> summarily and scathingly as utopians, they would have found it far harder to forget the sexual contract, and to treat the private sphere as the politically irrelevant, natural basis from which the worker emerges to contract out his labour power and engage in political struggle in the workplace. Socialist criticism of the employment contract might then have continued to be informed by feminist criticisms of the marriage contract and an appreciation of the mutual dependence of conjugal rights and civil equality.[133]

FEMINISM AND CRITICAL LEGAL STUDIES

The contemporary jurisprudential feminist debate is characterised by diversity. As current social and political theory reflects the uncertainties of the postmodern era, so too feminist jurisprudence questions its orientation and scope. If 'modernity' suggested that social and legal theory could be constructed as some universal truth – some form of certifiable absolute – the postmodern condition implies uncertainty, fragmentation and a distrust of Grand Theory.

Part of this broad movement in social and political theory is reflected in the Critical Legal Studies (CLS) movement. 'Critical Legal Studies' as a broad movement – or a reaction against, traditional jurisprudential thought – which has much affected feminist thought, emerged in the 1980s. CLS has been described by Professor Alan Hunt as the 'enfant terrible of contemporary legal studies'. CLS scholars – while adopting differing approaches – are united in their rejection of traditional legal thought and legal theory. Given the diversity of approach and the rejection of Grand Theory, CLS cannot itself be regarded as 'a theory' or 'a school'. Critical legal scholarship has been applied to feminist jurisprudence, as Professor Deborah Rhode explains in the following passage:[134]

> Critical feminism, like other critical approaches, builds on recent currents in social theory that have made theorising increasingly problematic. Postmodern and poststructural traditions that have influenced left legal critics presuppose the social construction of knowledge.[135] To varying degrees, critics within these traditions deny the possibility of any universal foundations for critique. Taken as a whole, their work underscores the cultural, historical, and linguistic construction of human identity and social experience.[136]

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133 *The Sexual Contract*, pp 133–36.

134 In 'Feminist Critical Theories' (see further below).

135 For discussion of postmodernism's denial that categorical, non-contingent, abstract theories derived though reason or human nature can serve as the foundation for knowledge, see JF Lyotard, *The Postmodern Condition* (1984); J Rajchmand and C West (eds), *Psycho-Analytic Philosophy* (1985); Nancy Fraser and Linda Nicholsen, 'Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism', in A Ross (ed), *Universal Abandon?: The Politics of Postmodernism* (1988), p 83; Sandra Harding, 'The Instability of the Analytical Categories of Feminist Theory' (1986) 11 *Signs* 645; David Luban, 'Legal Modernism' (1986) 84 *Michigan Law Review* 1656; Robin West, 'Feminism, Critical Social Theory and Law' (1989) *U Chi Legal F* 59.

For a useful overview, see Christopher Norris, *Deconstruction: Theory and Practice* (1982); P Fitzpatrick and A Hunt, 'Critical Legal Studies: Introduction' (1987) 14 *J Law and Society* 1; David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1986) 231 *New England L Rev* 209.

136 See, for example, JF Lyotard above; Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory' (1987) 12 *Signs* 621. Critical legal studies scholars have responded in varying ways, …

Critics such as Francois Lyotard invoke the term postmodernism to describe the present age's collapse of faith in traditional Grand Narratives. Since the Enlightenment, these metanarratives have sought to develop principles of objective science, universal morality, and autonomous art.

Poststructuralism, which arises from and contributes to this postmodern tradition, refers to the theories of interpretation that view meaning as a cultural construction mediated by arrangements of language or symbolic form. What distinguishes poststructuralism from other interpretive schools is the premise that these arrangements are unstable and contradictory, and that readers create rather than simply discover meaning.

FEMINISM AND CRITICAL LEGAL THEORY: AN AMERICAN PERSPECTIVE[137]

Frances Olsen

Liberal Dualisms

Since the rise of classical liberal thought, and perhaps since the time of Plato, most of us have structured our thinking around a complex series of dualisms, or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextualised; principled/personalised. These dualistic pairs divide things into contrasting spheres or polar opposites.

This system of dualisms has three characteristics that are important to this discussion. Firstly, the dualisms are sexualised. One half of each dualism, is considered masculine, the other half feminine. Secondly, the terms of the dualism are not equal, but are thought to constitute a hierarchy. In each pair, the term identified as 'masculine' is privileged as superior, while the other is considered negative, corrupt, or inferior. And thirdly, law is identified with the 'male' side of the dualism.

