I KNOW IT WHEN I SEE IT, OR WHAT MAKES SCHOLARSHIP FEMINIST: A CAUTIONARY TALE

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Before we can intelligently discuss the significance of feminist law journals, it is important, as a preliminary matter, to identify and define what makes scholarship feminist.[1] While we may have an intuitive sense of which writings are feminist and which are not (hence, the "I Know It When I See It" phrase in the title), it can be quite difficult in practice to identify the common features of a piece of writing that allow us to label it as feminist. I discovered this difficulty as I prepared this symposium paper and presentation and reluctantly concluded that I should append to the title the phrase "A Cautionary Tale."

My original intent in this piece was to take an empirical approach to the question, examining classics of the feminist legal literature of the past twenty years or so to discern common features. I planned, somewhat facetiously, to refer to the articles I reviewed as the "Top Forty Feminist Law Review Articles of All Time" or the "Greatest Hits of Feminist Scholarship."[2] Of course, I knew all along the impossibility of compiling *the* authoritative list or even *an* authoritative list, but I did not realize exactly how difficult the task was until I began. I was walking into a quagmire.

This is a rich literature with many outstanding scholars, making the task of creating a representative list quite complex. There are problems of inclusion and exclusion because those on the list are privileged over those rejected, implicitly creating a hierarchy of value. Moreover, there is insufficient agreement in any event on what scholarship is the best; our criteria for choice are not standardized.

The remainder of this essay will be the story—a narrative—of my quest for the optimal definition of feminist scholarship, why it was frustrated, and how we are still able to share a joint mission and provisionally define what makes scholarship feminist. In the end, I do not purport to provide a definitive list, but rather to identify some shared

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[1] I primarily consider law review articles in this essay, rather than books.

[2] I could imagine myself saying things like, "And who can forget the stirring phrases of Fran Olsen in The Family and the Market?" *See* Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983).

features with citations to representative articles. My experience reinforces basic feminist lessons I have known for years but could stand to be reminded of from time to time. The narrative framework of my essay is itself a conscious choice to use feminist method. I could derive the same points from a more traditional presentation, but it would not be as coherent.

In the interest of brevity, I will discuss only a few of the areas of feminist scholarship that I reviewed in my effort to create a "greatest hits" list, beginning in the late 1980s. The essay exemplifies both the difficulties of the task and a potential, partial resolution.

I. HOW I LEARNED—ONCE AGAIN—THAT ONE PERSON'S FEMINISM IS ANOTHER'S GENDER ESSENTIALISM

Some of the most influential feminist pieces of the 1980s were authored by cultural feminists, whose writings resonated with the experiences of many baby-boomers like myself. These writers exposed the gendered cognitive and affective gulf that existed between male legal culture and the experiences of most women. They also dignified the "caring" orientation of many women by demonstrating its internal rationality, equivalent to the rationality of the abstract, universalizing male culture.[3]

I have always found Robin West's writings particularly cogent in this regard.[4] Her exposition of the "separation thesis"—that humans are defined by their autonomy and separation from others—as gendered and male is quite powerful.[5] Arguing that women are defined by their essential connectedness to others, primarily evidenced by the mother/child relationship, she demonstrated the falsity of the assertion that all humans are essentially separate entities.[6]

But I later learned that these pieces appealed and spoke to me in part because of our similarities as middle-class, white women. A number of writers argued that many pieces in the same genre as West's essentialize feminism by broadly claiming that, for instance, all women share the so-called "caring" or nurturing orientation and that this orientation is fundamental to women's nature. Several writers were particularly persuasive with this criticism. Angela Harris argued that West privileges the experience of white women, disregarding the multiple perspectives and

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[3] *See* Mary Field Belenky et al., Women's Ways Of Knowing: The Development Of Self, Voice And Mind (1986); Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

[4] *See* Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988); Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women's L.J. 81 (1987).

[5] Jurisprudence and Gender, *supra* note 4, at 1-2.

