

Such strategies are, however, problematic on several levels. One difficulty involves the level of abstraction at which the ideals are formulated. It is not self-evident how individuals with diverse experiences, interests, and resources will reach consensus or how their agreements can be predicted with enough specificity to provide adequate heuristic frameworks. Strategies emphasising uncoerced dialogue have often assumed away the problems of disparate resources and capacities that parties bring to the conversation. Given the historical silencing of women's voices, many critical feminists have been unsatisfied by approaches that are themselves silent about how to prevent that pattern from recurring.

A related difficulty stems from idealists' faith in dialogue as the primary response to social subordination. Alternative visions that proceed as if the central problem were our inability to imagine such alternatives often understate the material conditions that contribute to that inability. Many feminists have no difficulty imagining a world without pervasive sexual violence or the feminisation of poverty; the difficulty lies in commanding support for concrete strategies that would make that vision possible. It is, of course, true that we cannot be free from coercive institutional structures as long as we retain an ideology that legitimates them. But neither can we rid ourselves of that ideology as long as such structures limit our ability to challenge it.

In response to this dilemma, critical feminism has tended to focus on particular issues that implicate both material and ideological concerns. Rather than hypothesising some universal Utopian programme, feminist legal critics have generally engaged in more concrete analysis that challenges both structural inequalities and the normative assumptions that underlie them. In evaluating particular strategies, critical feminism focuses on their capacity to improve women's social and economic status; to reach those women most in need; and to enhance women's self-respect, power, and ability to alter existing institutional arrangements.

For example, the struggle for comparable pay for jobs of comparable worth presents direct opportunities to increase women's financial security. The campaign has helped reveal the cultural undervaluation of 'women's work' has exposed gender and racial bias in employers' own criteria for compensation, and has aided workplace organising efforts.<sup>184</sup> Pay equity initiatives have also raised broader questions about market principles and social priorities. How should we reward various occupational and worker characteristics and how should those decisions be made? Are we comfortable in a society that pays more to parking attendants than child care attendants, whatever the gender composition of those positions? The struggle for comparable worth could spark a rethinking of the scope of inequality and the ideologies that sustain it.

The feminist focus on concrete issues has avoided an idealised vision that must inevitably change in the course of change. Feminist legal critics have been less interested in predicting the precise role that gender would play in the good society than in undermining its role in this one. Whether sex would ultimately become as unimportant as eye colour or whether some sex-linked traits and affiliations would endure is not an issue on which more speculation seems fruitful. Since what is now problematic about gender relations is the disparity in power, we cannot fully anticipate the shape of those relations in an ideal world

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184 See D Rhode, *Justice and Gender*, pp 368–69. See generally *Comparable Worth: New Directions for Research* (H Hartmann (ed), 1985).

where, by definition, such disparities do not exist. At Utopian as well as practical levels, critical feminism is unwilling to remain trapped in debates about women's commonality with or difference from men. Its commitment is neither to embrace nor to suppress difference but to challenge the dualism and make the world safe for differences.

Although we cannot know *a priori* what the good society will be, we know more than enough about what it will not be to provide a current agenda. It will not be a society with sex-based disparities in status, power, and security. Nor will it be a society that denies many of its members substantial control over the terms of their daily existence. To realise its full potential, feminism must sustain a vision concerned not only with relations between men and women, but also with relations among them. The commitment to sexual equality that gave birth to the women's movement is necessary but not sufficient to realise the values underlying it. Those values place critical feminism in both tension and alliance with aspirations that other critical legal theory expresses.

### **DECONSTRUCTING THE CLS-FEM SPLIT<sup>185</sup>**

**Robin West<sup>186</sup>**

Legal theorists within the critical legal studies movement have appropriated from literary theory some of the insights of the deconstruction movement, and as a result of that appropriation the Critical Legal Studies (CLS) school has made the rest of us more aware, I believe, than we would have been otherwise, of what people with legal power do with the words they use, and how those words at the same time mask what legally empowered people do. Deconstruction has found a natural home in legal theory. But the usefulness of 'deconstruction' is surely not limited to law, or to the unmasking of legal power, or to the workings of legal institutions, any more than it should be limited to literature, to the unmasking of literary power, or to the workings of subcommittees within English departments. Deconstruction at its most broadly conceived is simply a way to examine the verbal masks constructed by groups of powerful people. At its best, deconstruction is a tool of analysis for the benefit of the relatively disempowered in any given hierarchical institution.