Sexualisation

The division between male and female has been crucial to this dualistic system of thought. Men have identified themselves with one side of the dualisms and have projected the other side upon women. I have listed each dualism in the same order, with the term associated with men on the left: rational, active, thought, reason, culture, power, objective, abstract, principled. The terms associated with women are on the right side: irrational, passive, feeling, emotion, nature, sensitivity, subjective, contexualised, personalised.

rational/irrational
active/passive
thought/feeling
reason/emotion
culture/nature
power/sensitivity
objective/subjective
abstract/contextualised
principled/personalised

… ranging from Roberto Unger's and Jurgen Habermas's continued embrace of universalist claims, to Duncan Kennedy's reliance on deconstructive technique. *Cf* Roberto Mangabeira Unger *Knowledge and Politics* (1975) and Jurgen Habermas *Legitimation Crisis* (1975) with Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36 *Stanford L Rev* 1.

137 (1990) 18 *International Journal of the Sociology of Law* 199–215.

The sexual identification of the dualism has both a descriptive and a normative element. Sometimes it is said that men are rational, active etc and at other times it will be said that men should be rational, active etc. Similarly, the claim about women is sometimes considered to be descriptive: women simply are irrational, passive etc. A lot of people used to believe that this was an inevitable immutable fact about women – that women were unable to become rational, active etc. Another kind of claim is that women should be irrational, passive etc or at least that they should not become rational, active etc – either because it is important that women remain different from men, or because irrational, passive etc are good traits as applied to women.

Hierarchisation

The system of dualisms is hierarchised. The dualisms do not just divide the world between two terms; the two terms are arranged in a hierarchical order. Just as men dominate and define women, one side of the dualism dominates and defines the other. Irrational is the absence of rational; passive is the failure of active; thought is more important than feeling; reason takes precedence over emotion.

This hierarchy has been somewhat obscured by a complex and often insincere glorification of women and the feminine. While men have oppressed and exploited women in the real world, they have also placed women on a pedestal and treasured them in a fantasy world. And just as men simultaneously exalt and degrade women, so, too, do they simultaneously exalt and degrade the concepts on the 'feminine' side of the dualisms. Nature, for example, is glorified as something awesome, a worthy subject of conquest by male heroes, while it is simultaneously degraded as inert matter to be exploited and shaped to men's purpose. Irrational subjectivity and sensitivity are similarly treasured and denigrated at the same time. However much they might romanticise the womanly virtues, most men still believe that rational is better than irrational, objectivity is better than subjectivity, and being abstract and principled is better than being contextualised and personalised. It is more complicated than this, however, because no one would really want to eliminate irrational, passive etc from the world altogether. But men usually want to distance themselves from these traits; they want women to be irrational, passive, and so forth. To women, this glorification of the 'feminine' side of the dualisms seems insincere.

Law as Male

Law is identified with the hierarchically superior, 'masculine' sides of the dualisms. 'Justice' may be depicted as a woman but, according to the dominant ideology, law is male, not female. Law is supposed to be rational, objective, abstract and principled, like men; it is not supposed to be irrational, subjective, contextualised or personalised, like women.

The social, political and intellectual practices that constitute 'law' were for many years carried on almost exclusively by men. Given that women were long excluded from the practice of law, it is not surprising that the traits associated with women are not greatly valued in law. Moreover, in a kind of vicious cycle, this presumed 'maleness' of law used to provide justification for excluding women from practising law. While the number of women in law has been rapidly increasing, the field continues to be heavily male-dominated. In a similar vicious cycle, law is considered rational and objective in part because it is highly valued, and it is highly valued in part because it is considered rational and objective.[138]

138 *Ibid*, pp 200–01.

Feminist Strategies

> Feminist strategies for attacking the dominant dualistic system of thought fall into three broad categories. The first category consists of strategies that oppose the sexualisation of the dualism and struggle to identify women with the favoured side, with rational, active, and so forth. Strategies in the second category reject the hierarchy men have established between the two sides of the dualisms. This second category accepts the identification of women with irrational, passive etc but proclaims the value of these traits; they are as good or better than rational, active, and so forth. The third category rejects both the sexualisation and the hierarchisation of the dualisms. Strategies in this third category question and disrupt the differences asserted between men and women, and they deny the hierarchy of rational, active etc over irrational, passive, and so forth. Rational, active etc and irrational, passive etc are not polar opposites, and they do not and cannot divide the world into contrasting spheres.[139]

Olsen then analyses the differing approaches taken by feminists in relation to the first two categories she identifies, namely those who oppose the 'sexualisation of the dualisms', and those who reject the hierarchical nature that men assert characterises the dualisms – in men's favour. Attention is then turned to the third category, which rejects both sexualisation and hierarchalism.

