 7, Vaughn v. Gardner, No. 2 Civil B041542 (Cal. Ct. App., 2d App. Dist., filed Oct. 27, 1989) (citing D. Finkelhor, Sexually Victimized Children 88 (1979)). Vaughn is the latest in a series of California appellate cases in which incest survivors struggle to establish their right to sue perpetrators despite the expiration of statutes of limitation. Such time limits fail to take into account the Child Abuse Accommodation Syndrome, which causes forgetting, repression of memories, denial of incidents and, thus, considerable delays in the commencement of litigation. See DeRose, Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages, 25 Santa Clara L. Rev. 191 (1985); for a discussion of children's reactions to child abuse, see Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse and Neglect 177 (1983). To date, the California appellate courts have failed to recognize the importance of permitting litigation of these cases, instead hiding behind the legal fiction that time should be on the civil defendant's side. See, e.g., DeRose v. Carswell, 196 Cal. App. 3d 1011, 1019, 242 Cal. Rptr. 368 (1987).

"After elementary school, physical education classes and athletic teams are usually sex segregated, and different curricula and activities are offered for females and males. Interscholastic or intercollegiate athletic associations often bar participation by females in certain sports or prohibit co-ed extracurricular athletic competition." Tokarz, Separate but Unequal Educational Sports Programs: The Need for a New Theory of Equality, 1 Berk. Women's L.J. 201, 203 (1985).
THE "F" WORD

We have falsehoods. I will not dwell on these, either, except to observe that I believe Adrienne Rich, extraordinary feminist poet and ethicist, has done the best possible job of conveying the harms and costs of anti-feminist falsehoods. The lie of compulsory heterosexuality, the lie that just because a few women get paid a bit more, everyone else is necessarily better off, the lie that to love women is wrong, and the ultimate lie that to love ourselves is wrong: these lies shore up the status quo. There is also the fabulous falsehood that $4.35 per hour is a living wage. Certainly one of the most serious treacheries of law is that it thrives on the maintenance of these types of falsehoods, and casts out those who would challenge them.

Then I have a few "F" words left over. They speak for themselves. There are the frustrated dreams of feminists. There are friendships betrayed by the idea that women do not love one another. There is faking orgasm. There are various fraternity hazings, and I put within this "F" word all fraternal orders of benevolent and protective private heterosexist rich white men who call theirs an "Olympic" Club, while successfully using The Law to attack anyone "not in the club" who dares to use the vaunted term, "olympic."

---

26 The lie is many-layered. In Western tradition, one layer—the romantic—asserts that women are inevitably, even if rashly and tragically drawn to men... as an organic imperative. A. Rich, Compulsory Heterosexuality and Lesbian Existence 29 (1980). In an amicus curiae brief submitted on behalf of the Lesbian Rights Project and other public interest groups (hereinafter "Lesbian Rights Project") in Bowers v. Hardwick, I quoted Adrienne Rich, in pertinent part, for the proposition that the lie of exclusive heterosexuality is a "silence [that] makes us all, to some degree, into liars... . The possibilities that exist between two people... are... the most interesting things in life. The liar is someone who keeps losing sight of these possibilities." Brief of Amici Curiae, the Lesbian Rights Project, in Support of Respondent, Bowers v. Hardwick, 478 U.S. 186 (1986) (citing A. Rich, Women and Honor: Some Notes on Living (1979)), published in 14 N.Y.U. REV. L. & SOC. CHANGE 949, 965 (1986). Regrettably, the Supreme Court majority, per Justice Byron White, chose to lie, all the same.

*Bowers, supra.

27 Aaron Burr's sharp comment that "[t]he Law is that which is boldly asserted and plausibly maintained" continues to describe the mendacious ways of the legal system. Parton, 1 The Life and Times of Aaron Burr, 149 (reprint of 1858 ed.).