One such group of relatively powerful people are the tenured male law professors who are members of the CLS conference, and one such group of relatively powerless people are the untenured, feminist and female law professors who are members of that same institution. Relative to the larger society, of course, female law professors are quite powerful. But relative to the institutions that structure the work lives of legal-academics we are not, and one such institution is the conference on CLS itself – the very 'institution' which more than any other has facilitated deconstructionist analysis. But no matter how much gratitude we might feel toward institutional CLS for the insights it has offered, it is nevertheless an institution within which we work from a position of relative disempowerment. Therefore, if deconstruction is as essential to an understanding of power as its proponents profess, then it is surely important, perhaps imperative, for feminists in CLS (or who pay attention to its literature) to begin to deconstruct their words. We must understand what men with power within CLS are doing, with words and to women – and how they use words to mask what it is they do.

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185 [1985] *Wisconsin Women's Law Journal* 85.

186 At the time of writing, Assistant Professor University of Maryland Law School.

Towards that end, these comments offer a brief deconstruction of part of a short piece by Duncan Kennedy entitled *Psycho-Social CLS*,<sup>187</sup> which chronicles among other things the troubled relationship between feminists in CLS and non-feminists, particularly men. In that piece, Kennedy first issues a complaint, follows the complaint with a promise, and ends with a warning. The complaint is about the behaviour of women in the CLS movement. Women in CLS do several things that annoy Kennedy, but at the top of the list is that CLS women deny men visual access to women's sexuality. To quote: 'there sometimes seems to arise ... a feminist taboo on seductive self-presentation and on competition with other women [for men's favours] one that applies even where such behaviour looks appropriate [in my eyes].'<sup>188</sup> The promise is that if women would break the taboo and willingly be more sexually giving, love and equality might be the reward. To quote Kennedy: 'There is also the possibility that the eroticisation of [the relationship of domination between male mentor and female mentee] will be the route through to equality and love.'<sup>189</sup> The warning Kennedy issues is that unless CLS women give more of their sexuality to CLS men, the women will not 'get' from their male CLS mentors everything there is to get. 'When the mentor is a man and the mentee is a feminist, it seems likely she will ... apply the feminist taboo against seductive self-presentation and competition for men's favours. Yet it is very difficult to get what is to be gotten from a mentor if one is seriously inhibited from entering his or her universe.'<sup>190</sup>

In this brief space I want to argue that Kennedy's complaint, warning, and promise are all grounded in an 'interpretation' of a 'social text'. The 'social text' that Kennedy is interpreting is CLS women's refusal to engage in seductive self-presentation. The 'interpretation' that Kennedy offers of this text is that the reason women refuse to engage in seductive self-presentation is the presence of a 'feminist taboo' against that kind of behaviour. This interpretation, I will argue, rests on a partly explicit and partly implicit account of the way people just naturally are. My claim is that to even understand – much less criticise – how Kennedy arrives at his dangerously anti-feminist interpretation of women's behaviour within the CLS movement, we must first deconstruct its motivating vision. That is: we must first clearly see the vision for what it is – namely, a commitment to a particular prescriptive claim about how women might be, not how we naturally and ultimately are – and then come to grips with the empowered choices – not observations – that have rendered this vision so pervasive and familiar as to be virtually invisible. That vision has two parts. The first is a set of claims and values that emanate from the larger heterosexual culture to which CLS belongs. The second is a set of beliefs that emanate from the CLS subculture. Both claims have to do with the nature of desire – the first with sexual desire, the second with desire itself.

#### *1. The Nature and Politics of Heterosexual Desire*

The first part of the vision – borrowed from the larger culture – concerns the nature of heterosexual desire. Here, Kennedy is very explicit. He spells the vision out in some detail:

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187 D Kennedy, 'Psycho-Social CLS: A Common on the Cardozo Symposium' (1985) 6 *Cardozo Law Review* 1013.

188 *Ibid*, p 1021. Kennedy notes that his judgment of 'appropriateness' may be biased by his 'ruling class, straight, white, male' identity.

189 *Ibid*, p 1022.

190 *Ibid*, p 1023.