Critical Legal Theory

> The third category of feminist criticisms of law rejects the hierarchy of rational, objective etc over irrational, subjective etc and denies that law is or could be rational, objective, abstract and principled. The feminists who endorse this third category agree in part and disagree in part with the first two categories of criticism.
>
> These feminists do not belittle the benefits obtained by the legal reform feminists in the name of women's rights, but remain unconvinced by their claims about the role of abstract legal theory in obtaining these benefits. Legal reasoning and legal battles are not sharply distinguishable from moral and political reasoning, and moral and political battles.
>
> Similarly, feminists of the third category agree that law is often ideologically oppressive to women. They disagree, however, that law is male; law has no essence or immutable nature. Law is a form of human activity, a practice carried on by people – predominantly men. The men who carry on this activity make claims about what they are doing that are just not true and could not be true. While it is true that law has been dominated by men, the traits associated with women have been only obscured, not eliminated. Law is not male. Law is as irrational, subjective, concrete and contextualised as it is rational, objective, abstract and principled.

Law is not all one side of the dualisms

> Law is not now, and could not, consistent with what we believe, become principled, rational, and objective.
>
> (1) *Law not principled*. The claim that law is principled is based upon the belief that law consists of a few rules or principles and that these general rules provide a principled basis for deciding individual cases. But instead of this, law is actually made up of an agglomeration of lots of specific rules and some very general standards.

139 *Ibid*, pp 201–02.

The rules are too specific, definite, and contextualised to count as principles. The existence of these rules is what gives law the degree of predictability that it has – but no rules are too detailed and each rule covers too few cases to make the law principled. For example, in the United States there is at present a rule which allows for States to use gender-based statutory rape laws to try to reduce the incidence of teenage pregnancy, and there is another rule which states that the age of majority for purposes of terminating parental support may not be gender-based. In *Michael M v Sonoma County* (1981), the United States Supreme Court let stand a gender-based statutory rape law that the California Supreme Court said was intended to reduce the incidence of teenage pregnancy. In *Stanton v Stanton* (1975), the Supreme Court struck down a Utah law that required a parent to support his son until age 21 but allowed him to stop supporting his daughter at age 18. My point is not that these two rules conflict or that the cases cannot be reconciled with one another. Rather, each of these two rules apply in two few circumstances to provide any principled answer to the questions of when States may use gender-based laws.

The standards, on the other hand, are too vague and indeterminate to decide cases. In each interesting disputed case, you can find at least two different broad, general standards, that could apply to the case and that would lead to different results. For example, American courts have a long tradition of respecting family autonomy and not intervening in the family; they have an equally long tradition of protecting the welfare of children. Often, in particular cases, the standard of non-interference in the family will support one outcome, while the standard of protecting children will support the opposite outcome. Just as rules apply to too few cases, standards apply to too many. The legal system fluctuates between being based on rules and being based on standards, but its aspiration to be principled is not achieved. Law is no more abstract and principled than it is personalised and contextualised.

(2) *Law is not rational.* Nor is law rational. The efforts by American feminists to work out a rational elaboration of equal rights of human beings in order to achieve rights for women has not worked and it will not work. The classic conflicts between equality of opportunity and equality of result, between natural rights and positive rights, and between rights-as-a-guarantee-of-security and rights-as-a-guarantee-of-freedom, render rights analysis incapable of settling any meaningful conflict. More specifically, if one outcome will protect the plaintiff's right to freedom of action, the opposite outcome will often protect the defendant's right to security. If one outcome will protect a women's right to formal equality of treatment, her right to substantive equality of result may seem to require a different outcome. This conflict explains, for example, why American feminists argued opposite sides in *California Federal v Guerra* (1987), in which the United States Supreme Court upheld a State maternity leave provision. Some feminists argued that formal equality requires that the law treats pregnancy just like any other temporary disability. Other feminists maintained that substantive equality requires that women be able to give birth to children without losing their jobs – even if no other temporary absence from work is excused. Therefore some feminists argued that women should insist on formal equality and reject any form of special maternity leave; while other feminists argued that working women need adequate maternity leave, even if no similar leave of absence are given to men or other people who are not pregnant. The law does not provide a rational basis for choosing which right to recognise and protect in any particular case. Rights analysis cannot settle these conflicts, but merely restates them in a new – at most somewhat obscured – form.