[6] *Id.* at 2-3 (focusing on the experience of child-bearing).

identities of black women in the process.[7] Kimberlé Crenshaw elaborated the notion of "intersectionality," that the experiences of women of color are not just a combination of the experiences of women, on the one hand, and the experience of people of color, on the other, but a unique blending of multiple identities.[8] Patricia Cain effectively demonstrated how many feminist writers, whether cultural feminists or not, ignore the experience of lesbians when discussing women's realities, for instance by claiming that all women's lives are shaped by their relationships to men.[9]

These critiques are effectively summed up by Martha Minow:

> Feminist analyses have often presumed that a white, middle-class, heterosexual, Christian, and able-bodied person is the norm behind "women's" experience. . . . This set of assumptions recreates the problems feminists seek to address—the adoption of unstated reference points that hide from view a preferred position and shield it from challenge . . . .[10]

Thus one problem for my "greatest hits" list is that it inevitably would reflect my own subjectivity, based on personal experiences and biases. The attempt to create the list could also create the false impression of objectivity. Is there a way out? Could I transcend my own limitations by just citing several representative pieces from each sub-genre? But how would I select them?

The lesson of this exercise so far was its reinforcement of the principle that we are all situated and embody a perspective. We cannot transcend our limited perspectives but we can hope to recognize the existence of multiple perspectives and gain some understanding of them. *Eureka*! Perhaps I could best represent the indeterminacy of feminist theory and women's various experiences by dropping the idea of a definitive list. So I gave up on the idea of creating a list.

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[7] Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 602-05 (1990).

[8] Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139 (1989).

[9] Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 191 (1989).

[10] Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. Legal Educ. 47, 48 (1988).

II. GOING META: IDENTIFYING FEMINIST METHODS AND EPISTEMOLOGY

A. The Way Out?

The late 1980s and early 1990s were a very fruitful period in the endeavor to develop a specifically feminist epistemology and to identify feminist methods. I will cite a number of articles from this period that were particularly influential. In the process, I begin to develop an argument that in this arena we can discover common ground among feminists. This scholarship teaches that our categories and truths are provisional—more like cells with permeable membranes than boxes with rigid walls. But by moving my inquiry to a more general level, I found some hope that we have sufficient unity as a movement to be politically effective and culturally significant.

My efforts here are aided by my personal favorite article—my own greatest hit number one: Katharine Bartlett's Feminist Legal Methods.[11] According to Bartlett, feminist methods are best characterized by three features:

1. Asking the "woman question": How does a particular law or legal practice affect women or certain groups of women?[12]

2. Feminist practical reasoning: Pragmatism focuses on the real-world consequences of decisions and what is best, not what is true, since we cannot know that absolutely anyway.[13]

3. Consciousness-raising: Knowledge arises from experience, personal and collective. Women should not take the conventional wisdom for granted, but discover the contours of their world by examining their experiences.[14]

Bartlett's formulation effectively captures the feminist quest. Because it is very general, focused on methodology rather than substance, it encompasses the efforts of feminists of various backgrounds operating from different perspectives. These methods need not essentialize, but can respect diversity. It should also be noted that this is just one good example of many

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[11] Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829 (1990). Bartlett's analysis overlaps with and corresponds to others', and I therefore find it to be representative.

[12] *Id.* at 831 ("identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups").

[13] *Id.* ("reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives").

[14] *Id.* ("seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative").

important formulations of the same basic concepts, and Bartlett's categories can be blended or stated somewhat differently.[15]

It should come as no surprise that feminism and American pragmatism, along with its progeny Legal Realism, are closely related philosophically. We have intellectual precursors.[16] As Margaret Jane Radin explains: "Pragmatism and feminism largely share . . . the commitment to finding knowledge in the particulars of experience. It is a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning."[17]

As pragmatists, feminists and feminist scholarship are aware of the important dialectical relationship between theory and practice and the need for each to inform the other. This is an important consequence of adopting a pragmatic approach. Phyllis Goldfarb puts it well:

> Much of the content of many feminist theories is derived from [the experience] of sharing experiences, as is the feminist theory of theory: that theory is a practice, that it must emerge from an understanding of diverse lived realities and be tested against those realities. Experience and theory fold into one another in dialectical fashion, revealing the political quality of personal life.[18]

In a similar vein, feminists (as pragmatists) recognize the importance of physicality and affect in our lives and thought. As articulated by Jennifer Nedelsky:

> The feminist theory that I know characteristically insists that we cannot know the things we most need to know about people . . . unless we treat as central their embodiedness and the affective

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[15] For instance, Catharine MacKinnon identifies consciousness-raising as the predominant feminist method, whereas it is but one of three methods for Bartlett. Catharine A. MacKinnon, From Practice to Theory, or What Is A White Woman Anyway?, 4 Yale J.L. & Feminism 13, 14 (1991). However, all three of the methods Bartlett identifies overlap with consciousness-raising. For instance, knowledge derived from consciousness-raising assists in identifying how legal practices affect women; this knowledge is also integral to the process of feminist practical reasoning.