There are three crucial aspects of the sexual politics of CLS. First, there is desire – between men and women and also between men and between women ... Second, there is the historical fact of the oppression of women by men ... Oppression on the basis of gender is the actual context within which CLS came into being – ‘it’s no accident that the mentors are men’ – and CLS has never been a counter-sphere within which it was absent. [T]he internal structure of the conference is unmistakably reflective of the larger patriarchy. *Men have much more power than women ...* (My emphasis.)<sup>191</sup>

Combining claims one and two – the presence of sexual desire between men and women, with the historical oppression of women, yields the sum: powerful men in CLS desire powerless women and disempowered, oppressed women sexually desire powerful men. Kennedy’s belief that sexual desire between disempowered women and powerful men is reciprocal and symmetrical, despite the asymmetry of the hierarchy on which they find themselves, is reflected in word choice, grammar and style: sexual desire exists between men and women, women and women, and men and men. Oppression, by contrast, is not symmetrical, it is hierarchical: men have power, women are powerless, men are on top, women on bottom. The conjunction of these two claims, it is important to emphasise, is not simply that men desire women and women desire men, and that men happen to have more power. Their conjunction is that empowered men desire disempowered women, and that disempowered women desire empowered men.

Kennedy’s choice of grammar, placement, word choice and style also reveal his (unstated) belief that sexual desire between men and women in CLS is natural, while the oppression of women by men – both within and outside of CLS – is ‘contingent’ and historical. Look at the first short sentence: ‘First, there is desire ...’ Desire is unmodified in this sentence – it just is. There are no qualifying adjectives. Now note its placement: the desire is prior to oppression. ‘First,’ Kennedy intones, ‘there is desire.’ The naturalness of sexual desire between men and women thus immediately implies the interpretation of texts (such as behaviour) which might suggest to the contrary: the reluctance of CLS women to give expression to those natural desires. Or as Kennedy puts it in another passage, women’s reluctance to give expression to their ‘strong emotions’ – evidenced by their refusal to act seductively – must be because of an artificial, political, consciously imposed ‘taboo.’ Like all taboos, this taboo against seductive behaviour inhibits what is natural sexual seduction.

Against the backdrop of natural, prior, heterosexual desire, is the ‘second aspect’ of sexual politics in CLS: the ‘historical fact’ of gendered oppression. ‘Second,’ Kennedy teaches, ‘there is the historical fact of oppression ...’. The oppression of women by men is factual, contingent, historical, and, of course, hierarchical – men on top; women on bottom – while the desire of men for women and *vice versa* is natural, universal, symmetrical and prior to the factual oppression. To be more precise, then, the conjunction of claims one and two recited above is this: contingently powerful men naturally desire contingently disempowered women, and contingently disempowered women naturally desire contingently powerful men.

Finally, Kennedy makes clear that in his view the historical and contingent oppression of women is a very bad thing, and he accordingly aligns himself with what he perceives to be feminism’s definitive commitment to resist it. ‘Third,’ Kennedy intones, ‘there is feminism, a self-conscious reaction against the

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191 *Ibid*, p 1020.

oppression of women', with which Kennedy professes to feel 'undiluted enthusiasm, at the conscious level ...'. He is equally clear (although not so explicit) that the sexual desire of the disempowered women for the powerful men and *vice versa* – is as good as it is natural and can lead to good things. It can, for example, free what the mentors have to give, and at least on occasion it might lead to equality and love. Therefore, like all taboos, the feminist political taboo against expressing natural sexual desire, while understandable, is unfortunate: it leads to 'rough sledding'. Kennedy complains it inhibits the mentor; and it prevents the mentee from entering the mentor's universe and from getting all the mentor has to give.

Kennedy's total vision, then, of sexual politics in CLS can be summed as follows. Contingently disempowered women naturally desire contingently empowered men, and while the oppression which yields the power disparity is bad, the natural heterosexual desire between the differently empowered is good.

I want to make only one point regarding this picture, and it is the deconstructionist's: the source of this vision of sexual desire is not our human nature or anything like it. The source of this vision is the empowered institutions of the larger heterosexual society, namely marriage and the family, and the institutions which derivatively support them – including law, courts, and the popular media. The societal and institutional commitment to the notion that powerless women naturally desire powerful men – that heterosexual desire is reciprocal, symmetrical and natural even though it is between concededly unequal partners – accounts for this society's inability to 'see' marital rape as rape rather than as 'bad sex'. It accounts for the societal belief that women who do not desire men are 'frigid'. It accounts for the societal inability to see that sexual harassment in the workplace is indeed harassment rather than the soft 'personal' touch of an office. It accounts for the societal inability to even consider the possibility that teenage pregnancy is a function of teenage male coercion rather than a breaking of societal 'taboos' against 'natural' promiscuity. It accounts for the belief that rape victims asked for it. It accounts for the belief that pornography causes no harm other than an imagined and illusory offence to a Victorian sensibility. It accounts for the belief that wolf whistles and sexual jeers on the streets are compliments rather than assaults. In Kennedy's essay, it accounts for his belief that the powerless women in CLS desire the powerful men as much as the men desire the women, and for his interpretive claim that the reason that women do not behave as though this were true is that they have imposed upon themselves an artificial, unnatural, political taboo against their 'powerful emotions' to the contrary.

