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Feminist Legal Theories

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PANEL I: WHAT IS FEMINIST LEGAL THEORY?

FEMINIST LEGAL THEORIES

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The issue before this panel is one of identification. What epistemologically justifies attaching to an idea or set of ideas the label "feminist legal theory"? In other words, how can one recognize an example of feminist legal theory if and when one comes across it?

There are two dangers in this definitional enterprise: demanding too little from feminist legal theorists by way of definition and demanding too much. The former danger is more apparent, but the latter is just as serious. There is no reason to expect a single definition of feminist legal theory to be appropriate for all purposes and all contexts—no more than there needs to be a single definition of other important legal concepts. For example, there are at least six definitions of efficiency that are potentially relevant for law and economics,[1] and one could probably find at least that many definitions of interpretivism in the literature on constitutional theory.[2] Accordingly, it is no ground for criticism if self-described feminist legal theorists are not able to agree on a single, canonical definition of their enterprise.[3]

The possibility that feminist legal theory might have many valid definitions, however, does not mean that the problem of

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1. *See* Gary S. Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53 (1992) (identifying six definitions of "social efficiency" in the law and economics context).

2. Indeed, there are at least four plausible definitions of the written document known as "the Constitution of the United States" that are potentially relevant to constitutional theory. Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 114-17 (1989).

3. *See* Leslie F. Goldstein, *Can This Marriage Be Saved? Feminist Public Policy and Feminist Jurisprudence*, *in* FEMINIST JURISPRUDENCE 11, 15 (Leslie F. Goldstein ed. 1992) (noting the lack of agreement among theorists about the definition of feminist legal theory); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 24 ("[A]ny apparent orthodoxy of shared definitions is, at best, an illusion."). For a very accessible summary of some of the major currents in contemporary feminist legal scholarship, see Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20-29 (1991).

definition is therefore unimportant.[4] On the contrary, the fact that a term can be used in more than one way enhances the need to define that term in each context as carefully and precisely as possible to make sure that the term is used consistently throughout an argument—that is, to avoid the fallacy of equivocation. If someone makes an argument of the form:

(1) feminist legal theory entails X, and
(2) F endorses feminist legal theory; therefore,
(3) F endorses X,

one needs to be sure that the phrase "feminist legal theory" has the same meaning in each of the premises. The greater the number of potentially valid usages of the relevant phrase, the greater the need to be alert to the danger of equivocation.

My modest task here is to describe, in very abstract terms, some of the principal classes of definitions for feminist legal theory that appear in the literature that I have read and in the discussions that I have heard.[5] Some words of warning are appropriate. First, I am setting forth *classes* of definitions. There can be a wide range of more specific definitions within each class. Second, my knowledge of self-described feminist legal theory is very limited, and my categorization may therefore be incomplete—although the more incomplete my categorization proves to be, the more important the task of definition becomes. Third, and most importantly, my object here is not to discover the single best definition of feminist legal theory for any given context, but simply to ensure that chosen definitions are used without equivocation and with acknowledgement of their presuppositions and consequences.

One obvious way to define feminist legal theory is by reference to its subject matter: feminist legal theory is the study of the rela-

4. Professor Patterson, for example, claims that we can dispense entirely with definitions in this context:

> In light of the many projects, aspirations, and theories that can be denominated "feminist," it makes little sense to advance a definition of feminism. Like all notions, "feminism" has a grammar for its usage; this grammar, however, is contested. Hence, it seems silly to draw lines when no one is entirely reasonable. Better simply to notice and appreciate the multiplicity of meanings inherent in the term.

Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 256 n.8 (1992).

5. Definitions of feminist legal theory are often only implicit in published works. *See* Littleton, *supra* note 3, at 24 (noting "[t]he range and variety of implicit definitions of feminism, feminist method and feminist jurisprudence evident in the symposium and reflected in this volume"). It is possible to assure clarity and avoid equivocation without explicitly setting forth definitions, but it is difficult.

tionship between women and the law.[6] When stated this starkly, the definition is independent of both method and viewpoint; anyone who studies women and the law, in any fashion, is engaged in feminist legal theory. Thus, when Richard Epstein or I call for the repeal of Title VII's regulation of private discrimination on the basis of sex,[7] we are, under this view, engaging in feminist legal theory. Similarly, if Phyllis Schlafly and Pat Buchanan call for the overruling of *Roe v. Wade*[8] or the enactment of a Human Life Amendment to the Constitution, they too are engaging in feminist legal theory.

