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Introduction: The Distinctive Energies of
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Introduction: The Distinctive Energies of “Normal Science”*

Kathryn Abrams

Abstract

This article introduces *Issues in Legal Scholarship*'s issue on feminist legal theory.

KEYWORDS: feminist legal theory

*Herma Hill Kay Distinguished Professor of Law, UC-Berkeley School of Law. Many thanks to Hila Keren, and a lively group of faculty at Hebrew University-Jerusalem, for the opportunity to discuss these ideas in a cross-cultural context. My great appreciation goes to Genevieve Renard Painter, who provided superb editorial comments, chased down errant websites, and helped in many ways to make this symposium a more robust and illuminating exchange.

Over the past several years, I have often been confronted with the question, "what ever happened to feminist legal theory?" This question is occasionally posed as a smug jab by a contrarian; far more often, it is offered with curiosity by those sympathetic to feminism, or aware of its role in the legal academy. Some of these questioners observe that legal feminism is no longer a novel, or even highly visible, organizing frame in legal scholarship. Others note that younger scholars, who may be actively engaged with issues of gender, do not frequently think of organizing their courses, or their scholarship, under this rubric. Still others point out that some senior feminist legal theorists have moved on to other topics in their scholarly work.

I've always found it difficult to answer this question. While I see evidence of its factual premises, I tend to resist its implied conclusion. How could the field decline in salience when so many of the problems it has sought to address remain painfully unresolved? Rather than continue to mull these questions on my own, I decided to put them to a number of scholars – of different ages, races, and regions of the country – who either identified self-consciously as feminist legal scholars, or did work that centrally implicated questions of gender. With these questions as backdrop, I invited these colleagues to pursue several lines of analysis in addressing them.

For those who shared the suspicion that the field has suffered a diminution of visibility, energy, or practical purchase, I encouraged them to explore the factors they saw as being responsible for this shift. Have legal feminism's limited successes blunted the critical edge of its theories? Has the law's dogged commitment to formal equality (or emphasis on predictability, or unitary view of human subjectivity) limited its receptivity to the innovations of feminist theorists? Has legal feminism been vitiated by the exclusions highlighted by anti-essentialists, or by the rigidity and moralizing decried by queer theorists? Have American legal feminists become paralyzed by the difficulty of intervening in increasingly globalized issues of gender, without triggering legacies of colonialism or economic hierarchy? Is it possible to envision correctives to those missteps that may be responsible?

For those who saw reports of the death of legal feminism as greatly exaggerated, I asked how they might respond to this recurrent question, or to the evidence its proponents cite. Have we become too susceptible to mainstream cultural currents, which are quick to hail the demise of potentially radical movements? Has feminist legal theory not subsided so much as changed in form? Has it infused inquiry in a sufficient range of doctrinal fields that it is now doing its work under different, perhaps less conspicuous, banners?

And, finally, if legal feminism still has the potential to be a vital force, what are the most promising forms it is currently taking – or might take? What are the questions as to which it is making – or might make – its most valuable

contributions? What are the best strategies for raising the visibility of the questions it frames – whether we choose to call it “feminist legal theory,” intersectional analysis, left critique, or something else?

This symposium reflects the efforts of nearly a dozen scholars to engage these questions. Perhaps surprisingly, none of the participants disputes the indicia of diminution or quiescence that have struck me so strongly: indeed some, such as Brenda Cossman,¹ trace the trajectory of these developments in their own work. They offer many contrasting opinions about the causes and the most likely consequences of this diminution: about whether this is a natural, acceptable, or disturbing development; and about what if anything should be done to respond to it.

Contributors trace this development to both external and internal influences. Several cite various forms of backlash: early feminist victories triggered angry or otherwise negative reactions among privileged men, conventionally-gendered women, or others who saw their social value or world view as challenged by critical perspectives on gender. Some highlight media distortions, which amplified and sensationalized these individual reactions. Berta Hernandez-Truyol contends that the internet has enabled a particularly sharp and stigmatizing reaction because of the anonymity it provides.² Martha Chamallas points to the role of 9/11 in reinvigorating gender stereotypes: “our feelings and anxiety about U.S. weakness and ineffectuality in foreign affairs [have been] transferred to a less threatening domain, *i.e.*, anxieties about “depleted masculinity and overbearing womanhood” at home.”³ Martha McCluskey unpacks oppositional dynamics within the academy.⁴ She argues that funding by the Olin Foundation and the Federalist Society has nurtured a generation of economic or conservative scholars – some of whom are active critics of progressive reform -- while feminist scholars have been obliged to sustain themselves on far more constrained resources.