(3) Law is not objective. Further, law is not objective. The idea that law is objective is refuted by the gradual recognition that policy issues appear everywhere. Every time a choice is made, every legal decision that is not obvious and uncontroversial, is a decision based on policy – which cannot be objective. Thus, it is simply a mistake to say that law is or could become rational, principled and objective. Law is not all one side of the dualisms.

Law cannot be segregated

Sometimes dominant legal theory recognises that law is not principled, rational and objective. The dominant ideology does recognise the so-called 'female' traits – indeed it celebrates them – but only on the periphery, or in their own 'separate sphere'. For example, family law may be subjective, contextual and personalised, but commercial law is thought to be principled, rational and objective. It is important for feminists to correct this misperception, to dissolve the ghettos of law, and to show that you cannot exclude the personalised, irrational, and subjective from any part of law.

(1) *Dissolve law's irrational, subjective ghettos*. One way that dominant ideology makes law seem principled, rational, and objective is by banishing to the periphery of law those fields believed to be tainted by unruly, discretionary standards – fields such as family law, trust law, and the law of fiduciary obligations in general. The core subjects or the important fields of law are said to remain male. We can show, however, that in banishment, family law, trusts, and fiduciary obligations continue to influence the rest of law – including those fields that were supposed to be the bastion of the so-called 'male' principles of law. For example, the ideology of the market-place depends upon the ideology of the family, and commercial law can be understood adequately only by recognising the inter-relationship between it and family law.

(2) *Reconceive the core and periphery*. Another technique by which the dominant ideology tries to make the law seem rational and objective is by separating each field between, on the one hand, a set of basic rules, or a 'male' core that is principled, rational and objective and, on the other hand, a periphery of exceptions that can contain irrational and subjective elements. For example, contract law is frequently conceptualised as a set of rational, consistent, individualist rules, softened by somewhat subjective, variable, 'altruistic' exceptions, such as promissory estoppel. Therefore the basic core of contract law remains male. Feminists can disrupt this by showing that the conflict between the individualistic 'rule' and the altruistic 'exception' reappears in every doctrine. Every doctrine is a choice or compromise of sorts between the individualistic and altruistic impulses. This feminist analysis also problematises what should be considered the rule and what the exception. It is not possible to separate any field of law into a core and a periphery and the traits associated with women cannot be excluded from law.

Conclusion

As I have said, the feminist strategies for attacking legal theory are analogous to feminist strategies for attacking male dominance in general. The 'reject sexualisation' position resonates with the 'legal reformist' position, the 'reject hierarchisation' with the 'law as patriarchy' and the 'androgyny' with 'critical legal theory'. But I do not want to claim that the relationship is anything more than this – an analogy or a resonance. The sets of categories are not identical, and no strategy from one set requires or entails any strategy from the other set.

First, there is no necessary relationship between a feminist's attitude towards the sexualisation of the dualisms and her attitude toward the identification of law as

rational, objective, and principled. Moreover, a feminist can accept the hierarchisation for some purposes – for example, can believe that it is better for law to be rational, objective, and principled – but still reject the hierarchisation in general. Some feminists support androgyny but still claim that law is patriarchal. Similarly, one can support critical legal theory and still believe either that women are inherently or morally superior to men or that women should be rational, active etc like men.

My support for androgyny would not require me to support critical legal theory or vice versa, but both are related to my values and vision of the universe and both inform my political activity. Nothing in either theory will provide easy answers to concrete questions – such as 'Would women really benefit from more State regulation of the family?' or 'Could revised statutory rape laws protect young females without oppressing and demeaning them?'. What I do hope is that by improving the theories upon which we operate we can understand better what is at stake in questions like these. I hope that by recognising the impossibility of easy, logical answers we can free ourselves to think about the questions in a more constructive and imaginative manner. Law cannot be successfully separated from politics, morals, and the rest of human activities, but is an integral part of the web of social life.[140]

FEMINIST CRITICAL THEORIES[141]