This definition is intelligible, functional, and possibly more prevalent than one might suppose. At two previous public events, I asked panels composed entirely of self-described feminists whether they regarded Phyllis Schlafly as a feminist legal theorist, and the unanimous answer of those panelists who addressed the question was an unhesitating "Yes." Asking "the Schlafly question" may be a good way to test whether you regard a pure subject-matter definition of feminist legal theory as adequate in a particular context, keeping in mind that a definition's adequacy may vary from one context to another.

A variation on this definition, which narrows it somewhat while still retaining its inclusive scope, limits feminist legal theory to scholarship that " 'focuses on women, centrally and for their own sake.' "[9] This definition knocks Professor Epstein and myself from the ranks of feminist legal theorists, but is still broad enough to require a "yes" answer to "the Schlafly question," and thus can account for the responses that I have received to that question from some feminist legal theorists.

A third definition of feminist legal theory, which can be offered instead of or in addition to the first,[10] focuses on methodology. In this view, feminist legal theory is, at least in part, the use of some distinctive analytic method[11]—much as law and econom-

6. *See* Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1889 (1993) ("I will define feminist jurisprudence to include all scholarship that focuses on the legal system's impact on women and women's impact on the legal system.").

7. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS (1992). I agree generally with Professor Epstein's conclusions, though not with all of his reasoning.

8. 410 U.S. 113 (1973) (establishing a constitutional right to procure abortions).

9. Letter from Jane Larson, Associate Professor, Northwestern University School of Law, to Gary Lawson (May 17, 1994).

10. There can obviously be more than one defining characteristic of a legal theory.

11. Such a definition is at least implicit in a number of important works. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Christine A. Littleton, *Feminist*

ics can be defined in methodological terms as the systematic application of theories of rational choice to legal problems.[12] Of course, feminists who define their enterprise in whole or in part in terms of method do not always, and do not have to, agree on the nature of that method; the "method" approach describes a class of definitions that can accommodate a large number of more specific definitions. However, once a particular method (or set of methods) is put forward as constitutive of the feminist legal enterprise, one must ask of that method the same questions one must ask of any method in any discipline: is it coherent, is it comprehensible, and is it a fruitful tool of inquiry? The answer to the last question, at least, depends on what it means for a tool of legal analysis to be "fruitful"—a question that some feminist scholars have forthrightly addressed.[13]

Instead of, or in addition to, considerations of subject matter and method, feminist legal theory might also be defined in terms of its substantive viewpoint. In the most general sense, one might define feminist legal theory as that subset of ideas involving women and the law that is concerned with improving the condition or status of women.[14] Each important aspect of this kind of definition gives rise to a host of fundamental questions—only some of which I have seen addressed in the feminist literature.

Consider first the notion of "concern" (or related terms) for improving the condition or status of women. Is "concern" something to be determined by reference to intentions or by reference to effects? A way to get at this question is to ask whether a pro-life activist who genuinely thinks that pro-life policies are good for women (either adult women, unborn women, or both) is a feminist legal theorist merely by virtue of that belief, without regard to whether or not those policies are, by some external standard, good or bad for women. If the answer is "yes," then

Jurisprudence: The Difference Method Makes, 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)); Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109 (1991).

12. *See* Lawson, *supra* note 1, at 53 n.1.

13. *See, e.g.*, Abrams, *supra* note 11; Bartlett, *supra* note 11.

14. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL. ED. 3, 5 (1988) ("My working definition of 'feminism' is close to Linda Gordon's: 'By feminism I . . . mean an analysis of women's subordination for the purpose of figuring out how to change it.' " (footnote omitted)); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116 ("[W]hat does feminism 'in law' mean? I suggest, here too, an inclusive definition: Let us refer to feminist work in litigation, legislation, legal teaching, and legal theories to advance rights and opportunities for women.").

feminist legal theory is defined, at least in part, by reference to the motivations of its practitioners.