The value judgments reflected in Kennedy's piece – that the natural sexual desire between the disempowered and the empowered is good, even if the inequality itself is bad – are also derived from the larger culture. Those judgments account in the larger culture for the societal approval of the romantic liaisons and the marriages that evolve from hierarchies of sexual inequality, even while condemning the inequality itself. Thus, the romantic attachments and marriages between female secretaries and male executives or female students and male teachers, are applauded – viewed as loving and equal – even by those who generally disparage the disparity in power and income between secretaries and executives, and students and teachers. The fruit is treasured even though the vine is rotten. In Kennedy's piece, the same values account for his promise that eroticisation of the dominance between male mentor and female mentee in CLS may have within it the seeds of equality and love. Oppression is bad and equality is good, as is natural sexual desire. Therefore, eroticisation of bad hierarchy is the

route to good equality. Through natural sexual desire, inequality becomes purity. Through natural sexual desire the inequality between women and men becomes equality.

Now the core contention of modern radical feminism is that Kennedy's heterosexual vision is simply wrong both as description and prescription. Heterosexual desire of disempowered women for empowered men (and *vice versa*) is not reciprocal, it is not symmetrical, and it is not 'natural'. Eroticisation of hierarchical, dominating relationships is not the route to 'equality' and 'love', it is the route to unequal marriages, low female self-esteem, boredom, inactivity, unemployment and a devastating waste of female talent. It might indeed lead to what we have grown used to calling love, but what we call love actively embraces, does not dissolve, the dominance from which Kennedy claims it can evolve. Women love powerful men more often than not because we have been told to, not because they give pleasure, and unless they give pleasure – since they do not yield equality – we have no business applauding them as good. Thus, it is Kennedy's endorsement of the imperative judgment of the larger heterosexual culture – that powerless women will sexually desire powerful men – and his mistaking that imperative judgment for an empirical truth about women's nature, which accounts for his inability to grasp the fundamental insight of radical feminism, both legal and otherwise. That is, that heterosexual desire is a socially imposed, rather than naturally imposed, imperative.

Kennedy's commitment to the 'naturalness' of heterosexual desire, in short, is why 'he doesn't get it'. It is his insistence that heterosexual desire is natural rather than contingent that dictates the categories in which he sees the social world: polar camps of male and female, and straight and gay. It is thus not surprising that Kennedy cannot come to grips with a feminist analysis that insists that all four of these poles are socially constructed, not naturally created, categories. Similarly, it is Kennedy's endorsement of the imperative judgment of the larger heterosexual culture that leads him to affirm what is not the case – that natural heterosexual desire, reciprocal and symmetrical, can dissolve the asymmetrical, non-reciprocal, contingent hierarchy that constitutes gendered mentor/mentee relationships. It is his alignment with that heterosexual imperative that leaves him free to warn CLS women that unless they drop their unnatural 'taboo' against their 'natural sexual desire' they will not get what can be gotten from their male mentors. It is his acquiescence with the beliefs and values of the larger heterosexual culture that allows Kennedy, in the pages of the *Cardozo Law Review*, to bemoan the demise of behaviour which many feminists and many more women now understand to be sexual harassment on the job, plain and simple.

## *2. The Nature and Politics of Desire*

Desire, for Kennedy, is as immutable as it is natural. The desire for powerful men by powerless women is 'first' prior, a given, and is accordingly frustrated by feminist politics. If the politics are right, then the frustration of sexual, natural desire is a necessary evil; a casualty to a good cause. It is this perceived conflict between the immutability of heterosexual desire and the political correctness of feminist ideals that accounts for the hint of a tragic tone in Kennedy's piece. For although the piece is not overtly anti-feminist (or not intentionally so), Kennedy does not present himself as a feminist fellow-traveller; far from it. He endorses the feminist resistance to oppression, while at the same time willingly expresses his fears of its consequences. He thinks there's something right about feminism, but he fears he will lose, should it prove successful. Thus the following contradiction:

So long as women seem to be mainly interested in participating through CLS in an attack on patriarchy in the outside world, we men feel undiluted enthusiasm ... infected only by anxiety about what will happen to our own patriarchal privileges after the revolution. For the internal challenge, there is much more intense ambivalence, all the syndrome of defensiveness and rage against the feminist critique, a deep sense of guilt [and] fear of feminist power ...