Internal explanations for the present state of feminist work also abound in this collection. Feminism has proved vulnerable to a number of critiques -- often

¹ Brenda Cossman, *Where Did Feminism Go? Reflections from a Slightly Lapsed Feminist*, ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 5 (2011), <http://www.bepress.com/ils/vol9/iss2/article5>.

² Berta Esperanza Hernandez-Truyol, *On Que(e)rying Feminism: Reclaiming the F Word*, ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 4 (2011), <http://www.bepress.com/ils/vol9/iss2/article4>

³ Martha Chamallas, *Backlash, Covering, and the State of Feminist Legal Theory*, ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 3 (2011), <http://www.bepress.com/ils/vol9/iss2/article3>.

⁴ Martha T. McCluskey, *How Money for Legal Scholarship Disadvantages Feminism*, ISSUES IN LEGAL SCHOLARSHIP, Vol. 9: Iss. 2 (Legal Feminism Now), Article 9 (2011), <http://www.bepress.com/ils/vol9/iss2/article9>.

raised from within -- which have created tensions among various groups of scholars and activists, and fostered ambivalence about the frame that might initially have been thought to unite their work. The argument that feminist scholars forged a unitary or essentialist theory, inattentive to the way gender intersects with race, class, physical ability, sexuality, immigration status may be the most familiar. But contributors also highlight frustrations with an emphasis on women's victimization, with a moralizing rigidity that has obscured the fluidities of sexuality and gender, and with a hasty embrace of "governmentality" or state-centered intervention as a remedial posture. Janet Halley's critique of these tendencies, and exhortation to "take a break" from feminism,⁵ has had substantial influence, particularly on younger feminist scholars.⁶ All of these critiques, -- and the resulting costs in pain and mutual suspicion that Marc Spindelman documents⁷ -- have rendered feminism vexed ground for progressive women scholars and activists, and have enhanced the appeal of related discourses, such as queer theory or critical race theory, for doing left critical work related to gender. Years after feminist scholars began to acknowledge and respond to these internal critiques, the term may have retained its association with a demand for orthodoxy, or with unitary forms of analysis.

Generational differences among feminist scholars form another provocative theme of these essays. Several contributors suggest that younger gender scholars may view the term "feminist," and pursue the work that comes within its purview, differently from their predecessors. Younger women, as Kate Silbaugh observes,⁸ have come of age in a period when sex-based affronts are less frank or frequent: their experience, for the most part, does not signal to them a large, univalent, unaddressed problem connected with their sex or gender. For example, sexuality, in their minds, is not automatically correlated with sexual violence. This is not because the connection has ceased to exist, but because it has already been placed on the public's "radar screen," and because cultural changes, as Brenda Cossman observes,⁹ have encouraged younger women to view sexuality as a source of enjoyment and agency. In addition to being beneficiaries of feminist activism, younger women are beneficiaries of the internal critiques.

⁵ JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2004).

⁶ Clare Huntington's essay, Clare Huntington, *Feminism's Family*, *ISSUES IN LEGAL SCHOLARSHIP*: Vol. 9: Iss. 2 (Legal Feminism Now), Article 7 (2011), <http://www.bepress.com/ils/vol9/iss2/article7>, reflects this influence.

⁷ Marc Spindelman, *Feminism Without Feminism*, *ISSUES IN LEGAL SCHOLARSHIP*: Vol. 9: Iss. 2 (Legal Feminism Now), Article 8 (2011), <http://www.bepress.com/ils/vol9/iss2/article8>.

⁸ Katharine B. Silbaugh, *Architecture of Legal Feminism*, *ISSUES IN LEGAL SCHOLARSHIP*: Vol. 9: Iss. 2 (Legal Feminism Now), Article 6 (2011), <http://www.bepress.com/ils/vol9/iss2/article6>.

⁹ Cossman, *Where Did Feminism Go?*, *supra*.