Consider now a phrase like "improving the condition or status of women." By what kind of metric is "condition" or "status" measured, and how are improvements and retrogressions identified?[15] If, for example, the yardstick of "status" is equality between men and women, then what sort of equality is at issue? Equality in a formal sense or equality in a substantive sense?[16] If equality is substantive rather than formal, as seems to be the majority view among feminist legal scholars,[17] then what kind of substantive equality is meant, and is that conception of equality meaningful? These questions might all have good answers, but the questions need to be faced and answered forthrightly.

Finally, what is meant by "women"? Does it mean each individual woman, some subset of women, or women as a class? Although this problem has received considerable attention in the feminist literature,[18] it has some interesting methodological and normative implications that I have not yet seen addressed.

If one means by "women" anything other than individual women, and thus means by an "improvement" in the "condition" of women anything other than a Pareto improvement across the entire universe of women whereby at least one woman is made better off and none is made worse off,[19] how does one define a metric of well-being that permits interpersonal comparisons, and what is the normative basis for trading off gains and losses within the class? Does feminist legal theory contemplate the use of some analogue to Kaldor-Hicks analysis?[20] Does feminist legal theory therefore face precisely the same kinds of methodological problems that plague normative law and economics? And is feminist legal theory worse off, better off, or neither in this respect

15. *See* Goldstein, *supra* note 3, at 16 ("[F]eminists disagree even over what constitutes (i.e., what would count as) the disadvantaging of women.").

16. *See* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 803-04 (1990) (noting disagreement about the meaning of equality).

17. *See* Cain, *supra* note 3, at 23-24 ("Most feminists in law agree legal constructs have been created by patriarchal forces that have excluded women. Thus, use of the [formal] equality theory . . . necessarily reinforces patriarchal values."). *But see* Wendy W. Williams, *Notes From a First Generation*, 1989 U. CHI. LEGAL F. 99 (defending the use of formal equality as the best jurisprudential understanding of equality for feminist theory).

18. *See* Bartlett, *supra* note 11, at 834-35; Minow, *supra* note 14, at 129-30; *see generally* Cain, *supra* note 3, at 27-29 (describing the debate concerning the proper objects of feminist theory).

19. For a discussion of Pareto improvement, see Lawson, *supra* note 1, at 85-88.

20. For a discussion of Kaldor-Hicks analysis as it relates to Pareto improvement, see Lawson, *supra* note 1, at 89-92.

than any other normative legal theory? All of these questions are fruitful subjects of investigation.

A fifth definition of feminist legal theory is seldom stated explicitly but often seems implicit in both written and spoken discussions. Perhaps feminist legal theory can be defined as work concerning women and the law that reaches a particular set of concrete normative conclusions on specific policy issues, such as abortion, affirmative action, etc.[21] In other words, an article or idea is an instance of feminist legal theory if it endorses or entails a set of conclusions that corresponds (with whatever degree of fit is deemed necessary) to a "checklist" of conclusions that constitute the feminist enterprise. I originally believed that one could test whether this is really an adequate or operative definition of feminist legal theory by asking the following questions: Is the phrase "pro-life feminist" self-contradictory? Is the phrase "anti-affirmative action feminist" self-contradictory? Is the phrase "anti-Title VII feminist" self-contradictory? And so on. If the answer to some set of such questions is "yes," then one might think that feminist legal theory is at least partially definable in terms of some checklist of concrete outcomes. One could generate a similar set of answers, however, by applying some version of the "improving the condition or status of women" thesis that includes a very specific conception of what constitutes improving the condition or status of women. Thus, even if adherence to a checklist is an integral part of the feminist enterprise, that does not prove that such a checklist constitutes the feminist enterprise.

It is silly to think that every article on feminist legal theory should include a complete set of answers to these questions—just as it is silly to expect every article on law and economics, interpretivism, or any other legal theory to contain a lengthy essay on subject matter, goals, and method. But every practitioner of any theory—be it feminism, law and economics, or interpretivism—should always endeavor to be clear about the definition of his or her project. That is a minimal criterion of good analysis and good scholarship.

21. Katharine Bartlett perhaps approaches such a definition when she says that "[b]eing feminist is a political choice about one's positions on a variety of contestable social issues." Bartlett, *supra* note 11, at 833.