[16] *See generally* John Dewey, The Essential Dewey (Larry Hickman & Thomas M. Alexander eds., 1998); John Dewey, Pragmatism in Law & Society (Michael Brint & William Weaver eds., 1991).

[17] Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1707 (1990) (footnote omitted).

[18] Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1629-30 (1991). *See also* Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. Rev. 589 (1986).

> dimensions of their lives. . . . But when we make embodiment and affect central, diversity immediately confronts us in all its overwhelming multiplicity. . . . [This] theoretical stance . . . is itself an important point of commonality, a reflection, I think, of some shared vision of the world . . . .[19]

Ah, yes, we are getting somewhere. Shared features of feminist scholarship are beginning to emerge.

And feminists, as pragmatists, appreciate the value of narrative. According to Anne C. Dailey,

> At the point where postmodern theory might conclude "Woman no longer exists," narrative steps in to recreate a meaningful sense of connection among women. The stories women relate expose common patterns of gender in a world of gender inequality; they confirm that the experience of gender, albeit multifaceted, can tentatively, intermittently, yet distinctly cut across the varying differences that divide women. . . . Narrative's focus on women's experience thus might be understood to reflect a pragmatic approach to the question of female meaning.[20]

The lessons of Section II might be summed up in a sort of feminist pragmatist platform:

1. We oppose abstract universalism as the ideal type of knowledge, as well as its hegemonic tendencies.

2. Similarly, we oppose sole reliance on linear thinking and syllogistic logic.

3. We recognize the limitations of human thought and appreciate insight gained from the affective dimension of our perceptions and experiences.

4. We seek to be faithful to the realities of women's lives in all their diversity.

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[19] Jennifer Nedelsky, The Challenges of Multiplicity, 89 Mich. L. Rev. 1591, 1602 (1991) (reviewing Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (1988)).

[20] Anne C. Dailey, Feminism's Return to Liberalism, 102 Yale L.J. 1265, 1276 (1993) (footnotes omitted) (reviewing Feminist Legal Theory: Readings in Law and Gender (Katharine T. Bartlett & Rosanne Kennedy eds., 1991)); *see also* Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 976 (1991) (footnote omitted) ("Experiential narratives are significant not only for the substantive message they convey but for the way they claim to know what they know. Feminist narratives present experience as a way of knowing that which should occupy a respected [position] . . . in analysis and argumentation."). See also the brilliant use of narrative as an integral part of legal discourse by Patricia Williams, in On Being the Object of Property, 14 Signs 5 (1988). Also very important to clinicians is Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990).

5. We are aware, or should be aware, of the paradox created when feminists use the conventions of standard legal academic writing to elaborate feminist theory. Our scholarship should reflect our consciousness of that tension.

6. We seek to improve the situation of women in the world legally, politically, and otherwise.

7. Our scholarship exists to further that objective.

As a postscript or final lesson, I would note in addition that feminist scholarship written in the last ten years confirms that feminist pragmatism captures the common features of feminist legal writing.[21] The commonality is on the level of epistemology and method rather than in particular responses to substantive issues. This is enough to go on. Indeed, it is more than enough to continue with the feminist project.

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[21] *See, e.g.*, Patricia L. Bryan, Stories in Fiction and in Fact: Susan Glaspell's A Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack, 49 Stan. L. Rev. 1293 (1997) (historical narrative concerning the trial on which the well-known story was based); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995) (starting with personal experience, uses cognitive theory to demonstrate that disparate treatment discrimination is not primarily motivational, but cognitive); Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849 (1996) (using examples from practice and feminist theory, former domestic violence prosecutor analyzes issue of mandatory victim testimony in domestic violence cases); Catharine A. MacKinnon, Disputing Male Sovereignty: On United States v. Morrison, 114 Harv. L. Rev. 135 (2000) (criticizing the Supreme Court's decision overturning the civil rights remedy for gender-motivated violence of the Violence Against Women Act, on which MacKinnon had worked); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117 (1996) (historical treatment of the marital right of chastisement, as basis for critique of certain modern reforms).