Through their exposure to various forms of identity politics and its postmodern successors, younger women, as Cossman and Silbaugh argue,¹⁰ are more likely to see gender as intersecting with other axes of subordination than as any kind of unitary influence or formation. They are more likely to be drawn to theories that describe gender as complex, fluid, or performative. They are less inclined to teach courses such as “women and the law” or “feminist jurisprudence,” and more likely to do gender analysis throughout the curriculum, or think about gender in conjunction with family law – a field which has been reinvigorated, as Clare Huntington observes, by influx of scholars who might earlier have identified as feminist legal theorists.¹¹ And while Herma Hill Kay urges us not to “walk the walk without talking the talk,”¹² and Martha Chamallas sees reclaiming the term “feminist” as a form of resistance to backlash,¹³ others – particularly those who have not lived through feminism’s most transformative period – feel more ambivalent. Marc Spindelman¹⁴ finds the label almost irredeemably evocative of painful internal struggles; Cossman,¹⁵ Huntington¹⁶ and Hernandez-Truyol¹⁷ wonder if the term fully evokes the hybrid or intersectional character of much contemporary gender analysis.

A final line of analysis suggests that legal feminism has experienced a predictable progression which reflects, in varying ways, its own success. For some, this success means changes in the feminist rank and file. Angela Harris argues that privileged women – the greatest beneficiaries of formal equality and those least likely to grasp the intersection of gender with other forms of subordination -- have decamped, taking media and mainstream attention with them but leaving a myriad of complex problems to be resolved.¹⁸ For others this progression signals a kind of ubiquity, or “silent presence” that is equivocal in its effects. Berta Hernandez-Truyol observes that contemporary arguments that unequivocally foreground gender – whether and how male couples can describe themselves as “pregnant” or whether the term “women” should be removed from

¹⁰ Silbaugh, *Architecture of Legal Feminism*, *supra*; Cossman, *Where Did Feminism Go?*, *supra*.

¹¹ Huntington, *Feminism’s Family*, *supra*.

¹² Herma Hill Kay, *What I Learned About Feminism From the Early Women Law Professors*, ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 2 (2011), <http://www.bepress.com/ils/vol9/iss2/article2>.

¹³ Chamallas, *Backlash, Covering and the State of Feminist Legal Theory*, *supra*.

¹⁴ Spindelman *Feminism Without Feminism*, *supra*.

¹⁵ Cossman, *Where Did Legal Feminism Go?* *supra*.

¹⁶ Huntington, *Feminism’s Family*, *supra*.

¹⁷ Hernandez-Truyol, *Que(e)rying Legal Feminism*, *supra*.

¹⁸ Angela P. Harris, *What Ever Happened to Feminist Legal Theory?* ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 12 (2011), <http://www.bepress.com/ils/vol9/iss2/article12>.

CEDAW – no longer take place under the rubric of “feminism.”¹⁹ As its assumptions have gained greater acceptance, feminism has been “mainstreamed”²⁰; but that success has simultaneously served to lower its profile. Angela Harris uses a metaphor borrowed from Kuhn’s **The Structure of Scientific Revolutions**.²¹ The mainstream embrace of certain critical assumptions of (legal) feminism has meant that it has moved from being paradigm-shifting to being normal science. Normal science, Harris observes, doesn’t generate the visibility or excitement of revolutionary or paradigm-shifting science; but it represents continued problem-solving in more particularized, local incarnations – subtle in its colorations, but still-imperative in its social and political effects.²² Others may be more unabashedly enthusiastic: feminism as “normal science” may be a welcome invitation to depart from divisive,²³ or rarified²⁴ struggles over grand theory, and to delve into the practical questions that shape the lives of women and men.

This pragmatic tone characterizes participants’ response to the normative dimensions of the question posed: how *should* we respond to the current quiescence in legal feminism, whatever its causes? Those who believe that the work is continuing, under more plural, localized auspices, suggest there is nothing *to* do. Though the decline of the term might represent a partial victory for backlash, younger feminists – whatever they call themselves and whatever the visibility of their efforts – are pursuing doing gender work with more fluidity and complexity, and less political baggage. Clare Huntington declares herself “sanguine about the future of legal feminism”²⁵; Brenda Cossman finds legal feminism not so much erased as productively decentered: “it has arrived as a lens through which legal discourses, practices and institutions can be analyzed. Feminism hasn’t been abandoned or repudiated, but migrated and matured into a more subtle and perhaps less dogmatic methodological and theoretical posture.”²⁶

Even those who are more equivocal about the trajectory of the present moment are quick to identify work that might bear fruit. At the level of meta-analysis, contributors propose new approaches to analyzing and responding to the contemporary condition of feminism. Marc Spindelman challenges us “to think openly and collectively about the emotions as they relate to the [feminist legal]

¹⁹ Hernandez-Truyol, *Que(e)rying Legal Feminism*, *supra*.