Deborah L Rhode

Heidi Hartmann once described the relation between Marxism and feminism as analogous to that of husband and wife under English common law: 'Marxism and feminism are one, and that one is Marxism.' In Hartmann's view: 'Either we need a healthier marriage or we need a divorce.'[142] Responding to that metaphor, Gloria Joseph underscored the exclusion of black women from the wedding and redescribed the interaction between Marxist, feminist, and minority perspectives as an 'incompatible *ménage à trois*'.[143]

The relations between Critical Legal Studies (CLS) and feminism have provoked similar concerns. The origins of this article are a case in point. The piece has grown out of an invitation to offer a feminist perspective for an anthology on critical legal studies. Such invitations are problematic in several respects. Almost any systematic statement about these two bodies of thought risks homogenising an extraordinarily broad range of views. Moreover, providing some single piece on the 'women question' perpetuates a tradition of tokenism that has long characterised left political movements.

Whatever the risks of other generalisations, one threshold observation is difficult to dispute: feminism takes gender as a central category of analysis, while the core texts of critical legal studies do not. To be sure, many of these texts make at least some reference to problems of sex-based subordination and to the existence (if not the significance) of feminist scholarship. Yet most critical legal theory and the traditions on which it relies have not seriously focused on gender inequality.

140 *Ibid*, pp 208–11.

141 (1990) 42 *Stanford Law Review* 617.

142 Heidi Hartmann, 'The Unhappy Marriage of Marxism and Feminism: Toward a More Progressive Union', in L Sargent (ed), *Woman and Revolution* (1981).

143 Gloria Joseph, 'The Incompatible Menage a Trois: Marxism, Feminism and Racism' in *Women and Revolution*, p 91.

Why then should feminists continue participating in enterprises in which their perspectives are added but not integrated, rendered separate but not equal?

Efforts to provide the 'woman's point of view' also risk contributing to their own marginalisation. In effect, feminists are invited to explain how their perspectives differ from others associated with critical legal studies or with more mainstream bodies of legal theory. Such invitations impose the same limitations that have been characteristic for women's issues in conventional legal ideology. Analysis has fixated on how women are the same or different from men; men have remained the unstated standard of analysis.

In recent years, these concerns have increasingly emerged within the critical legal studies movement. During the last decade issues of gender as well as race and ethnicity dominated the agendas of several national CLS conferences and feminist theorists organised regional groups around common interests. A growing body of feminist and critical race scholarship also developed along lines that paralleled, intersected, and challenged critical legal theory.[144]

This chapter charts relationships among these bodies of work. Although no brief overview can adequately capture the range of scholarship that co-exists under such labels, it is at least possible to identify some cross-cutting objectives, methodologies, and concerns. The point of this approach is neither to develop some unifying Grand Theory nor simply to compare feminism with other critical frameworks. Rather, it is to underscore the importance of multiple frameworks that avoid universal or essentialist claims and that yield concrete strategies for social change.

The following discussion focuses on a body of work that may be loosely identified as feminist critical theories. Although they differ widely in other respects, these theories share three central commitments. On a political level, they seek to promote equality between women and men. On a substantive level, feminist critical frameworks make gender a focus of analysis, their aim is to reconstitute legal practices that have excluded, devalued, or undermined women's concerns. On a methodological level, these frameworks aspire to describe the world in ways that correspond to women's experience and that identify the fundamental social transformations necessary for full equality between the sexes. These commitments are, for the most part, mutually reinforcing, but they occasionally pull in different directions. This essay explores various ways that feminists have sought to fuse a political agenda that is dependent on both group identity and legalist strategies with a methodology that is in some measure sceptical of both.

What distinguishes feminist critical theories from other analysis is both the focus on gender equality and the conviction that it cannot be obtained under existing ideological and institutional structures. This theoretical approach partly overlaps and frequently draws upon other critical approaches, including CLS and critical race scholarship. At the most general level, these traditions share a common goal: to challenge existing distributions of power. They also often employ similar deconstructive or narrative methodologies aimed at similar targets – certain organising premises of conventional liberal legalism. Each tradition includes both internal and external critiques. Some theorists focus on the inadequacy of conventional legal doctrine in terms of its own criteria for coherence, consistency,

144 See C Menkel-Meadow, 'Feminist Legal Theory – Critical Legal Studies: Minority Critiques of the Critical Legal Studies Movement' (1987) 22 *Harv CR-CLL Rev* 297; 'Voices of Experience: New Responses to Gender Discourse' (1989) 24 *Harv CR-CLL Rev* 1.

and legitimacy. Other commentators emphasise the role of legal ideology in legitimating unjust social conditions. Yet these traditions also differ considerably in their theories about theory, in their critiques of liberal legalism, in their strategies for change, and in their alternative social visions.