28 On the subject of Olympics and law, there has been a lot of printer's ink spilled as to the nomination of Vaughn R. Walker to the U.S. District Court for the Northern District of California in San Francisco. See Mandel, Gay Games Foe Tries Again for Court Seat, San Francisco Examiner, Oct. 2, 1989, at A-4, col. 1; Checchio, Bench Chances Bleak For Walker, The Recorder, Aug. 8, 1989, at 1, col. 2; Jacobs, Bush Nominee for Bench Likely to Draw Opposition, San Francisco Examiner, Feb. 24 1989, at A-4, col. 5. In all of these stories, however, no one observed the irony of Mr. Walker's position relative to the term "Olympic": this ancient and hoary word seems to be double-edged in Mr. Walker's legal and political life. Mr. Walker's nomination has been criticized and challenged for his misuse of a coercive lien on the home of the late Dr. Thomas F. Waddell, a founder of the later-to-be-declared-improper "Gay Olympic Games," which Mr. Walker removed (almost one and one half years after the Ninth Circuit vacated the attorneys fees award for which the lien purported to be security) only in the face of the possibility of international adverse publicity when Dr. Waddell died of AIDS. See Oral Testimony of Mary C. Dunlap before the United States Senate Committee on the Judiciary, June 13, 1988, at 118-27; Oral Testimony of T.J. Anthony before the United States Committee on the Judiciary, June 13, 1988, at 143; Written Testimony of Judith L. Baer, submitted to United States Senate Committee on the Judiciary, July 28, 1988.

Mr. Walker was also criticized and challenged because of his insistent maintenance of his membership in the lawless Olympic Club, which he finally cancelled many months after his
In closing, I will offer my candidates for the two nastiest “F” words. The first of these is female co-optation, acceptance, adjustment, adaptation, cooperation and compromise with any of these other “F” words. At the same time, I believe we must not be anxious to withhold identification with feminist values from those who practice and perceive them in ways that disagree with us; such feminist elitisms help to make feminism a sword (a sharp-edged word, with a blade to smite those who differ) rather than a gourd (a generous-edged word, with room for every feminist.) Ultimately, the feminist struggle, and the human rights movement of which feminism is part, are all about coalition, consensus-building and advancement of our common causes, and are not advanced by the fragmented fractionalizing factionalism of any one person or group within us, pronouncing or denouncing to the rest, who is or is not a true feminist.\footnote{29} We all need each other, in the full flower of our diversity. And finally, I utter the “F” word to best all “F” words, the “F”-est of the “F”s—fear. If we can overcome it, we’ve got it all.

\footnote{29}{Efforts to exclude those with whom we disagree by depriving them/us of feminist identification have done us not a bit of good so far. I listened to Catherine MacKinnon call Nan Hunter, a woman who has dedicated her life and work to the advancement of equality and decency for women, non-feminist after (and, I think, because) Ms. Hunter articulately opposed Ms. Hunter articulately opposed Ms. MacKinnon’s view that pornography should be a central target of our feminist legal energies. In a subsequent argument on this and related issues, I said, “What I am trying to say is that the idea that any of us here, or any of you there, should decide for all of us who is a good feminist, who is a good radical, what sex is good, and who gets to talk is taking advantage of the rest of us.” Dunlap, in a heated discourse with Catherine MacKinnon, Feminist Discourse, Moral Values and the Law—A Conversation, 34 BUFF. L. REV.-11, 76 (1985). Ms. MacKinnon responded later, in print, that:

[A] stunning example of the denial of gender occurred in a dialogue in which I participated at Buffalo Law School. . . . [In Dunlap’s view] any woman’s victory over sexism becomes a source of proud disidentification from the rest of her sex and proud denial of the rest of her life. . . . [After what Dunlap said] I understood with new clarity what conservative women have been trying to tell us about feminists.

C. MacKinnon, Feminism Unmodified 305-06, n.6 (1987). In personal reply, I must assert that I would be among the last to deny my gender; I am a woman. I am also not shy to identify my sexual orientation as a lesbian, even in the apparently non-traditional forum of a law review, when it is relevant. See Dunlap, Sexual Speech and the State: Putting Pornography in Its Place, 17 GOLDEN GATE UNIV. L. REV. 359, 363 (1987). I challenge Ms. MacKinnon, and the other feminists who have taken to calling names and levelling accusations at those of us who disagree with them, to be as open.