²⁰ Both Hernandez Truyol and Cossman, whose gender work has an international dimension, invoke the trope of “gender mainstreaming.”

²¹ Harris, *What Ever Happened to Feminist Legal Theory?* *supra* (citing and discussing THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962)).

²² Harris, *Whatever Happened to Feminist Legal Theory?* *supra*.

²³ Spindelman, *Feminism Without Feminism*, *supra*.

²⁴ Silbaugh, *Architecture of Legal Feminism*, *supra*.

²⁵ Huntington, *Feminism’s Family*, *supra*.

²⁶ Cossman, *Where Did Legal Feminism Go?* *supra*.

theory project”: the present moment in feminist legal theory may be explained less by what people “think about [it] than how they feel about it.”²⁷ He also proposes that we pursue “feminism without feminism”: a meticulous translation of ‘feminist’ projects into the normative analyses and goals that comprise them.²⁸ Martha McCluskey advocates a materialist focus that draws lessons from the successful nurturance of conservative scholarship: “Feminist ideas can go further to upend the power of money and privilege in law if feminist scholars and advocates both harness and challenge the material foundations of intellectual power in law.”²⁹ Martha Chamallas³⁰ and Angela Harris³¹ find a potential resource in transgender analysis – which may be having its own revolutionary moment right now: they see a movement which is plural in substantive, methodological, and identitarian terms, yet manages to function as a flexible coalition in its interrogation of the relations among gender, sex, and sexuality.

Still other contributors highlight substantive areas that are ripe for gender-based interventions, whether under the rubric of feminism or some other conceptual frame. Several point to the failure of the state and the market to respond to workers’ caregiving responsibilities as a rich and imperative field for future inquiry. Gowri Ramachandran argues that accommodation must address an increasingly plural array of family forms, rather than pursuing a “gender essentialist” focus on two-parent, heterosexual, nuclear families.³² Joan Williams argues that closer attention to masculinity, and to the intertwinement of gender dynamics with those of class, will be necessary to respond to this problem.³³ Angela Harris affirms this intersectional theme, noting the need, for example, to address more broadly the reproductive health of poorer women, rather than focusing primarily on the availability of abortion.³⁴

However, a crucial prior question may be how we motivate these necessary labors. It may be one thing to suggest potentially productive directions for feminist legal theory (or whatever we call the work), but another to marshal the energy or morale required to act on them. This challenge reflects the fact that for a number of contributors – particularly those who were part of legal feminism’s more dynamic early period -- this present moment carries a hint of the

²⁷ Spindelman, *Feminism Without Feminism*, *supra*.

²⁸ *Id.*

²⁹ McCluskey, *How Money for Legal Scholarship Disadvantages Feminism*, *supra*.

³⁰ Chamallas, *Backlash, Covering, and Feminist Legal Theory*, *supra*.

³¹ Harris, *What Ever Happened to Feminist Legal Theory?* *supra*.

³² Gowri Ramachandran, *Pulling the Ladder Up Behind You: Feminism and Family*, ISSUES IN LEGAL SCHOLARSHIP: Vol. 9: Iss. 2 (Legal Feminism Now), Article 10, <http://www.bepress.com/ils/vol9/iss2/article10> (2011).

³³ Joan C. Williams, *Tough Guise*, ISSUES IN LEGAL SCHOLARSHIP: Vol .9: Iss. 2 (Legal Feminism Now), Article 11 (2011), <http://www.bepress.com/ils/vol9/iss2/article11>.

³⁴ Harris, *What Ever Happened to Feminist Legal Theory?* *supra*.

elegiac. Several of these pieces – as well as my own opening paragraphs – strike a wistful note: we are asking, in effect, “what to make of a diminished thing.”³⁵ We may feel the ebbing of a shared purpose capable of connecting us across inevitable differences; we may miss the feeling of newness and possibility, or the stance of irreverence³⁶ that marked earlier phases of the work. Particularly for more senior feminist scholars, the “normal science” phase of feminist legal theory – fruitful though it may be – may pale in contrast with the passionate, vertiginous character of its revolutionary counterpart.