1. Theoretical Premises

Critical feminism like other critical approaches, builds on recent currents in social theory that have made theorising increasingly problematic. Postmodern and poststructural traditions that have influenced left legal critics presuppose the social construction of knowledge.[145] To varying degrees, critics within these traditions deny the possibility of any universal foundations for critique. Taken as a whole, their work underscores the cultural, historical, and linguistic construction of human identity and social experience.[146]

Yet such a theoretical stance also limits its own aspirations to authority. For feminists, this postmodern paradox creates political as well as theoretical difficulties. Adherents are left in the awkward position of maintaining that gender oppression exists while challenging our capacity to document it.[147] Such awkwardness is, for example, especially pronounced in works that assert as unproblematic certain 'facts' about the pervasiveness of sexual abuse while questioning the possibility of any objective measure.[148]

To take an obvious illustration, feminists have a stake both in quantifying the frequency of rape and in questioning the conventional definitions on which rape statistics are based. Victims of sexual assault by acquaintances often respond to questions such as, 'Have you ever been raped?' with something like, 'Well … not exactly'. What occurs in the pause between 'well' and 'not exactly' suggests the gap between the legal understanding and social experience of rape, and the ways in which data on abuse are constructed, not simply collected.

Although responses to this dilemma vary widely, the most common feminist strategies bear mentioning. The simplest approach is to decline to address the problem – at least at the level of abstraction at which it is customarily formulated. The revolution will not be made with slogans from Lyotard's *Postmodern Condition*, and the audiences that are most in need of persuasion are seldom interested in epistemological anxieties. Critiques of existing ideology and institutions can proceed under their own standards without detailed discussions of the philosophy of knowledge. Yet even from a purely pragmatic view, it is helpful to have some self-consciousness about the grounding for our claims about the world and the tensions between our political and methodological commitments.

Critical feminism's most common response to questions about its own authority has been reliance on experiential analysis. This approach draws primarily on

145 See J-F Lyotard, *The Postmodern Condition* (1984); *Post-Analytic Philosopy*, J Rajchmand and C West (eds) (1985).

146 See Jane Flax, 'Post Moderism and Gender Relations in Feminist Theory' (1987) 12 *Signs* 621.

147 As Nancy Cott notes, 'in deconstructing categories of meaning, we deconstruct not only patriarchal definitions of 'womanhood' and ' truth' but also the very categories of our own analysis – 'women' and 'feminism' and 'oppression'. (Quoted in France E Macia-Lees, Patricia Sharpe and Colleen Ballerino Cohen, 'The Postmodernist Turn in Anthropology: Cautions from a Feminist Perspective' (1989) 15 *Signs* 7 at 27.)

148 Compare CA MacKinnon, *Feminism Unmodified* (1987), pp 81–92 (discussing the social construction of rape and sexual violence) with *ibid*, p 23 (asserting 'facts' about its prevalence). See also CA MacKinnon, *Toward a Feminist Theory of the State* (1989), p 100 (acknowledging without exploring the difficulty).

techniques of consciousness raising in contemporary feminist organisations but also on pragmatic-philosophical traditions. A standard practice is to begin with concrete experiences, integrate these experiences into theory, and rely on theory for a deeper understanding of the experiences. One distinctive feature of feminist critical analysis is, as Katharine Bartlett emphasises, a grounding in practical problems and a reliance on 'practical reasoning'.[149] Rather than working deductively from abstract principles and overarching conceptual schemes such analysis builds from the ground up. Many feminist legal critics are also drawn to narrative styles that express the personal consequences of institutionalised injustice.[150] Even those commentators most wedded to broad categorical claims usually situate their works in the lived experience of pornography or sexual harassment rather than, for example, in the deep structure of Blackstone's *Commentaries* or the fundamental contradictions in Western political thought.[151]