One can hardly imagine the same ambivalence so freely expressed over a left-wing class or race triumph. Both the ambivalence Kennedy feels regarding feminist triumph and the apparent permissibility of the expression and publication of that ambivalence are reflections of the conflict he sees between his (and other's) immutable given 'first' heterosexual desire, and the political, contingent, historical, egalitarian ideal, an ideal to which he at least nominally subscribes. Yet this conflict is nonsense. Our desires, sexual or otherwise, and whatever their source, are not immutable. They are no more immutable than they are natural. Neither men nor women have to eroticise the dominance that permeates male mentor/female mentee relationships. The alternative is not loneliness, coldness, isolation or despair. We can, after all, eroticise other things. We can eroticise mountains, trees, men, women, equality, or, yes, dominance itself, so long as we do so in safe and undamaging circumstances. The mentor/mentee relationship is not such a circumstance, so look elsewhere. I am not, but I strongly doubt that the relationships in CLS are, as shot through with eroticism – whether or not censored by feminist political taboos – as Kennedy would hope. But to whatever extent they are, they need not be. The self-pity in this piece is silly because it is false. It is as false as the immutable vision of our sexual nature from which it draws.

#### *Conclusion*

I will conclude with three points. First, men in CLS should eroticise something other than the relationships of dominance that are mentor/mentee relationships. Second, unless they do so, CLS is not a congenial atmosphere for feminist work, nor is it a healthy environment for women, and women should therefore get out. But third, feminists cannot afford to lose the audience of the CLS movement, even if we must forego their mentorship. The commitment to deconstruction, if its dictates are consistently followed, should make CLS members willing, even if unhappy, listeners of feminist claims. Deconstruction commits the theorist to at least the coherency of the claim that what a culture or institution has defined as natural is in fact a social, cultural or institutional imperative. The core radical-feminist claim that 'heterosexuality is compulsory' – a socially rather than naturally imposed imperative – badly needs the deconstructionist's commitment for its minimal coherency. Feminists now need listeners as well as participants, an audience as well as adherents. By virtue of its commitment to deconstruction, and in spite of its present anti-feminist bias, the CLS members are surely the logical audience to cultivate.





## **PART IV**

# **KEY ISSUES IN FEMINIST JURISPRUDENCE**



## CHAPTER 9

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### WOMEN, VIOLENCE AND THE LEGAL SYSTEM

Patriarchal attitudes pervade the legal system. Whether the enquiry is into the personnel of the legal profession, or attitudes towards female victims of crime or defendants in the criminal process, the legal system reveals itself as still steeped in the patriarchal, exclusionary, tradition. Before considering the manner in which the law responds to female victims of violence, the personnel of the legal profession is considered. In the first extract, recent data on access to the legal profession is outlined. There follows an extract from Albie Sachs and Joan Hoff Wilson's seminal work on sexism and the law, which traces the early attempts by women to enter the legal profession, and details the resistances which were then faced. These resistances, whilst ostensibly now eliminated, continue to have depressing relevance to the opportunities for women in the legal profession – a matter which, whilst difficult to quantify in precise terms, has an inevitable and direct bearing on the manner in which the law continues to treat the victims of violence and rape and those women who, having suffered violence for protracted periods of time, respond with violence against their partners.

#### THE PERSONNEL OF LAW<sup>1</sup>

##### Access to Legal Education and the Profession

###### 1. *Access to legal education*

Factors of gender, race and ethnicity and social class raise common concerns both in relation to access to legal education and in relation to access to the legal profession. The following data provide an outline summary of relevant changes over time in respect of these factors.

###### (a) Gender

In Australia in 1960 women comprised to 11.4% of the law student cohort: by 1984 the proportion had increased to 41%,<sup>2</sup> although in 1986 only 17.2% of all lawyers engaged in practice were women.<sup>3</sup> In Ontario,<sup>4</sup> in 1978, women comprised 31% of all law undergraduates; in 1987 this proportion had increased to 42.5%. Nationally by 1989 this figure was 48%, and women engaged in legal

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1 Extracted from Hilaire Barnett, 'The Province of Jurisprudence Determined – Again!' [1995] *Legal Studies* p 88.

2 D Weisbrot, 'Access to Legal Education in Australia', in R Dhavan, N Kibble, W Twining (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989), p 85.

3 Australian Bureau of Statistics National Census cited in D Weisbrot, *Australian Lawyers* (Longman, 1990).

4 National figures unavailable for that time.