Yet the wistful, or ambivalent, among us may take heart from the more optimistic responses of younger gender scholars. Their matter-of-fact confidence not only punctuates this issue; it may also be responsible for an apparent uptick of energy around gender in the legal academy in recent months. For example, on two occasions this past summer, legal scholars working on gender and sexuality came together for the presentation and discussion of ongoing work, with surprisingly invigorating results.³⁷ These gatherings took place under the auspices of mainstream (legal) academic institutions -- the Law and Society Association, and the AALS. They elicited widespread interest through calls for proposals. They comprehended a range of topics, including perennial concerns such as domestic violence or work-family conflict, renewal of older questions such as the relations between capitalism and gender hierarchy, and exploration of newer issues such as the implications for sexuality and gender of globalization, climate change, and patterns of migration. Perhaps most notably, they produced unexpectedly large numbers of participants, crowded panels, and a level of excitement that took many participants by surprise. In neither setting was there any substantial discussion of the specific term under whose sign these inquiries were being conducted: participants referred to their efforts as gender, feminist, or queer scholarship or advocacy, critical race feminism, critical race theory, intersectional theory, or progressive advocacy, with no disputes about the classification. The sense of energy about the topics being debated, and the palpable pleasure in participating together in these discussions, trumped such definitional concerns.

These gatherings may reflect one benefit of the generational disjuncture several contributors identify. They featured – among both organizers and participants -- a substantial contingent of younger scholars: women and men who

³⁵ The phrase is from Robert Frost’s poem, “The Oven Bird,” whose fuller text is also apt. Frost evokes a “midsummer bird” whose call “says that leaves are old and that for flowers mid-summer is to spring as one to ten.” The concluding line, quoted above, not only acknowledges the inevitability of change and diminution, but asks what it demands of us of those who observe and recognize it.

³⁶ See Cossman, *Where Did Legal Feminism Go?* *supra* (“...My own ambivalent relationship with feminism today comes in part from this sense that it has lost its irreverent edge.”).

³⁷ I attended one of these gatherings as an organizer, and another as as participant.

had entered the profession in the last decade, and did not take part in feminism's "revolutionary" moment. They had no stake in either the term or the distinctive energies of that time; they could therefore delight in what Angela Harris hails as the satisfactions of "normal science" – particularly when it generates collaborative energy, and enhances the well-being of those still precariously positioned by virtue of their sex and/or gender. Moreover, these gatherings were structured by a set of common substantive challenges that animated participants, more than by a meta-question about the status of "feminism" or the inter-temporal comparison it seemed to demand. This is a useful reminder of a point made by Catharine MacKinnon, that the most productive energies of feminism tend to move from practice to theory,³⁸ rather than the reverse: an incitement to engage in collective problem solving may generate a different kind of response than an invitation to reflect on a theoretical category. This experience of these occasions supports the suggestion of Clare Huntington,³⁹ Berta Hernandez-Truyol,⁴⁰ and Brenda Cossman⁴¹ that spirited, gender-focused inquiry is continuing – albeit in different course contexts or under different organizing labels – perhaps without some of the most damaging errors of the earlier feminist period. It may suggest that the ubiquity and decentering of feminist legal theory has produced the "feminism after women" that Angela Harris has identified,⁴² or has initiated the "feminism without feminism" that Marc Spindelman has proposed,⁴³ without requiring the difficult acts of un-marking or translation that he describes as the initial step. This experience reminds us that whatever the transformative sense of possibility that marked 1967, or 1985, the present moment possesses a distinctive energy of its own. The trajectory of these dynamic gatherings is at this point unknown,⁴⁴ though we hope that the diverse and lively arguments offered here will provide fodder for future analysis, discussion, and advocacy work. In the meantime, we invite readers to ponder, to participate -- and to remain alert to the possibilities of this new period as it unfolds.

³⁸ Catharine MacKinnon, *From Practice to Theory, or What is a **White** Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 13-14 (1991).

³⁹ Huntington, *Feminism's Family*, *supra*.

⁴⁰ Hernandez-Truyol, *Que(e)rying Legal Feminism*, *supra*.

⁴¹ Cossman, *Where Did Legal Feminism Go?* *supra*.

⁴² Angela Harris, *What Ever Happened to Feminist Legal Theory?* *supra*.

⁴³ Marc Spindelman, *Feminism Without Feminism*, *supra*.

⁴⁴ It is interesting to note, however, that participants have quickly made plans for two more gatherings, which will be organized under the auspices of the new Collaborative Research Network on Feminist Legal Theory of the Law and Society Association. One will occur in Washington, D.C., in conjunction with the AALS Annual Meeting in January 2011; and one will occur in Honolulu in conjunction with the Law and Society Annual Meeting in June 2012.