In part, this pragmatic focus reflects the historical origins and contemporary agenda of feminist legal theory. Unlike critical legal studies, which began as a movement within the legal academy and took much of its inspiration from the Grand Theory of contemporary Marxism and the Frankfurt school, feminist legal theories emerged against the backdrop of a mass political movement. In America, that struggle has drawn much of its intellectual inspiration not from overarching conceptual schemes but from efforts to provide guidance on particular substantive issues. As Carrie Menkel-Meadow has argued the strength of feminism 'originates' in the experience of 'being dominated, not just in thinking about domination' and in developing concrete responses to that experience.[152] Focusing on women's actual circumstances helps reinforce the connection between feminist political and analytic agendas, but it raises its own set of difficulties. How can critics build a unified political and analytical stance from women's varying perceptions of their varying experiences? And what entitles that stance to special authority?

The first question arises from a long-standing tension in feminist methodology. What gives feminism its unique force is the claim to speak from women's experience. But that experience counsels sensitivity to its own diversity across such factors as time, culture, class, race, ethnicity, sexual orientation and age. As Martha Minow has noted, 'cognitively we need simplifying categories, and the unifying category of 'woman' helps to organise experience, even at the cost of denying some of it'.[153] Yet to some constituencies, particularly those who are not white, heterosexual, and economically privileged, that cost appears prohibitive, since it is their experience that is most often denied.

149 See, for example, the work of Amelie Rorty, discussed in Katharine Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard L Rev* 829. (Extracted in Chapter 4.) Margaret Jane Radin, 'The Pragmatist and the Feminist' (1990) 63 *S Cal L Rev* 1699.

150 See eg Patricia Williams, 'Spirit Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism' (1987) 42 *U Miami L Rev* 127; Mari J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan L Rev* 2320; Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81.

151 See Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo L Rev* 205.

152 Menkel-Meadow, *op cit*, p 61.

153 Martha Minow, 'Feminist Reason: Getting It and Losing It' (1988) 38 *J Legal Education* 47, 51.

A variation of this problem arises in discussions of 'false consciousness'. How can feminists wedded to experiential analysis respond to women who reject feminism's basic premises as contrary to their experience? In an extended footnote to an early article, Catharine MacKinnon noted:

> Feminism aspires to represent the experience of all women as women see it, yet criticises anti-feminism and misogyny, including when it appears in female form. [Conventional responses treat] some women's views as unconscious conditioned reflections of their oppression, complicitous in it. [This approach] criticises the substance of a view because it can be accounted for by its determinants. But if both feminism and anti-feminism are responses to the condition of women, how is feminism exempt from devalidation by the same account? That feminism is critical and anti-feminism is not, is not enough, because the question is the basis on which we know something is one or the other when women, all of whom share the condition of women, disagree.[154]

Yet having raised the problem, MacKinnon declined to pursue it. As a number of feminist reviewers have noted, MacKinnon has never reconciled her unqualified condemnation of opponents with her reliance on experiential methodology.[155]

The issue deserves closer attention, particularly since contemporary survey research suggests that the vast majority of women do not experience the world in the terms that most critical feminists describe. Nor do these feminists agree among themselves about which experiential accounts of women's interests should be controlling in disputes involving, for example, pornography, prostitution, surrogate motherhood, or maternity leave.

A related issue is how any experiential account can claim special authority. Most responses to this issue take one of three forms. The first approach is to invoke the experience of exclusion and subordination as a source of special insight. According to Menkel-Meadow the 'feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins – and, some would argue, remains – in a male-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced'.[156] Yet such 'standpoint' theories, if left unqualified, present their own problems of privilege. There remains the issue of whose standpoint to credit, since not all women perceive their circumstances in terms of domination and not all who share that perception agree on its implications. Nor is gender the only source of oppression. Other forms of subordination, most obviously class, race, ethnicity, and sexual orientation, can yield comparable and, in some instances competing, claims to subjugated knowledge. To privilege any single trait risks impeding coalitions and understating other forces that constitute our identities.

A second feminist strategy is to claim that women's distinctive attributes promote a distinctive form of understanding. Robin West has argued, for example, that –

> there is surely no way to know with any certainly whether women have a privileged access to a way of life that is more nurturant, more caring, more natural, more loving, and thereby more moral than the lives which both men

154 CA MacKinnon, 'Feminism, Marxism and State' (1982) 7 *Signs* at 637, n 5.

155 See West, *op cit*, pp 117–18.

156 Menkel-Meadow, *op cit*, p 61.